



April 12, 2005

Mr. Randolph Hutson  
Director, Competitive Disputes  
Broadcasting  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2  
VIA FACSIMILE: 819-997-4504

Dear Mr. Hutson:

**Re: Complaint by 6166954 Canada Inc. (616) against Shaw Cable (Shaw) and Star Choice pursuant to sections 9, 20 and 40 of the Broadcasting Distribution Regulations (BDU Regs)**

1. This is the response of Shaw to the above-captioned complaint, as requested in your faxed letter of March 24, 2005 (which due to technical problems was not received by Shaw Cable until March 29, 2005).
2. Shaw does not agree with the complaint of 616 for the following reasons, which are explained more fully in the remainder of this response, and requests that it be dismissed.
  - The previous owner of PrideVision, who sold the assets of the service on July 29, 2004, requested and agreed to stand-alone carriage of PrideVision in distribution agreements with all major Canadian distributors. *As it is in the law, I could have completed the agreement SA carriage.*
  - Under PrideVision's stand-alone distribution agreement with Shaw, the service received a wholesale rate [REDACTED] - a pricing agreement that the owners of PrideVision believed would enable them to carry on a successful business venture. As a result, PrideVision's owners chose to be excluded from newly-created packages of Category 1 specialty services, in which other new digital specialty services, including some in which Shaw had a direct or indirect ownership interest, chose to begin building their respective subscriber bases. In so doing, they assumed the risk and reward of their particular business model.

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- On July 29, 2004, 616 acquired the assets of PrideVision, including the current distribution agreement with Shaw, and continued to carry on the PrideVision business. The current distribution agreement with Shaw continues to be in full force and effect. Any risk associated with the business model of PrideVision was accepted by 616 at the time of acquisition of the assets, and cannot be ascribed to any undue preference or discrimination by Shaw.
  - In the course of 616's acquisition of PrideVision's assets, including the Commission's public proceeding to consider approval of the same, no indication whatsoever was given to BDUs that 616 proposed to seek different distribution arrangements for Pridevision or to claim a regulatory entitlement preceding stand-alone carriage. As such, the fact that Shaw did not intervene the proceeding which culminated in *Decision CRTC 2004-191* should not be interpreted as acquiescence to any demands of 616 or to forfeiture of Shaw's right to have the Commission hear its concerns about any new distribution proposals by 616.
  - PrideVision's programming schedule, under the previous and current owners, has contained and continues to contain a significant amount of "hard-core" adult programming. Since November 1, 2004, this programming has been broadcast from 9:00pm to 6:00am ET. As long as such programming appears on PrideVision OUTtv, stand-alone carriage is reasonable and completely consistent with Commission policy on the distribution of adult programming services.
3. While Shaw strongly believes that no undue preference or undue disadvantage has been demonstrated by 616, we are prepared to propose, on a without prejudice basis, a new carriage arrangement for the Category 1 service originally named PrideVision (to be re-named OutTV). The details of this proposal are set out below, and are consistent with the terms of carriage afforded to the other Category 1 digital specialty services when they commenced operation. We believe that they would represent a fair and equitable market solution to the issue of PrideVision/OutTV's distribution on Shaw.

#### **Stand-Alone Marketing Is By Agreement**

4. In Decision CRTC 2000-456 a Category 1 digital specialty service licence was granted to Levfam Holdings Inc., on behalf of a company to be incorporated. The specialty service, to be known as PrideVision, was to be dedicated to programming of specific interest to the gay and lesbian community. Subsequently, in Decision CRTC 2001-54, a corporate reorganization of PrideVision Inc. was approved and it became wholly owned by Headline Media Group Inc.

5. PrideVision launched its service in September 2001, as did a number of other Category 1 specialty services. However, PrideVision chose a unique approach to the marketplace. [REDACTED] and sought to be sold in subscriber-created pick packs, or in new theme packages. It was in these packages – which were introduced to the market with a zero subscriber-base – that all other Category 1 services began to carry-on-business. In contrast, PrideVision insisted on being sold as a premium service and demanded the much higher wholesale rate of [REDACTED]
6. As the Commission was aware, PrideVision's marketing approach was consistent among all major distributors, all of whom agreed to PrideVision's marketing and rate plan. Accordingly, all major distributors launched the service as a stand-alone premium service, with the full agreement of PrideVision's ownership. As summarized by Commissioner Langford in his dissent in *Decision CRTC 2001-612*, regarding the issue of free previews for the service:

In its complaint against Shaw and Star Choice, PVTV informed the Commission that by agreement it waived this right [to be distributed as part of a package]. "...PrideVision has agreed to make itself available to cable and DTH customers, either on a standalone basis or as an optional add-on to other discretionary packages."

