



Broadcasting Decision CRTC 2003-408

Ottawa, 21 August 2003

Saskatchewan Telecommunications

MTS Communications Inc.

Shaw Communications Inc. and Shaw Pay-Per-View Ltd. (formerly Corus VC Ltd.)

Complaints by Saskatchewan Telecommunications and MTS Communications Inc. alleging breaches of section 9 of the *Broadcasting Distribution Regulations* against Shaw Communications Inc. and of section 6.1(1) of the *Pay Television Regulations, 1990* against Shaw Pay-Per-View Ltd. (formerly Corus VC Ltd.)

The Commission allows the complaints filed by Saskatchewan Telecommunications and MTS Communications Inc. and concludes that Shaw Pay-Per-View Ltd. (formerly Corus VC Ltd.) contravened section 6.1(1) of the Pay Television Regulations, 1990, which prohibits licensees from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.

The Parties

1. Saskatchewan Telecommunications (SaskTel) is the licensee of a Class 1 cable broadcasting distribution undertaking (BDU) authorized to serve Regina, Saskatoon, Moose Jaw, Prince Albert, Yorkton, Estevan, Weyburn, Swift Current, North Battleford, Battleford, White City and Pilot Butte, Saskatchewan. SaskTel is a provincial crown corporation, operating under the authority of *The Saskatchewan Telecommunications Act*, and is a wholly-owned subsidiary and the primary asset of a holding company known as the Saskatchewan Telecommunications Holding Corporation.
2. SaskTel began operation of its cable BDU on 12 September 2002. It provides a digital interactive video (DIV) service and uses digital subscriber line (DSL) technology.
3. MTS Communications Inc. (MTS) is the licensee of a Class 1 cable BDU authorized to serve Winnipeg and surrounding communities in Manitoba. MTS is a wholly-owned subsidiary of Manitoba Telecom Services Inc., a public corporation whose shares are widely held. Manitoba Telecom Services Inc. is controlled by its Board of Directors.
4. MTS began operating its cable BDU on 14 January 2003. It offers a broad range of broadcasting services over telephone lines using DSL technology.

5. Shaw Communications Inc. (Shaw) is a public corporation controlled by Mr. J.R. Shaw and family. Shaw is the parent company of Canada's second-largest operator of cable BDUs.
6. Shaw Pay-Per-View Ltd. (formerly Corus VC Ltd.¹) is a wholly-owned subsidiary of Shaw. Shaw Pay-Per-View Ltd. (Shaw PPV) is the licensee of a regional English-language general interest terrestrial television pay-per-view (PPV) service known as Viewer's Choice. The service is distributed exclusively to subscribers in British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon Territory, Nunavut and the Northwest Territories.

The complaints

7. On 21 November 2002, SaskTel filed a complaint with the Commission alleging that Shaw had breached section 9 of the *Broadcasting Distribution Regulations* (the Distribution Regulations) and that Shaw PPV had breached section 6.1(1) of the *Pay Television Regulations, 1990* (the Pay Television Regulations). Section 9 of the Distribution Regulations and section 6.1(1) of the Pay Television Regulations prohibit a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.
8. On 20 January 2003, the Commission received a similar complaint from MTS against Shaw and Shaw PPV.
9. SaskTel and MTS stated that, as the licensees of Class 1 cable BDUs serving Anglophone markets, they are required, by section 18(5) of the Distribution Regulations, to distribute at least one English-language general interest television PPV service. The complainants stated that Viewer's Choice is the only such service currently operating in western Canada. They noted that, while Bell ExpressVu Limited Partnership (Bell ExpressVu) holds a broadcasting licence for a terrestrial PPV undertaking, the service is not yet operational. They submitted that it would be too costly for them to negotiate directly with the U.S. rights holders for PPV services and that Viewer's Choice is, therefore, their only viable source for obtaining an English-language television PPV service.
10. SaskTel and MTS alleged that Shaw PPV has not offered Viewer's Choice to them on comparable terms to those under which it is provided to Shaw's cable BDUs and other affiliated and unaffiliated cable BDUs in western Canada. Specifically, the complainants stated that the two-year affiliation agreement proposed by Shaw PPV would require that SaskTel and MTS each make guaranteed minimum payments of \$1 million in the first year and \$1.5 million in the second year, and that these payments be paid in equal monthly instalments. The proposed agreement also stipulated a revenue split that would

¹ Corus VC Ltd. (Corus) changed its name to Shaw Pay-Per-View Ltd. following the intracorporate reorganization approved in *Intracorporate reorganization of Corus VC Ltd.*, Broadcasting Decision CRTC 2002-242, 22 August 2002. This reorganization resulted in the transfer of all of the issued and outstanding shares of Corus from 616554 B.C. Ltd., a wholly-owned subsidiary of Shaw, to 900989 Alberta Ltd., a new wholly-owned subsidiary of Shaw.

allocate 80% of the revenues derived from the distribution of Viewer's Choice to Shaw PPV with the remainder to the SaskTel or MTS cable BDU in their respective areas of operation.

