



Broadcasting Decision CRTC 2007-401

Ottawa, 23 November 2007

Complaint by Torstar Corporation alleging undue preference by Cogeco Cable Inc.

*The Commission concludes that Cogeco Cable Inc.'s proposal to move ShopTV from an analog to a digital channel on its Oakville/Burlington system, while continuing to distribute The Shopping Channel on an analog basis, would not contravene 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 Commission therefore **dismisses** the complaint by Torstar Corporation.*

The parties

1. Torstar Corporation (Torstar), the parent company of Toronto Star Newspapers Limited, operates ShopTV, a teleshopping programming service undertaking operating pursuant to the exemption order set out in Broadcasting Public Notice 2003-11.
2. Cogeco Cable Inc. (Cogeco) is the parent company of Cogeco Cable Canada Inc., the licensee of a Class 1 cable broadcasting distribution undertaking (BDU) authorized to serve, among other areas, Oakville/Burlington, Ontario. Cogeco currently distributes ShopTV on an analog channel (channel 46) in its Oakville/Burlington licensed area. Cogeco also distributes The Shopping Channel (TSC), an exempt teleshopping programming service undertaking owned and controlled by Rogers Communications Inc. (Rogers), on an analog channel (channel 41) in the same licensed area.

Background

3. Cogeco began distributing ShopTV pursuant to a one-year agreement entered into in 2004 and renewed in 2005. The agreement was again renewed in 2006. The 2006 agreement expired on 31 August 2007. In accordance with the terms of the 2006 agreement, Cogeco provided written notice to ShopTV on 30 May 2007 that it would not be renewing the contract. Cogeco also stated that it was open to discussions to negotiate a new agreement to distribute ShopTV on a digital channel. Since 30 May 2007, the parties have, without success, held discussions and exchanged proposals in an attempt to arrive at an acceptable distribution arrangement for ShopTV.

4. On 27 September 2007, Torstar filed a request for dispute resolution assistance with the Commission, pursuant to section 12(2) of the *Broadcasting Distribution Regulations* (the Regulations). As part of this submission, Torstar also requested that the Commission investigate whether Cogeco would contravene section 9 of the Regulations by moving ShopTV from its current analog channel to a digital channel.
5. Cogeco filed a reply to Torstar's complaint on 28 September 2007. Cogeco also provided a copy of a letter to Torstar in which it stated that it was willing to suspend its decision to cease distribution of ShopTV on an analog basis until 5 October 2007 to allow the Commission to examine Torstar's complaint. Torstar filed a response on 3 October 2007, to which Cogeco in turn replied on 4 October.
6. In response to a letter from Commission staff on 5 October 2007, Torstar filed a further letter dated 9 October 2007. On 11 October 2007, Torstar requested confidentiality with respect to two segments of its 3 October 2007 letter. Finally, on 18 October 2007, Cogeco indicated that it would continue to distribute ShopTV in its current analog position to allow the Commission a reasonable period of time to issue a decision on this matter.
7. After considering the positions of the parties, the Commission finds that the issue to be determined is whether Cogeco would be conferring an undue preference on TSC or subjecting ShopTV to an undue disadvantage by moving the latter to a digital channel while continuing to distribute TSC on an analog basis.

Would Cogeco be conferring an undue preference on TSC or subjecting ShopTV to an undue disadvantage by moving the latter to a digital channel?

8. Section 9 of the Regulations states:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

9. In Public Notice 1997-150, the Commission set out a list of circumstances that could constitute instances of undue preference or disadvantage. One of the circumstances identified in this notice was the following:

The analog distribution by a Class 1 licensee of one or more exempt programming services in which a similar type of entity has an ownership interest of 15% or more, where the licensee is not making available an equal number of analog channels for the distribution of independently-owned exempt programming services. ... [T]he Commission considers, for example, two cable companies and their affiliates, or two telephone companies and their affiliates, to be of similar type.