- *Decision CRTC 2001-612*, p. 4

#### Effect of Change of Ownership

7. In *Broadcasting Decision CRTC 2004-191* (28 May 2004), the CRTC approved the acquisition of the assets of PrideVision Inc. by 616, a company owned and controlled by Mr. William Craig. The Commission subsequently issued a new Category 1 licence for PrideVision to that company. The acquisition closed on July 29, 2004.
8. The existing distribution agreement between the original owners of PrideVision and Shaw comprised part of the assets purchased by 616. That distribution agreement continues to be in full force, notwithstanding the change of ownership.
9. In the course of 616's acquisition of PrideVision's assets, including the Commission's public proceeding to consider approval of the same, no indication whatsoever was given to BDUs that 616 intended to seek different distribution arrangements for PrideVision or to claim a regulatory entitlement to stand-alone carriage.
10. As such, the fact that Shaw did not intervene in the proceeding which culminated in *Decision CRTC 2004-191* should not be interpreted as acquiescence to any claims of 616 or to forfeiture of Shaw's right to have the Commission hear its

concerns about any new distribution proposals by 616.

11. With respect to the programming content of PrideVision following its acquisition by 616, a press release dated February 11, 2005 (attached as Schedule 1) announced 616's intention to re-name the Category 1 service as "OUTtv" and to move all the adult programming to a new Category 2 service. This Category 2 service was licensed pursuant to *Decision CRTC 2005-89* and referred to therein as "617", but will apparently be renamed "Hard on PrideVision" as of April 12, 2005.
12. The press release indicated the launch of the Category 2 service and concomitant movement of adult programming would occur in mid-March. PrideVision's website now indicates this will occur on April 12, 2005. Given that April 12 is the first day on which the re-branded service OUTtv is being offered, Star Choice has not yet been able to determine whether or not that service will continue to offer adult programming.

### **Financial Condition of PrideVision Service**

13. The complaint of 616 includes considerable discussion of the financial performance of PrideVision compared with other Category 1 services, particularly TechTV. 616 alleges that PrideVision's poorer financial performance occurred because "PrideVision was not granted the privilege of packaged distribution on Shaw's digital broadcasting distribution undertakings". (616 Complaint, para. 4, p. 2)
14. As noted above, PrideVision's owners opted in favour of stand-alone distribution and received a premium wholesale rate far in excess of that paid to all other new Category 1 specialty services. The method of and rate for distribution was a matter of agreement and was not imposed unilaterally upon them, and PrideVision's ownership assumed the potential risk and reward of carrying on business on these terms.
15. 616, in its acquisition of the assets of PrideVision, must be presumed (under the normal practices of due diligence and the principle of *caveat emptor*) to have had knowledge of the financial and contractual circumstances applicable to the service. Accordingly, 616's suggestions that the poor financial performance of PrideVision is due to discriminatory treatment is without merit.
16. BDUs, while they must afford equitable carriage to Category 1 services, are not required to be guarantors of the business success of those services. Despite 616's claims of undue preference in favour of its own services, Shaw notes that indeed one of the digital specialty services in which Shaw held an ownership interest has since ceased to operate (MSNBC Canada), notwithstanding that it

was sold in a programming package at a wholesale rate that was consistent with those of other new digital services.

### **Appropriateness of Stand-Alone Marketing in View of Adult Content**

17. Not only did PrideVision differentiate itself from other Category 1 digital services by its pricing and marketing strategy. In addition, it differentiated itself significantly by including in its program schedule "hard-core" adult content.
18. Beyond the agreement of the former ownership of PrideVision to the current distribution model on Shaw Cable, stand-alone distribution was, and continues to be to the present time, appropriate due where adult content is included in the program schedule of PrideVision.
19. The former owners of PrideVision, in entering stand-alone carriage arrangements with BDUs, themselves acknowledged that the appropriateness of such carriage was consistent with the nature of PrideVision's programming. As explained by Commissioner Langford in *Decision CRTC 2001-612*:

...PVTV, apparently recognizing the controversial nature of its programming, entered into an agreement with distributors whereby its service could be marketed differently than others: "PrideVision accepts the fact that its programming will not be to everyone's tastes. It was for that reason, during negotiations with BDUs, it agreed to a marketing strategy that will ensure that only those subscribers who specifically want the service will receive it."

-*Decision CRTC 2001-612*, p. 4

20. Pridevision's ownership change did not lead to any reduction of hard-core adult content, but rather the contrary. Subsequent to its acquisition by 616, hard-core adult content on the service was increased from 12 hours per week, which had started daily at 1:00am EST, to 63 hours per week, starting daily at 9:00pm EST.
21. Stand-alone distribution on the basis of adult content is consistent with the CRTC's distribution rules regarding both Playboy TV and Adult Category 2 digital programming services. In particular, *Broadcasting Public Notice CRTC 2004-88* (the most recent version of the Eligible Satellite Service lists) states that:

Playboy TV is only authorized for distribution at the specific request of a subscriber. Distributors are not permitted to package Playboy TV in such a way that subscribers are obligated to purchase Playboy TV in order to purchase any other programming service.

-Footnote 3 to Section B of Appendix A to *Broadcasting Public Notice CRTC 2004-88*, List of Part 2 Eligible Satellite Services

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22. Similarly, the Commission's linkage requirements for cable undertakings state that a cable undertaking:

...is not permitted to package an Adult Category 2 programming service in such a way that subscribers are obligated to purchase the service in order to purchase any other programming service.

