



## Broadcasting Decision CRTC 2008-299

Ottawa, 4 November 2008

### **Complaint by 6166954 Canada Inc., licensee of OUTtv, against Shaw Cablesystems Ltd. pursuant to section 9 of the *Broadcasting Distribution Regulations***

*The Commission finds that Shaw Cablesystems Ltd. (Shaw) has subjected 6166954 Canada Inc. to an undue disadvantage with respect to the marketing of OUTtv, a Category 1 specialty service, contrary to section 9 of the Broadcasting Distribution Regulations.*

*This decision also addresses a number of other issues related to the treatment of OUTtv by Shaw, including notices of channel realignment, audits of subscriber information, and the offer of free previews of OUTtv to subscribers. As well, the Commission rules on a confidentiality request relative to a 2005 agreement between Shaw and the previous owners of OUTtv.*

### **Introduction**

1. On 9 April 2008, 6166954 Canada Inc. (616), licensee of OUTtv, filed a complaint pursuant to section 9 of the *Broadcasting Distribution Regulations* (the Regulations) against Shaw Cablesystems Ltd. (Shaw). 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.
2. OUTtv is a national English-language Category 1 digital specialty television service that offers news and information, current affairs, lifestyle and entertainment programming designed to meet the needs of the gay and lesbian community. Shaw Cablesystems is one of the largest operators of cable broadcasting distribution undertakings (BDUs) in Canada.
3. Once the record was complete on a preliminary basis, the parties made an effort to negotiate a settlement between June and August 2008. When the parties informed the Commission that they had reached an impasse, they were each provided with an opportunity to file concluding submissions.
4. After examining the record, the Commission finds that the primary question to be addressed is as follows:
  - Has Shaw marketed OUTtv in a manner that is contrary to section 9 of the Regulations?

5. This decision also addresses the following questions:
- Did Shaw breach section 26 of the Regulations by changing the channel placement of OUTtv without providing proper notification?
  - Has Shaw provided OUTtv with an adequate opportunity to conduct an independent audit of subscriber information?
  - Has Shaw provided free previews of OUTtv to subscribers on an equitable basis?
  - Should the Commission grant confidentiality to the 2005 agreement between Shaw and the previous owners of OUTtv?

### **Has Shaw marketed OUTtv in a manner that is contrary to section 9 of the Regulations?**

#### **Background**

6. Shaw offers an “All In” pack of channels to its subscribers, which includes all specialty channels offered by Shaw for a monthly fee of \$26.95. In Shaw’s marketing materials (including Shaw’s website), the reference to the All In pack includes an asterisk (\*) stating that “All In includes OUTtv by request only.” Upon a subscriber request for the All In pack with OUTtv, Shaw provides an “All in OUTtv” package that includes OUTtv at no extra charge.
7. Shaw also provides OUTtv on a standalone basis for \$2.95 – the same price as all other Category 1 services. As well, Shaw makes OUTtv and all other Category 1 services available to subscribers as part of any of its 2, 7, or 14 subscriber chosen “pick ‘n pay” packages.
8. Shaw currently distributes OUTtv on channel 370 on most of its systems. It distributes a number of adult programming services on adjacent channels. These include Hustler (channel 371), Playboy TV (channel 372) and Red Light District (channel 373). The digital music channels are adjacent to the other end of the adult grouping, beginning at channel 401. All of the other Category 1 services distributed by Shaw are located between channels 95 and 129.
9. In its complaint, 616 submitted that, when customers contact Shaw customer service representatives (CSRs), the package that includes OUTtv is “not even presented as an option.” Further, 616 stated that, when customers request all of the digital services, “OUTtv is not made available, unless specifically requested.”
10. 616 argued that the marketing practices of Shaw have caused the penetration rate of OUTtv to be lower on Shaw systems than on other BDUs. The penetration rate of OUTtv, as recorded in December 2007, was 0.49% of subscribers on Shaw systems. This

compares to 18.11% for TELUS systems, 15.69% for Bell ExpressVu, 9.27% for Cogeco systems and 7% for Rogers systems and 6.61% for Star Choice. The average penetration rate for OUTtv on Cogeco, Bell ExpressVu and Rogers BDUs was 10.7%. Shaw did not dispute these figures.

