



Broadcasting Decision CRTC 2005-189

Ottawa, 6 May 2005

Complaint by TELUS Communications Inc. alleging denial of access to certain pay-per-view programming by Shaw Pay-Per-View Ltd.

*The Commission concludes that Shaw Pay-Per-View Ltd. has not contravened section 6.1(1) of the Pay Television Regulations, 1990 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 TELUS Communications Inc.*

The parties

1. In *Regional broadcasting distribution undertakings in Alberta and British Columbia*, Broadcasting Decision CRTC 2003-407, 20 August 2003, the Commission licensed TELUS Communications Inc. (TELUS) to operate regional broadcasting distribution undertakings (BDUs) in certain areas of Alberta and British Columbia. The service, to be known as TELUS TV, will offer broadcasting services over telephone lines using digital subscriber line (DSL) technology. These BDUs are expected to enter into operation in both Alberta and British Columbia in the near future.
2. Shaw Pay-Per-View Ltd. (Shaw PPV) is a wholly owned subsidiary of Shaw Communications Inc. and is the licensee of Viewer's Choice Pay-per-view, a pay-per-view (PPV) programming service distributed in western Canada. Shaw Communications Inc. also holds direct or indirect control of some six other subsidiaries companies, which hold broadcasting licences to operate BDUs in western Canada. These BDUs are referred to herein as Shaw's BDUs.

The complaint

3. TELUS filed a complaint on 11 November 2004 alleging that Shaw PPV conferred on itself and on Shaw's BDUs an undue preference, and subjected TELUS to an undue disadvantage, contrary to section 6.1(1) of the *Pay Television Regulations, 1990*. Specifically, TELUS claimed that Shaw PPV breached section 6.1(1) of these regulations by denying TELUS access to some of the programs of the Shaw PPV service that Shaw PPV makes available to Shaw's BDUs, and by subjecting TELUS to potential legal action to which Shaw's BDUs would not be subject and which Shaw PPV itself might trigger.
4. More specifically, TELUS noted Shaw PPV's claim that its agreements with certain U.S. program rights holders that supply programming for broadcast on Shaw PPV's service prohibit Shaw PPV from making this programming available to any affiliate of Shaw PPV operating a "telco network" to distribute PPV programming, thus applying to

TELUS. Moreover, TELUS stated that, under the terms of the proposed affiliation agreement offered to it by Shaw PPV, TELUS would be obliged to black out channels offering programming from those suppliers and prohibiting its subscribers from ordering or accessing programming on those channels. TELUS added that the proposed affiliation agreement would subject TELUS to enforcement actions from Shaw PPV's program suppliers to which it appeared that Shaw's BDUs would not be subject. TELUS filed a copy of the proposed affiliation agreement with the Commission on 15 December 2004 and requested that it be treated as confidential.

5. TELUS submitted that Shaw PPV's position on the need for such provisions in the draft affiliation agreement was unacceptable and without foundation. According to TELUS, Shaw PPV had claimed that the limitations imposed by U.S. program rights holders on Shaw PPV reflected the concerns of these rights holders regarding digital copy protection for programming distributed by DSL BDUs. TELUS stated, however, that its DSL network is no less secure than cable or satellite distribution networks.
6. TELUS maintained that it should be free to obtain programming from the licensed PPV undertaking of its choosing, provided the PPV licensee is authorized to operate in the markets served by it. It argued that it should also be able to expect such a PPV licensee to comply with the Commission's rules. TELUS added that, because its BDU competitors in western Canada offer the Shaw PPV service, TELUS should have the right to match its competitors' offerings with the same service, in its entirety.
7. TELUS argued that, unless it was given the same access to programming as that provided by Shaw PPV to Shaw's BDUs, or unless TELUS and Shaw's BDUs were made subject to the same programming limitations and constraints, Shaw PPV would be conferring upon Shaw's BDUs an undue preference and subjecting TELUS to an undue disadvantage.
8. TELUS submitted that the Commission should order Shaw PPV to provide its service to TELUS on an expedited basis, under terms and conditions that are substantially similar to those that apply to Shaw's BDUs, thus permitting TELUS to offer a PPV service substantially similar to, and competitive with, the PPV service that Shaw PPV provides to Shaw's BDUs. Specifically, TELUS stated that:
 - the Commission should require Shaw PPV to provide TELUS with access to all the PPV programs that Shaw PPV makes available to Shaw's BDUs;
 - alternatively, if Shaw PPV demonstrates that its agreements with U.S. program rights holders prohibit it from providing their programs to Shaw PPV affiliates that distribute PPV programming using DSL technology, the Commission should prohibit Shaw PPV from providing such programs to any BDU affiliates, including Shaw's BDUs, until such time as Shaw PPV amends those agreements to ensure equal access by all BDUs to the same programming; and

