



## Broadcasting Decision CRTC 2012-645

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Ottawa, 27 November 2012

### **TELUS Communications Company**

Provinces of British Columbia, Alberta and Quebec

*Application 2012-1195-3*

### **Application by TELUS Communications Company (TELUS) regarding the distribution by Corus Entertainment Inc. of a new programming service on Shaw Communications Inc.'s services Shaw Cable and Shaw Direct, and not on TELUS's service Optik on the Go**

*The Commission finds that Corus Entertainment Inc. did not contravene section 6.3 of the Pay Television Regulations, 1990, when providing Movie Central/HBO Canada content to Shaw Communications Inc.'s service known as Shaw Go prior to providing this content to TELUS Communications Company's service known as Optik on the Go.*

### **Introduction**

1. The Commission received an application by TELUS Communications Company (TELUS), dated 20 September 2012, alleging that Corus Entertainment Inc. (Corus) contravened section 6.3 of the *Pay Television Regulations, 1990* (the Regulations) in light of the fact that Corus launched a new programming service and made it available to Shaw Cable and Shaw Direct to the exclusion of other broadcasting distribution undertakings (BDUs) such as TELUS.
2. The public record for this application is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."

### **The parties**

3. TELUS<sup>1</sup> is the licensee of an Internet Protocol Television (IPTV)-based terrestrial distribution service known as Optik TV, which serves parts of British Columbia, Alberta and Quebec. TELUS has also launched Optik on the Go, which permits

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<sup>1</sup> TELUS Communications Inc., and 1219823 Alberta ULC and Emergis Inc. in partnership with TELUS Communications Inc. in TELE-MOBILE Company, partners in a general partnership carrying on business as TELUS Communications Company

Optik TV subscribers to access programming from Internet-connected smartphones, tablets or computers.

4. Corus owns Movie Central, which is licensed to Corus's subsidiary Movie Central Ltd. Movie Central is a regional, general interest pay television service that is offered in British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon Territory, the Northwest Territories and Nunavut, and includes a multiplexed channel branded as HBO Canada.
5. Shaw Communications Inc. (Shaw) owns various BDUs in Western Canada operating under the name Shaw Cable, as well as the direct-to-home satellite BDU known as Shaw Direct. Shaw has also launched a service known as Shaw Go, which, like Optik on the Go, permits Shaw BDU subscribers to access programming from Internet-connected smartphones, tablets or computers.

### **The complaint**

6. TELUS submitted that Corus has launched a new programming service related to its Movie Central pay television service and has been making this service available only to Shaw Cable and Shaw Direct. TELUS further submitted that this new programming service makes Movie Central/HBO Canada content available "in-home, out-of-home and on-the-go" via broadband, WiFi and cellular networks on a variety of connected devices, and that access to this service is authenticated to customers' BDU subscription to Movie Central.
7. Noting that it launched Optik on the Go in December 2011, TELUS indicated that it had been working with Corus for months in advance of that date in order to obtain the necessary rights to make Movie Central/HBO Canada content available on Optik on the Go. It further indicated that Shaw released Shaw Go on 20 September 2012.
8. TELUS stated that although Corus had now agreed to make the same content available to it for distribution to its Optik TV subscribers via broadband and WiFi, this agreement would only take effect as of 20 October 2012 and would not include rights to make the content available via cellular networks.
9. TELUS alleged that Corus, by making Movie Central/HBO Canada content available to qualifying Shaw Cable and Shaw Direct customers in the manner described above prior to granting TELUS with the same access to this content for Optik on the Go, was in contravention of section 6.3 of the Regulations, which reads as follows:

Except as otherwise provided under a condition of its licence, a licensee that is ready to launch a new programming service shall make that programming service available for distribution by all licensed broadcasting distribution undertakings or operators of exempt distribution undertakings, despite the absence of a commercial agreement.

10. TELUS requested that the Commission order Corus to immediately provide it access to the same content being offered to Shaw.