11. In response, Shaw stated that the lower level of penetration of OUTtv on Shaw systems could be attributed to a public campaign to discredit Shaw that has been waged by 616 and the previous owners of OUTtv. As a result, Shaw submitted that subscribers interested in receiving OUTtv may have chosen to subscribe to other BDUs.
12. In its final submission, 616 requested that the Commission find that Shaw had subjected 616 to an undue disadvantage contrary to section 9 of the Regulations and issue an order requiring Shaw to distribute OUTtv in an appropriate package with other services offering lifestyle themed programming.

### **Regulatory framework**

13. In analyzing a complaint of undue preference under the Regulations, the Commission must first determine 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.
14. In order to determine if a preference or a disadvantage is undue, the test applied by the Commission is to examine whether the preference or disadvantage has had, or is likely to have, a material adverse impact on OUTtv or 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).
15. In this case the Commission must also consider that Public Notice 2000-171, which introduced decisions licensing new digital pay and specialty services, stated that “[a]ll Category 1 services must be packaged and *marketed* on an equitable basis, with terms comparable to those applied to any other new digital service.” (emphasis added)

### **Commission’s analysis and determinations**

16. Based on the information filed as part of this process, it is clear that Shaw currently markets OUTtv in a different manner than any of the other Category 1 services that it distributes. OUTtv is the only Category 1 service (or any other service) that Shaw requires subscribers to specifically request if they wish to have it as part of an All In pack. Further, in Shaw’s marketing materials OUTtv is the only service that is offered as an “add-on” to a package. In addition, the record demonstrates that Shaw’s CSRs do not appear to be promoting OUTtv, or even making it available as an option, when subscribers inquire about Shaw’s All In pack.

17. As a result of Shaw's marketing practices, subscribers must not only be aware of the OUTtv service, but also must specifically request OUTtv as part of the package in order to receive it. This is significantly different from the manner in which Shaw markets other Category 1 services, since those services are automatically included in the All In pack. Thus, there is no need for subscribers to be familiar with these other Category 1 services before they receive them.
18. The Commission also notes that Shaw's distribution of OUTtv on channel 370, adjacent to adult programming services, may leave some subscribers with the impression that OUTtv contains adult content. In fact, although OUTtv did at one time distribute adult programming, such programming was discontinued on 12 April 2005. Thus, confusion could arise when Shaw subscribers scroll through their electronic program guides (EPGs) to determine what services may be offered since OUTtv is the only non-adult programming service adjacent to these adult programming channels.
19. The Commission indicated in Public Notice 1996-60 and later in Broadcasting Public Notice 2004-188 that channel placement issues should properly be the subject of negotiation between the parties concerned and that, generally, it would not be prepared to apply its dispute resolution powers in matters that were essentially commercial in nature. In this case, however, the Commission considers that the fact that Shaw has made a decision to locate a service on a channel adjacent to adult channels would disadvantage the successful marketing of a non-adult service such as OUTtv.
20. In light of all the above, the Commission finds that Shaw is subjecting OUTtv to a disadvantage by marketing this service in a manner that is different than the manner in which it markets other Category 1 digital specialty television services.

Undue preference or disadvantage

21. As noted above, OUTtv's penetration on Shaw systems in December 2007 was 0.49% of subscribers. This was significantly lower than the penetration rates of OUTtv on other BDUs during the same period.
22. The record of this proceeding does not provide extensive detail on the marketing practices of BDUs other than Shaw. However, according to 616, none of the other BDUs make a distinction between OUTtv and any other services in their package (i.e., they do not offer OUTtv on a "by request" basis). Star Choice, for example, offers two separate packages – one without OUTtv (More Movies) and one with OUTtv (More Movies II). As a result of this marketing approach, it would be clear to Star Choice subscribers that a package that includes OUTtv exists.
23. The Commission notes that the only common factor that might explain the significantly lower penetration of OUTtv on Shaw systems in comparison to other BDUs is the less favourable way that Shaw markets OUTtv. 616 argued that the number of subscribers to OUTtv would increase by 80,000 if the service were marketed by Shaw in a manner similar to that of other BDUs. According to 616, this would increase OUTtv's monthly

revenues by \$34,000. While this entire amount might not be achieved solely through a change in Shaw's marketing of OUTv, the Commission is of the view that the manner of marketing OUTv employed by Shaw has led to a decrease in revenue for OUTv and has had an adverse material impact on the service.