- the Commission should stipulate that TELUS must not be made potentially subject to any legal action by program rights holders to which all other Shaw PPV affiliates, including Shaw's BDUs, would not also be potentially subject.
9. In TELUS' letter of 20 December 2004, Telus argued that Shaw PPV had, in its letter of 15 December 2004 effectively confirmed in its responses to the Commission's questions that Shaw PPV confers a preference on Shaw's BDUs, and on approximately 23 other BDUs against which Shaw's BDUs do not compete, by not imposing on those BDUs the programming restrictions it seeks to impose on TELUS, and that it has taken no steps to try to eliminate this inequity by contacting the U.S. program rights holders that it claims require it to impose such restrictions on TELUS.
 10. TELUS also suggested in its 20 December 2004 letter that Shaw Communications Inc. was using its ownership in its affiliated PPV service to confer on Shaw BDUs an unfair and anti-competitive advantage over TELUS. In its view, nothing in the Shaw PPV letter of 15 December 2004 justified it not providing TELUS with the Shaw PPV service under reasonable terms and conditions which are substantially similar to those provided Shaw's BDUs. This conclusion was reiterated in TELUS' final reply of 3 February 2005 wherein it also requested that the Commission make an order to that effect.

Shaw PPV's position

11. In a letter dated 24 November 2004, Shaw PPV stated that the proposed terms that it has offered TELUS are based on actual contractual language that exists in the agreements between Shaw PPV and certain U.S. program rights holders, and that certain clauses have been included in the proposed affiliation agreement with TELUS at the request of these program suppliers because of their concerns regarding digital copy protection and DSL-based BDUs.
12. Shaw PPV submitted that, due to the contractual requirements imposed by U.S. program rights holders, it would be unable to guarantee TELUS access to all PPV programs that Shaw PPV is able to provide to affiliated broadband cable distributors. Shaw PPV also noted that Shaw's BDUs, as well as any other affiliate of Shaw PPV, would become the subject of exactly the same concerns among program rights holders as TELUS currently is, were Shaw PPV to allow these BDUs to transmit unencrypted PPV signals over a DSL distribution network. Shaw PPV argued that, in the circumstances, it is not conferring an undue advantage on Shaw's BDUs, or on other cable BDUs that are affiliates of Shaw PPV, nor is Shaw PPV subjecting TELUS to an undue disadvantage.
13. Shaw PPV noted that TELUS has access to other sources of PPV programming that could serve as alternatives to the service provided by Shaw PPV. According to Shaw PPV, these alternatives include obtaining its own PPV broadcasting licence, as other BDUs have done; seeking an affiliation agreement with the national terrestrial PPV service operated by Bell ExpressVu;¹ seeking a condition of licence to offer PPV

¹ Bell ExpressVu Inc., (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

programs on an interim basis; or seeking other regulatory relief. As a further option, Shaw PPV also noted that TELUS already has a video-on-demand (VOD) licence and, in its letter of 20 January 2005, went on to state that TELUS could, through its VOD licence, provide the same movie titles as are available on PPV.

14. On 26 November 2004, the Commission asked Shaw PPV to provide copies of agreements it had entered into with certain U.S. program rights holders. On 1 December 2004, Shaw PPV responded by providing the Commission with three licence agreements it had entered into with these rights holders. Shaw PPV requested that the information contained in these agreements be kept confidential.
15. In a letter dated 8 December 2004, the Commission requested additional information concerning any restrictions imposed by rights holders that are present in existing agreements between Shaw PPV and its affiliates, including any that might employ DSL technology. On 15 December 2004, Shaw PPV responded that it has distribution agreements with Shaw's cable systems and with approximately 23 other BDUs in western Canada. Shaw PPV stated that it was unaware of any restrictions pertaining to those distributors other than what it described as standard terms and restrictions.
16. Shaw PPV also stated that it was sceptical of the seriousness of TELUS' interest in distributing the Shaw PPV service and that, while it would welcome business from TELUS, Shaw PPV was uncertain that it would be practical or realistic for TELUS to become a Shaw PPV affiliate, given the fact that Shaw's BDUs and those of TELUS are direct competitors.
17. Finally, in its 20 January 2005 letter, Shaw PPV summed up its position that it was not conferring an undue preference upon itself or its affiliates as a result of its inability to convey certain programming rights to TELUS. It argued that TELUS had not provided it the "...information necessary for Shaw PPV to be able to seek and provide PPV distribution rights to TELUS." Shaw PPV also noted that TELUS had not provided any comment on the various potential alternatives that Shaw PPV had identified. Shaw PPV submitted, therefore, that the Commission should dismiss TELUS' complaint and encourage TELUS to explore the other options available to it.