10. Torstar argued that leaving the cable-owned competitor TSC in a very desirable high traffic neighbourhood while relegating its independently-owned competitor to a very low traffic location would give a clear preference to TSC and subject Torstar to a disadvantage. It stated, however, that it was difficult to measure how “undue” this preference would be because Cogeco had the relevant information. Torstar indicated that based on information it was able to obtain from other sources, moving to channel 88 on digital would result in a significant reduction in the average minute audiences of ShopTV’s neighbouring channels. It noted that Cogeco refused to confirm these figures.
11. Torstar also referred to a letter decision of 31 May 2000 concerning a complaint by Torstar alleging breaches of sections 21(3) and 9 of the Regulations by Cogeco, in which the Commission stated the following:

...there is a rebuttable presumption that the distributor make available a channel to at least one independently-owned exempt programming service on a “first come, first served” basis.

It is to be noted that the distributor in this case has not attempted to rebut this presumption that is raised by its being a similar type of entity.

Based on the above, Torstar maintained that it was Cogeco’s duty to provide evidence that it had not conferred an undue preference on TSC or subjected ShopTV to an undue disadvantage.

12. Cogeco rejected Torstar’s allegation of undue preference, arguing among other things that it is not obligated to distribute ShopTV. Cogeco submitted that while it is a similar type of entity to Rogers, the licensee of TSC, this fact alone does not mean that Cogeco is obliged to make another analog channel available to a third-party exempt programming undertaking. In support of this position, Cogeco cited a letter decision dated 31 May 2000 relating to a complaint by Torstar Corporation against Southmount Cable Limited, as well as Broadcasting Decision 2003-518. Cogeco also noted that under the Commission’s current undue preference test, there is no requirement for a distributor to prove that a preference or disadvantage is not undue.
13. Cogeco submitted that even if there were a rebuttable presumption, it had rebutted this presumption with a number of points, including the following:
 - Cogeco has no ownership interest in TSC or any other exempt programming service.
 - TSC has been distributed by Cogeco since 1987, prior to Rogers’ ownership of the service.

- Cogeco deals with TSC fully at arm's length and has not received any special compensation from TSC, nor has Cogeco colluded with Rogers with respect to the distribution of TSC or any other service. Cogeco also noted that Rogers recently announced that it would be competing for subscribers in Cogeco's licensed area.
 - TSC is carried by every large BDU in the country, including both direct-to-home BDUs, even though they are not "similar types of undertakings" to Rogers. Cogeco argued that this demonstrates the broad consumer appeal of TSC.
 - Cogeco requires the flexibility to begin harvesting analog capacity in light of increasing demands with respect to the mandatory distribution of licensed Canadian digital and high definition programming services.
14. Cogeco also submitted that the distribution of ShopTV, which it maintained is essentially duplicative of TSC, is an inefficient use of analog capacity and thus is inconsistent with the policy objectives set out in the *Broadcasting Act* (the Act) relating to the diversity and the efficient delivery of programming, using the most effective technologies available at reasonable cost.

Commission's analysis and determinations

Preference or disadvantage

15. In analyzing a complaint of undue preference under the Regulations, the Commission must first determine, based upon the record developed in the case, whether there is a preference or a disadvantage. Where it determines that there is a preference or disadvantage, the Commission must then determine whether, under all the circumstances, it is undue.
16. The Commission notes that Cogeco is currently distributing TSC, a service that is owned by Rogers, on an analog basis. Further, Cogeco and Rogers operate similar types of distribution undertakings. As a result, Cogeco's continued distribution of TSC on an analog basis while moving ShopTV to digital distribution, or dropping the service entirely, falls within the circumstance set out in Public Notice 1997-150 as a potential undue preference.
17. The Commission considers that ShopTV and TSC are comparable entities, in that they are both exempt services operating under the same exemption order. Further, in proposing to treat ShopTV differently than TSC, the Commission considers that Cogeco would be conferring a preference on TSC and subjecting ShopTV to a disadvantage.