24. Further, the Commission notes that section 3(1)(d)(ii) of the Act states that the Canadian broadcasting system should:

encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.

25. The Commission is of the view that an increase in OUTv's revenue would improve the service's ability to invest in programming, including Canadian programming. This would serve to increase the diversity of programming available in Canada, consistent with the objective set out in section 3(1)(d)(ii) of the Act.
26. In light of the above, the Commission is of the view that Shaw's conduct with respect to the marketing of OUTv has had and is likely to continue to have a material adverse impact on OUTv. It further considers that Shaw's conduct has had, or is likely to have, a negative impact on the achievement of the objectives of the broadcasting policy for Canada set out in the Act. Accordingly, the Commission finds that Shaw has subjected OUTv to an undue disadvantage with respect to the marketing of the service, contrary to section 9 of the Regulations.
27. As a remedy, 616 requested that the Commission issue a mandatory order with respect to the distribution of OUTv. The Commission notes that a public hearing must be held before it can issue such an order. It is not the Commission's practice to proceed to such an order until it has provided a party with an opportunity to take the necessary steps to address the practice that led to the finding of undue preference or disadvantage.
28. Accordingly, the Commission directs Shaw to reply to the Commission within 30 days of the date of this decision setting out the steps it will take to ensure that in the future its marketing of OUTv does not result in the service being subjected to an undue disadvantage.

**Did Shaw breach section 26 of the Regulations by changing the channel placement of OUTv without providing proper notification?**

29. 616 alleged that Shaw had changed the channel location of OUTv twice – in February 2007 and in April 2007– without providing the notification required under section 26 of the Regulations. Section 26 states:

If a licensee intends to change the channel on which a Canadian programming service is distributed, the licensee shall not implement the change unless, at least 60 days before the proposed effective date of the change, it sends a written notice indicating the intended date of the change and the channel number on which the programming service will be distributed, to each of the operators of the programming services whose channel placements will be affected by the proposed realignment.

30. Shaw denied that it had moved OUTtv twice, stating that it moved OUTtv only once over a six month period in 2007 on most of its systems. However, Shaw did not challenge 616's allegation that it had not provided the 60 day notification of the move required by section 26 of the Regulations. Accordingly, the Commission finds that Shaw has breached section 26 of the Regulations by changing the channel on which it distributes OUTtv without providing the required notification.
31. The Commission recently addressed the issue of Shaw's compliance with section 26 of the Regulations in Broadcasting Decision 2008-234. In that decision, the Commission found that Shaw had breached section 26 of the Regulations in a number of instances (none of which involved OUTtv). These breaches, along with non-compliance in other areas, resulted in the Commission issuing a short-term licence renewal of two years so that the Shaw licences will expire in August 2010. The Commission stated that "[t]his short-term renewal will allow the Commission to review at an earlier date the licensees' compliance with the Commission's regulatory requirements and policy provisions." In light of the finding above, the Commission reiterates that it will closely monitor Shaw's performance with respect to compliance with section 26 of the Regulations, and that it will consider this matter in the context of Shaw's next licence renewals.

**Has Shaw provided OUTtv with an adequate opportunity to conduct an independent audit of subscriber information?**

32. 616 stated that Shaw had failed to grant its request for an independent audit of digital subscriber information. Shaw did not challenge this statement but indicated that it would negotiate with 616 for an amendment to an agreement concerning the distribution of OUTtv that was concluded in 2005 between Shaw and the previous owners of OUTtv (the 2005 Agreement) to incorporate terms for audit rights acceptable to both parties.
33. The Commission addressed the issue of audit rights for programmers in Broadcasting Decision 2008-234, stating:

In Broadcasting Public Notice 2005-34, the Commission published what it considered to constitute reasonable audit terms, which serve as guidelines that do not supersede the terms of existing affiliation agreements. ... In the Commission's view, those principles and terms generally constitute an appropriate minimum standard for the audit of BDU subscriber information conducted on behalf of a programming service and will be used as a point of reference in the Commission's consideration of future disputes relating to audit issues that may be brought before it.