## **Answer by Corus**

11. Corus submitted that it cannot grant TELUS immediate access to Movie Central/HBO Canada programming for the purposes of its Optik on the Go service given that copyright and contractual considerations are, in large part, beyond its control. In this regard, Corus stated that each programming rights holder (in particular, the American studios), in granting rights to exhibit programming, establishes specifications with respect to the transmission, storage and display of their content. As such, Corus is required to assess the specifications relating to operating systems, applications, encoding, delivery portals, access controls, bit rates, hardware, security and authentication of any broadcasting undertaking to which it intends to provide exhibition rights, in order to ascertain whether the studio-imposed requirements are met.
12. Corus further explained that the manner in which the broadcasting undertaking proposes to use the copyrighted programming and the nature of the platforms to be used must be reviewed against the rights that Corus has obtained from the relevant studios. Where the characteristics of the platform or the proposed uses do not mesh with the rights obtained, Corus is required to enter into discussions with the relevant rights holders. It argued that this process takes time. Furthermore, it emphasized that TELUS is also a mobile operator and that its request involved a different set of requirements than did those regarding the Shaw service. Specifically, Corus stated that TELUS and Shaw operate similar businesses in the BDU space but that TELUS also operates mobile services while Shaw does not. Furthermore, whereas Shaw operates a WiFi service, TELUS does not operate such a service. Corus argued that these differences are material from a copyright and contractual rights perspective.
13. In addition, Corus submitted that section 6.3 of the Regulations does not apply to the current situation and that it therefore has not contravened that section of the Regulations. Noting that Movie Central has been operating as a licensed programming undertaking for many years, Corus argued that what was provided to Shaw and that which TELUS is seeking by way of the present application are certain broadband rights relating to the established linear service Movie Central. It argued that in providing Shaw with these rights, it was acting as a program title supplier for the digital new media environment, rather than as a licensed programming undertaking. Corus therefore argued that TELUS's complaint is not premised on a valid regulatory provision, and as such should be dismissed.

## **Answer by Shaw**

14. Shaw submitted that section 6.3 of the Regulations has two key elements that must be present for this provision to apply, namely:
  - a licensee must be ready to launch a new programming service; and
  - a new programming service must be available for distribution by licensed BDUs or operators of exempt distribution undertakings.

15. In regard to the present case, Shaw argued that there was no contravention of section 6.3 of the Regulations given that neither of the above-mentioned key elements is present. It submitted that the service being referenced by TELUS is not a “new programming service” as defined in section 2 of the Regulations, and that the distribution of that service is not relative to a licensed or exempt BDU.
16. Shaw noted that the Regulations address allegations of a possible “head start,” specifically with respect to new, licensed linear programming services made available solely on one distribution system for a certain period of time, and not exempt digital media broadcasting undertakings. It also noted that given TELUS’s admission that Corus will make the programming available on 20 October 2012, the matter will apparently be resolved through commercial negotiation without need for any regulatory process or determination.

### **Intervention by MTS Inc.**

17. In its intervention, MTS Inc. (MTS Allstream) stated that both the Shaw Go and Optik on the Go services require their users to be customers of their respective BDUs, with a valid subscription to the linear channel(s) being accessed on demand, and that, therefore, the distinction that Corus tries to make (i.e., that TELUS operates a mobile service, while Shaw does not and that Shaw operates a WiFi service, while TELUS does not) is irrelevant.
18. Moreover, MTS Allstream argued that by providing its pay television content to Shaw for over-the-top (OTT) distribution, Corus has contravened the vertical integration framework. The intervener noted that in that framework, the Commission concludes that permitting vertically-integrated entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and video-on-demand services would result in harm to consumers and the competitiveness of the industry.<sup>2</sup>
19. MTS Allstream also argued that Shaw and Corus are controlled by the same entity and that, as such, they are to be considered as part of the same vertically-integrated entity. It noted that in the vertical integration framework, the Commission determined that the “no head start” rule would also be made to apply to television programming distributed on digital media broadcasting platforms such as mobile and retail Internet. MTS Allstream argued that given the previous, Shaw must be viewed as having contravened the “no head start” rule when it made the relevant Corus content available on its Shaw Go service, without that content also being made available to another distributor that wants it for a competing service.
20. MTS Allstream took the position that by choosing to make content available to a related entity for a new OTT service, the no head start provisions introduced by the Commission as a result of its vertical integration framework are applicable to the situation under consideration.

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<sup>2</sup> See paragraph 21 of Broadcasting Regulatory Policy 2011-601.