The Commission's analysis and determinations

18. Section 6.1(1) of the *Pay TV Regulations, 1990* states:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.
19. In analyzing a complaint under section 6.1(1) of these regulations, the Commission seeks to determine, first, whether a party has given a preference to any person, or subjected any person to a disadvantage. Second, the Commission considers whether any such preference or disadvantage is undue. In examining this second issue, the Commission considers whether a preference or a disadvantage has had, or is likely to have, a material adverse impact on the complainant or 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 objectives of the broadcasting policy for Canada set out in the *Broadcasting Act* (the Act).

20. The Commission notes that, since the TELUS TV service will be operating in an anglophone market, it will be required, pursuant to section 18(5)(a)(iii) of the *Broadcasting Distribution Regulations*, to distribute, to the extent of available channels, at least one English-language general interest television PPV service.
21. The Commission considers that TELUS currently has various options available to it for obtaining and distributing PPV programming to the subscribers of its TELUS TV service. It could enter into an affiliation agreement with Shaw PPV. Alternatively, as noted by Shaw PPV, TELUS could seek an affiliation agreement with Bell ExpressVu, apply for a licence to operate its own PPV service or, through its VOD licence, provide subscribers with access to the same movie titles as are available on PPV.
22. In this case, TELUS has chosen to seek an affiliation agreement with Shaw PPV on the basis of TELUS' belief that, since its BDU competitors in western Canada offer Shaw's PPV service, it should have the right to match its competitors' offerings with the same service.
23. The Commission is not persuaded by TELUS' arguments that it should be entitled to offer, through Shaw PPV, PPV programming that is exactly the same as that offered by its BDU competitors in western Canada. Rather, the Commission considers that TELUS has other adequate alternatives that would permit it to offer a competitive PPV service. There is, however, nothing on the record of this proceeding to indicate that TELUS has explored these alternatives.
24. The Commission notes, for example, that TELUS has provided no information to indicate that it has explored the option of obtaining programming from Bell ExpressVu, despite the fact that TELUS intervened in support of Bell ExpressVu in the proceeding leading to *Terrestrial television pay-per-view service – Licence amendment*, Broadcasting Decision CRTC 2003-429, 28 August 2003. In its intervention, TELUS stated that there was a critical need for Bell ExpressVu's terrestrial television PPV service to be implemented, because it would provide a competitive alternative to Shaw PPV.
25. Finally, the Commission considers it essential that any undue preference and/or disadvantage allegation be accompanied by evidence sufficient to permit it to determine whether or not the alleged preference and/or disadvantage has had, or is likely to have, a material adverse impact on the complainant or other person, and to enable the Commission to assess the impact that the alleged preference and/or disadvantage has had, or is likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the Act. In the present case, TELUS has not provided sufficient information to permit the Commission to make such determinations.

Conclusion

26. Based on the foregoing, the Commission concludes that there is insufficient evidence on the record to sustain a finding of undue preference and/or undue disadvantage. The Commission therefore **dismisses** the complaint by TELUS Communications Inc.

Other matters – requests for confidentiality

27. In its 11 November 2004 letter to the Commission, TELUS requested that its references to certain provisions of the proposed Shaw PPV affiliation agreement be treated as confidential. Article 20 of the agreement provides that a signatory shall not disclose to any other person any provision of the agreement without the prior written consent of the other signatory.
28. In its 1 December 2004 letter to the Commission, Shaw PPV provided the Commission with copies of the relevant licence agreements it had entered into with certain U.S. program rights holders. Shaw PPV requested that all the information contained in these agreements be kept confidential. Shaw PPV considered this information to be commercially sensitive, as its revelation to its competitors could cause potential harm to Shaw PPV, to Shaw's BDUs, and the various other cable BDUs that distribute the service of Shaw PPV. In addition, the confidentiality clauses in the agreements provide that disclosure of their contents is prohibited other than as may be required by applicable law.
29. For its part, TELUS requested in its 15 December 2004 letter that the Commission treat as confidential certain information it identified in that letter as being confidential. TELUS submitted that this information revealed specific details of TELUS' current technology and future plans, and that disclosure of this information to the public and to TELUS' competitors would harm TELUS' ability to compete in the BDU market.
30. The Commission is of the view that the potential harm that could result from disclosure of the above-mentioned information outweighs the public interest in disclosure. The Commission also notes that neither party contested the other's confidentiality requests. The requests for confidential treatment of these particular documents are therefore allowed.

Secretary General

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