34. In Broadcasting Decision 2008-234, the Commission found that there was insufficient information on the record for it to take specific action on Shaw's audit practices at that time and noted that it intended to closely monitor this matter. Further, the Commission stated that the interveners' comments on audit matters made during the licence renewal process were a factor in the issuance of a short-term renewal to Shaw.
35. The Commission notes that Shaw has agreed to negotiate an amendment to the 2005 Agreement with 616 to incorporate audit rights on terms acceptable to both parties. The Commission expects Shaw to report to the Commission on the status of these negotiations within three months of the date of this decision. The arrangements concluded by Shaw and 616 should reflect the Commission's statement on audits set out in Broadcasting Decision 2008-234, which is cited above.

**Has Shaw provided free previews of OUTtv to subscribers on an equitable basis?**

36. In its final submission of 21 August 2008, 616 submitted that Shaw is not adhering to the Commission's ruling on free previews or "freeviews" set out in Decision 2001-612.<sup>1</sup> The term "freeviews" refers to the distribution of discretionary services for a limited period of time to subscribers in order to promote the service to potential subscribers.
37. 616 did not, however, provide any information with respect to the number of freeviews that Shaw has provided to programming services, including Category 1 services such as OUTtv. In light of this lack of evidence, the Commission is unable to conclude that Shaw has not provided freeviews on an equitable basis to OUTtv.
38. The Commission notes that, in its submission of 21 August 2008, Shaw stated that it: "... is proposing to include OUTtv in our one month preview of Category 1 and 2 services to all new digital subscribers on a going forward basis. This would be conditional on 616 agreeing to waive its fees during this preview." The Commission reminds Shaw that Public Notice 2000-171 provides that all Category 1 services must be marketed by BDUs on an equitable basis. The Commission considers that equitable treatment applies to the provision of free previews.

**Should the Commission grant confidentiality to the 2005 agreement between Shaw and the previous owners of OUTtv?**

39. On 20 May 2008, 616 provided the Commission with a copy of the 2005 Agreement, which was signed by the previous owner of OUTtv and Shaw. Shaw requested that the Commission grant confidentiality to this agreement pursuant to section 20 of the *CRTC Rules of Procedure* and Circular No. 429. 616 did not object to Shaw's request.

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<sup>1</sup> Decision 2001-612 dealt with a complaint by PrideVision (the predecessor to OUTtv) regarding free previews of the service by Shaw and Star Choice. This decision stated, in part, that "...the requirement for subscribers to take active steps to receive the PrideVision preview amounts to substantially different treatment of the service on the part of Shaw Cable and Star Choice."

40. In this case, the Commission considers that revealing the complete terms of the 2005 Agreement could reasonably be expected to prejudice negotiations with third parties. As a result, the potential harm that could result from disclosure of the information outweighs the public interest in disclosure. Accordingly, the Commission grants Shaw's request for confidentiality and it will not place the 2005 Agreement on the public file.

Secretary General

**Related documents**

- *Various cable broadcasting distribution undertakings in western Canada – Short-term licence renewals and licence amendments*, Broadcasting Decision CRTC 2008-234, 28 August 2008
- *Auditing of distributor subscriber information by programming services*, Broadcasting Public Notice CRTC 2005-34, 18 April 2005
- *Complaint by CTV Television Inc. alleging that Rogers Cable Communications Inc. contravened section 9 of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2004-188, 20 May 2004
- *Complaint by PrideVision against Shaw Cablesystems Ltd. and Star Choice Television Network Ltd. regarding “Free Previews” – Undue Disadvantage*, Decision CRTC 2001-612, 28 September 2001
- *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000
- *Guidelines respecting the confidential treatment of annual returns and material or information filed in support of a broadcasting application before the Commission*, Circular No. 429, 19 August 1998
- *Access Rules for Broadcasting Distribution Undertakings*, Public Notice CRTC 1996-60, 26 April 1996

*This decision is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>.*