## **Reply comments by TELUS**

21. In its reply dated 25 October 2012, TELUS argued that Corus's arguments regarding copyright and contractual terms are belied by the fact that the two parties already have a fully executed agreement for the provision of Movie Central/HBO Canada content on a multi-platform basis, subject only to the launch date, which "shall be mutually agreed to by the parties." It stated that Corus clearly has the rights to offer content on multiple platforms since it has made it available to Shaw via its Shaw Go service as early as September 2011.
22. TELUS further argued that Corus's interpretation of what constituted a "new programming service" was restrictive and not consistent with the wording of the definition provided in the Regulations. It also argued that it is disingenuous for Corus to argue that it is merely acting as a programming supplier, and not as a regulated undertaking, by providing multi-platform access to its content to Shaw when the service is authenticated to BDU subscribers of the linear service.
23. TELUS indicated that notwithstanding pronouncements made by Corus to the effect that it was working towards providing TELUS with the content for a 20 October 2012 launch date, it still does not have access to the content it requested at the time it filed its reply.

## **Commission's analysis and decision**

24. The Commission notes that TELUS, in its application, invoked section 6.3 of the Regulations in support of its requested remedy. As such, the Commission considers that the issue it must address is whether this section of the Regulations applies to the facts of the dispute.
25. Section 6.3 of the Regulations applies to a pay television licensee that has launched a new programming service. In this regard, section 2 of the Regulations defines "licensee" and "new programming service" as follows:
  - "licensee" means a person who is licensed by the Commission pursuant to paragraph 9(1)(b) of the [Broadcasting] Act to carry on a pay television programming undertaking or a pay television network
  - "new programming service" means a programming service that has not been previously distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service.
26. Section 6.3 of the Regulations is a fairly recent provision, having been enacted to implement the Commission's regulatory framework relating to vertical integration, which is set out in Broadcasting Regulatory Policy 2011-601. In the vertical integration framework, the Commission determined, amongst other things, that it would introduce regulatory measures requiring a programming undertaking that is ready to launch a new pay or specialty service to make that service available to all BDUs, even in the absence of a commercial agreement. The Commission further

determined that the rule would also apply to television programming distributed on other distribution platforms such as mobile and retail Internet.<sup>3</sup>

27. The Commission notes that section 6.3 of the Regulations relates to pay television services. In this regard, the term “new programming service” relates to the class of services to which the Regulations apply. Since high definition versions and multiplex versions of existing pay television services are pay television services, the class of services referred to in the definition of “new programming service” relates to pay television services.
28. According to the record of this proceeding, the programming rights at issue allow for the relevant programming to be either delivered and accessed over the Internet or delivered using point-to-point technology and received by way of mobile devices. As such, any programming service subject to the agreement entered into between Corus and Shaw is one that is meant to operate under the terms and conditions of the *Exemption order for digital media broadcasting undertakings*, which is set out in the appendix to Broadcasting Order 2012-409, and not pursuant to the Regulations.
29. In light of the above, the Commission determines that Corus, by entering into an agreement with Shaw in order to provide it with the rights necessary to make available programming from Corus’s linear pay television undertaking branded as Movie Central via Shaw’s service Shaw Go, without making this programming available to TELUS for delivery and access via TELUS’s service Optik on the Go, has not contravened section 6.3 of the Regulations.
30. In its intervention, MTS Allstream expressed concerns relating to the consequences of allowing “a vertically integrated distributor to use a related programmer’s existing television content for non-linear and/or multi-platform distribution without that content also being made available to competing distributors.” In this regard, the Commission notes that the determination set out in the present decision relates strictly to the facts of the present issue, and does not represent a reconsideration of its previous policy determinations set out in the vertical integration framework. Specifically, this determination addresses whether there has been a violation of section 6.3 of the Regulations.

Secretary General

#### **Related documents**

- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012

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<sup>3</sup> In Broadcasting Regulatory Policy 2012-407, the Commission finalized the amendments made to its various regulations. In that regulatory policy, the Commission clarified that the amendments introduced into the Regulations would capture all newly launched pay television programming services.

- *Amendments to various regulations – Implementation of the regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2012-407, 26 July 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011

*\*This decision is to be appended to the licence.*