Undue preference or disadvantage

18. Regarding Torstar's argument that Cogeco has a duty to provide evidence that it has not conferred an undue preference on TSC or subjected ShopTV to an undue disadvantage based upon the presence of a "rebuttable presumption," the Commission notes that this term was used in two letter decisions, both dated 31 May 2000, concerning complaints by Torstar against Cogeco and Cableworks Communications Inc. under sections 21(3) and 9 of the Regulations. These two decisions applied the "first come, first served" policy set out in Public Notice 1996-60. However, the use of the term "rebuttable presumption" therein did not reverse the onus regarding the undue preference provision set out in section 9 of the Regulations. The undue preference test has placed, and continues to place, the onus on the applicant to demonstrate that an undue preference or disadvantage has occurred. In the Commission's view, the concept of rebuttable presumption is therefore not relevant in this case.
19. In order to determine if a preference or a disadvantage is undue, the Commission must examine whether the preference or disadvantage has had, or is likely to have, a material adverse impact on any other person. It also examines the impact the preference or disadvantage has had, or is likely to have, on the achievement of the policy objectives set out in the Act.
20. As indicated above, under the Commission's approach to undue preference, the onus is on the applicant to establish both that a preference or advantage has occurred and that the preference or advantage is undue. An examination of the record reveals that Torstar has provided very little evidence that would permit a finding that it would suffer a material adverse impact from being moved to digital distribution. For example, it provided no specific information as to how the proposed placement of ShopTV on digital channel 88 would affect viewership or sales. The only point it advanced in this regard was its submission that ShopTV's neighbouring channels on digital would have significantly less "average minute audience."
21. Further, with respect to Torstar's submission that Cogeco, not Torstar, has the information that would permit Torstar to establish the extent of the disadvantage it would suffer, the Commission notes that the specific information Torstar stated it had been seeking was: (a) confirmation that, in the key Cogeco systems, the neighbouring channels were either Chinese-language services or duplicated services, and (b) an instance of a constant digital channel that is bounded by unduplicated English-language services.
22. The Commission notes that information as to the first point could presumably have been ascertained by referring to Cogeco's channel lineups, which are generally widely available. Further, in the Commission's view, the information sought on the second point would have been insufficient in any case to support Torstar's allegation that moving ShopTV to a digital channel, while distributing TSC on an analog basis, would have a material adverse impact on Torstar.

23. The Commission also notes that Torstar has not provided any evidence that Cogeco has received any special compensation from TSC for its distribution, or that Cogeco and Rogers engaged in any type of joint activity which would benefit TSC or any other service. Finally, the Commission considers that Torstar has offered little in the way of argument to permit the Commission to find that there would be an impact on the achievement of the policy objectives set out in the Act.
24. In light of the above, the Commission concludes that although this case falls within the circumstance set out in Public Notice 1997-150 as potential undue preference, there is insufficient evidence to substantiate a finding of undue preference or disadvantage. The Commission accordingly **dismisses** the complaint by Torstar Corporation.

Torstar's request for confidentiality

25. Torstar requested that two segments of its 3 October 2007 submission be treated as confidential pursuant to Section 20 of the *CRTC Rules of Procedure* and Circular 429. Cogeco did not object to Torstar's request for confidentiality.
26. In this case, the Commission considers that the potential harm that could result from disclosure of the information outweighs the public interest in disclosure. As a result, the Commission **approves** Torstar's request for confidentiality with respect to the two segments of its 3 October 2007 letter. An abridged version of the letter will accordingly be placed on the public file.

Secretary General

Related documents

- *Complaint by Wagg Communications against Shaw Communications Inc. alleging breaches of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2003-518, 23 October 2003
- *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
- *Complaint by Torstar Corporation Alleging Breaches of Sections 21(3) and 9 of the Broadcasting Distribution Regulations Against Cogeco Cable Inc.*, Letter, 31 May 2000
- *Complaint by Torstar Corporation Alleging Breaches of Sections 21(3) and 9 of the Broadcasting Distribution Regulations Against Southmount Cable Limited*, Letter, 31 May 2000

- *Complaint by Torstar Corporation Alleging Breaches of Sections 21(3) and 9 of the Broadcasting Distribution Regulations Against Western Co-Axial Limited, now called Cableworks Communications Inc.*, Letter, 31 May 2000
- *Guidelines respecting the confidential treatment of annual returns and material or information filed in support of a broadcasting application before the Commission*, Circular 429, 19 August 1998
- *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 22 December 1997
- *Access Rules for Broadcasting Distribution Undertakings*, Public Notice CRTC 1996-60, 26 April 1996

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