*-Broadcasting Public Notice CRTC 2004-56*

23. Accordingly, Shaw submits that, in addition to the existence of binding contractual arrangements, stand-alone carriage of the Category 1 service currently known as PrideVision and re-branded as OUTtv continues to be appropriate as long as the service contains adult programming.

### **Conclusion & New Distribution Proposal**

24. In view of circumstances discussed above, Shaw respectfully submits that the complaint of 616 be dismissed for the following reasons:
- 1) No undue preference could have occurred from the inception of PrideVision's distribution until the closing of the sale of PrideVision's assets on 29 July 2004, because PrideVision's ownership had requested the wholesale rate and distribution model that is the subject of this complaint. It is, as such, inappropriate and irrelevant for 616 to complain to the CRTC about distribution arrangements agreed to by PrideVision's previous owners.
  - 2) PrideVision continued to include hard-core adult content in its programming schedule up to and including April 11, 2005, specifically from 9:00pm EST to 6:00am EST daily, and it is not yet clear that this programming has been removed from the re-branded OUTtv service. Consistent with Commission policy governing Playboy TV and adult Category 2 services, stand-alone carriage or add-on carriage, at the discretion of a subscriber, is the only appropriate distribution model as long as such content forms part of the Category 1 PrideVision/OUTtv service.
  - 3) The requested re-packaging of the Category 1 service PrideVision/OUTtv - i.e. in an existing Shaw package with no fewer subscribers than the Shaw packages carrying TechTV - would afford preferential treatment to PrideVision as compared with that given to all other Category 1 services at their inception. Those services all began their businesses with distribution on Shaw as part of new packages being offered anew, from a zero-subscriber base. By contrast, PrideVision itself assumed the possible risk and reward of stand-alone carriage, coupled with premium wholesale rates. The fact that PrideVision's performance has been relatively poor

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does not mean that BDUs have discriminated against it, or that they are responsible for rectifying its business by affording a mode of distribution superior to that given to all other Category 1 services – carriage in an existing package with a well-established subscriber base. PrideVision has been in operation for nearly 5 years, has a loyal base and is well-known in the community. The new owners must assume responsibility and risk undertaken when they purchased the service last year.

- 4) The existing affiliation agreement for the distribution of PrideVision by Shaw comprised part of the assets purchased by 616 and continues to be in force, a position that Shaw has communicated to 616. It appears that the true nature of 616's complaint is that Shaw does not wish to renegotiate PrideVision's distribution at this time, instead preferring to rely on regulatory relief in place of honouring contractual commitments.
25. We firmly reject the suggestion that Shaw has conferred an undue preference upon itself or discriminated against PrideVision in its carriage arrangements. At the same time, we take note of 616's expressed intention for the transfer of adult programming to its Category 2 service, to be named "Hard on PrideVision".
26. In the event that such a content change is effected (i.e. the removal of adult content from the service), Shaw would propose, on a without prejudice basis, to offer 616 a distribution arrangement for PrideVision/OUTtv that is the same as that which it offered to the other Category 1 services upon their launch.
27. Specifically, Shaw launched the Category 1 services, other than PrideVision, on a pick and pay basis and in new packages. Customers could select individual channels, create a package of 5 or 10 channels, or purchase a new "multi-pack" including all Category 1 specialty services other than PrideVision. As explained above, however, Category 1 services were not introduced into existing packages and developed their subscriber base over time.
28. Shaw is prepared to propose, on a without prejudice basis, the same arrangement for the Category 1 service to be known as OUTtv, 

  
This packaging would be consistent with that of other Category 1 services at the time of their launch. OUTtv would also have the benefit of leveraging its existing subscriber base and presence in the market to this new distribution option.

29. In view of the reasons, set out above, that Shaw has not conferred any undue preference to the disadvantage of PrideVision, and the proposed carriage alternative offered if adult content is removed from the Category 1 service to be known as OUTtv, we respectfully request that the complaint of 616 be dismissed.

30. In support of this request, we note the Commission's view, as expressed recently in *Broadcasting Decision CRTC 2004-197-1*, that:

...the ongoing commercial relationship between programmers and distributors should properly be the subject of negotiations between the parties, who are well equipped to respond to the exigencies of the marketplace... - para. 29

31. We believe the distribution proposal, set out above on a without prejudice basis, demonstrates a reasonable approach to the issue of OUTtv's distribution and confirms the Commission's view that commercial relationships are properly the subject of negotiations, rather than regulation. Shaw is making this proposal despite its belief that it currently has a valid affiliation agreement concerning the service that is both fair and enforceable, and that it has conferred no undue preference or disadvantage affecting the PrideVision Category 1 service.

32. Finally, we note that 616 has filed the current agreement between Shaw and PrideVision, now applicable to OUTtv, as part of its complaint, and in so doing has breached the confidentiality provisions of that agreement. Because the agreement contains competitively sensitive information, we respectfully request that the Commission retain it in confidence and that it not be made part of the public file in connection with this or any other matter.

Yours truly,

Michael Ferras  
Director, Regulatory Planning  
Shaw Communications Inc.

cc: William Craig