



## Broadcasting Decision CRTC 2007-160

Ottawa, 1 June 2007

### **Complaint by Campbell River TV Association alleging denial of access to 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 Campbell River TV Association.*

#### **The parties**

1. Campbell River TV Association (CRTV) is a non-profit, co-operative cable system that serves approximately 13,400 members in the Campbell River area.
2. Shaw Pay-Per-View Ltd. (Shaw PPV) is a wholly-owned subsidiary of Shaw Communications Inc. (Shaw) and is the licensee of a national service offering both English and French pay-per-view (PPV) programming that may be distributed across Canada.

#### **The complaint**

3. CRTV filed a complaint on 8 February 2007 alleging that, contrary to section 6.1(1) of the *Pay Television Regulations, 1990* (the Pay TV Regulations), Shaw PPV conferred on Shaw's own broadcasting distribution undertakings (BDUs) an undue preference, and subjected CRTV to an undue disadvantage, by refusing to renew its affiliation agreement with CRTV while continuing to provide its service to other BDUs, including its affiliate Star Choice Television Network Inc. (Star Choice). CRTV claimed that it had no reason to believe that its contract for the Shaw PPV service would not be renewed until Shaw PPV gave notice that it was terminating its service to CRTV. CRTV submitted that it had always paid its invoices on time and in full and that Shaw PPV had never expressed concern about its contract with CRTV. CRTV added that it had no practical alternatives to the Shaw PPV service.
4. CRTV indicated that it does not hold either a PPV or VOD licence and that it would take considerable time and resources for it to obtain such a licence. CRTV stated that it is considering applying for a VOD licence, and determined through the Canadian Cable Systems Alliance (CCSA) that the capital cost to launch such a service would be approximately \$250,000. CRTV stated that it would take at least a year for it to obtain a licence, acquire the necessary equipment, conclude arrangements with program suppliers and launch a service. CRTV noted that the CCSA is in negotiations with a number of content providers and distributors for the provision of VOD products.

5. According to CRTV, if Shaw PPV were permitted to terminate its PPV service, CRTV and its members would be without PPV or VOD service until CRTV could obtain its own VOD licence. This would constitute a material adverse impact for CRTV and its members as it would deprive CRTV's members of a popular service and put CRTV at a serious competitive disadvantage to Shaw's direct-to-home (DTH) service, Star Choice, and Bell ExpressVu Inc. (ExpressVu).
6. CRTV indicated that it has few practical alternative sources for PPV programming. Rogers Cable Communications Inc. (Rogers) VOD movie services are not available to CRTV because Rogers cannot make such programming available on a sub-licensee basis. While Rogers does have a PPV licence for sporting events, and would be willing to supply CRTV with PPV sports content via a fibre connection, the cost of such a connection from southern Ontario to Campbell River would be unreasonable.
7. CRTV noted that Telus Communications Inc.'s (Telus) PPV service offers only special events, and Telus's VOD service offers only a limited number of movies. In any case, CRTV submitted that Telus' PPV and VOD services are not available via satellite, Internet or by fibre delivery on Vancouver Island.
8. CRTV suggested that, other than Shaw PPV, ExpressVu's PPV service was the only satellite-delivered option realistically available to CRTV. However, CRTV argued that it was not aware of any cable television operator in Canada that receives and distributes ExpressVu's PPV services for three key reasons:
  - ExpressVu is a direct competitor to cable operators in Western Canada;
  - Shaw PPV provides 100% of the PPV cable television service in Western Canada, making it difficult for ExpressVu to compete against Shaw PPV;
  - The ExpressVu system is not directly compatible to HITS Motorola equipment, such as that used by CRTV. (In the case of CRTV, it would have to re-digitize each PPV channel received from ExpressVu in order to keep the audio synchronized with the video and make it compatible with CRTV's set top boxes. The additional capital cost of adapting to the ExpressVu system would be \$7,000 per channel or \$112,000 to replace the current 16 PPV channels received from Shaw PPV).

### **Shaw PPV's position**

9. Shaw Communications Inc. (Shaw) responded on behalf of Shaw PPV. Shaw rejected CRTV's arguments, and submitted that Shaw PPV had not conferred an undue preference on itself, nor subjected CRTV to any undue disadvantage for the following reasons:

- Shaw PPV's Agreement with CRTV expired on 1 March 2007 and did not contain a renewal term;
  - In Shaw's view, CRTV has engaged in questionable business practices, to the detriment of Shaw, and Shaw PPV was no longer interested in contracting with CRTV;
  - CRTV has various options available to it for obtaining and distributing PPV or VOD programming; and
  - CRTV has provided no evidence that the alleged preference and disadvantage have had or are likely to have a material adverse impact on it or any other person.
10. Shaw argued that it is a fundamental principle of contract law that parties are allowed to decide with whom they choose to do business. In Shaw's view the CRTC should not intervene, unless there are compelling regulatory reasons to force parties to contract against both their will and business judgment. Shaw contended that there are no such compelling reasons, and that CRTV could pursue other alternatives.
  11. Shaw noted that there are a number of general interest PPV undertakings licensed to operate in the same community served by CRTV. In addition to Shaw's PPV undertaking, ExpressVu and Rogers are both licensed to provide PPV services to cable distributors on a national basis and could therefore provide PPV services to CRTV. Telus and Rogers are also licensed to operate national VOD services that could be distributed by CRTV.
  12. Alternatively, Shaw stated that CRTV could obtain its own PPV or VOD licence, noting that a significant number of cable distributors have been issued licences to operate VOD undertakings. Many of these cable distributors operate in communities that are comparable in size to Campbell River. Shaw submitted that VOD and PPV increasingly share the same exhibition window for the release of titles.
  13. Shaw argued that it did not dispute that CRTV may encounter additional costs in obtaining PPV or VOD services from another supplier, but that such costs would be normal for any business to encounter when it changes suppliers. In Shaw's view, CRTV's claim that it was impractical to obtain alternative PPV or VOD services, did not mean that it is impossible. Moreover, Shaw submitted that it should not be forced to provide its PPV service to CRTV while other providers are free to decide whether or not they wish to provide services to CRTV.
  14. Finally, Shaw noted that CRTV has had three years to address its PPV needs and ensure that it would continue to have access to PPV or VOD services. Shaw further noted that, during that time period, CRTV could have tried to obtain VOD or PPV services from some other provider under acceptable terms. In the alternative, it could have applied for its own PPV or VOD licence.

## **Commission's analysis and determinations**

15. Section 6.1(1) of the Pay TV Regulations states:

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

16. In analyzing a complaint under section 6.1(1), the Commission must first determine whether a party gave a preference to any person, or subjected any person to a disadvantage. If so, the Commission must determine whether any such preference or disadvantage had been 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).
17. The Commission notes that pursuant to subsection 18(5)(a)(iii) of the *Broadcasting Distribution Regulations*, CRTC is required to distribute, to the extent of available channels, at least one English-language, general interest PPV television service.
18. The Commission is not persuaded by CRTC's arguments that CRTC has no practical alternative to Shaw PPV and that the termination of the Shaw PPV service would have a material adverse impact on CRTC and its members. In its 15 March 2007 letter to the Commission, CRTC indicated that the ExpressVu PPV service was realistically available to CRTC but at an estimated cost of \$116,000. CRTC further stated that it was considering applying for a VOD licence and determined that the estimated cost to launch a VOD service would be \$250,000.
19. Based upon the information provided to it, the Commission cannot conclude that the financial impact on CRTC of having to obtain access to PPV programming from another supplier or by launching its own VOD service is unreasonable. It must be seen as a normal cost of doing business in a competitive environment that distribution undertakings incur capital costs in order to offer fully competitive services.
20. Furthermore, the Commission notes that the record does not contain any information that sets out the likely negative impact of Shaw PPV's decision on CRTC's subscribers and on its revenues. It was incumbent upon CRTC to demonstrate that Shaw PPV's decision has had or is likely to have a material adverse impact upon it, or that the impact is or would be significant on the achievement of the objectives of the broadcasting policy for Canada set out in the Act, and it has not done so.

## Conclusion

21. 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 CRTV. However, in order for CRTV to have the opportunity to find an alternative source of PPV programming, the Commission requests that Shaw PPV continue to provide access to CRTV to its PPV programming for 60 days after the issuance of this decision. Further, in the interest of subscribers being fully aware of this situation, the Commission requests that, prior to the end of this 60 day period, a notice be sent by CRTV to its subscribers to inform them that there will be a change or termination of availability of PPV service on CRTV's cable system.

Secretary General

*This decision is to be appended to the licence. It 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>*