11. According to the complainants, the payments requested by Shaw PPV are exorbitant and unreasonable. They stated that Shaw PPV provides Viewer's Choice to every other cable BDU in western Canada and does not require that they make minimum payments for the service or guarantee payments of the magnitude proposed in the terms offered to SaskTel and MTS. In addition, the complainants contended that, under its existing arrangements with these other cable BDUs, Shaw PPV receives a much lower percentage of the revenues derived from the distribution of Viewer's Choice.
12. SaskTel and MTS stated that Shaw PPV sought to justify the proposed minimum guaranteed payments and revenue splits on the basis of the additional costs allegedly imposed on Viewer's Choice by its suppliers for the distribution of PPV programming using DSL technology. The complainants further stated that Shaw PPV only offered this explanation after months of protracted negotiations with them. In disputing this purported justification, MTS filed a letter, dated 25 March 2003, from View Now, a U.S. provider of video-on-demand (VOD) programming, containing the following statement: "the financial terms and conditions that we require from DSL exhibition are materially the same as those that we require from exhibition via traditional hybrid fibre-coax technology. We do not impose penalties, financial or otherwise, that are technology dependent." MTS stated that major U.S. film studios provide VOD programming on the same basis.
13. SaskTel and MTS claimed that the terms offered by Shaw PPV effectively deny them access to an English-language television PPV service, a service that they are required to distribute by the Distribution Regulations. They also submitted that, by denying them the capability of offering a service that their subscribers expect to receive and that is already provided by their competitors, Shaw PPV has limited the attractiveness of their service offerings, thereby placing them at a serious competitive disadvantage. Furthermore, they alleged that the terms proposed by Shaw PPV give Shaw a competitive advantage in markets where its cable BDUs compete with the complainants' undertakings.
14. In SaskTel and MTS's submission, the terms under which Shaw PPV has offered Viewer's Choice to them constitute a breach of section 6.1(1) of the Pay Television Regulations. They asked the Commission to order Shaw PPV to provide Viewer's Choice to their cable BDUs under reasonable terms and conditions.
15. The complainants argued that smaller cable BDUs, such as the ones they operate, face significant challenges, which include difficulties in negotiating wholesale programming fees that are comparable to those available to larger BDUs. In addition, many smaller cable BDUs have lower distribution capacity and, therefore, may find it difficult to offer packages that are similar to those offered by their competitors.

16. In support of their arguments, the complainants cited *Small cable systems – Digital migration policy*, Public Notice CRTC 2001-130, 21 December 2001 (Public Notice 2001-130), in which the Commission noted the significant contribution that small cable companies make to maintaining competition in the distribution of programming, which in turn promotes lower rates, thus contributing to the affordability of service and to the delivery of a broad range of services to Canadians. The complainants pointed out that the Commission stated in that public notice that special measures are warranted to help ensure that smaller cable systems remain competitive while the marketplace makes the transition to digital distribution. They noted that the Commission also indicated in Public Notice 2001-130 that it expects programmers to give their consent to small systems to distribute previously uncarried analog services on digital tiers, at effective per-subscriber rates that are substantially similar to those offered to their larger competitors, and that failure to grant such consent would constitute an undue disadvantage to the small cable distributor under the Pay Television Regulations.

Shaw's position

17. In response, Shaw PPV acknowledged that its existing agreements with cable BDUs that currently distribute Viewer's Choice do not require minimum annual payments to be remitted on a monthly basis, and stipulate a lower percentage of the revenue split for itself than what is proposed in the affiliation agreements offered to SaskTel and MTS. Shaw PPV stated that the differences between the terms of its proposed affiliation agreement with the complainants and those it offers to other cable BDUs are based on the use by SaskTel and MTS of DSL technology. Shaw PPV explained that it must agree to make minimum guaranteed payments in order to obtain the rights from U.S. rights holders for PPV programming and that any additional rights, such as DSL rights, increase its costs. It further maintained that U.S. rights holders charge premium prices for DSL rights because they consider that DSL is a new technology and are concerned about the security of signals distributed by DSL providers.
18. In support of its arguments, Shaw PPV filed an unsigned, generic agreement as an example of the type of program supply contract it was attempting to negotiate with the U.S. studios that are rights holders of PPV programming. Shaw PPV maintained that the section in the agreement pertaining to DSL rights demonstrates that they are treated as a separate program right to be negotiated between distributors and rights holders.
19. On 10 January 2003, the Commission asked Shaw PPV to provide examples of executed agreements with U.S. rights holders and a detailed breakdown of the methodology it used to determine the minimum guaranteed revenues and revenue splits proposed in the affiliation agreements offered to SaskTel and MTS. In a letter dated 17 January 2003, Shaw PPV responded that it had no executed agreements with U.S. program rights holders at the time of the filing. Shaw PPV did not specify a methodology for arriving at the proposed payment guarantees or revenue splits, but stated that the rationale for these terms was "fair and reasonable."

20. With respect to the letter by View Now, Shaw PPV contended that this company is a provider of VOD programming and is, therefore, a content aggregator, not a content programmer. According to Shaw PPV, View Now cannot speak for or represent the studios in terms of their concerns and particular demands for DSL rights for PPV content.
21. Shaw PPV also argued that it would not be in its economic interest to deny SaskTel or MTS access to Viewer's Choice. Finally, Shaw PPV stated that SaskTel and MTS could obtain PPV programming from Bell Express Vu, which has been licensed to deliver PPV programming to cable and other terrestrial BDUs.

The Commission's analysis and determination

22. Section 6.1(1) of the Pay Television Regulations states that:

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

23. Currently, Viewer's Choice is the only terrestrial television PPV service operating in western Canada. All of the complainants' competitors currently offer Viewer's Choice as part of their service. The Commission notes that Bell ExpressVu has not yet launched the television PPV service authorized in *New national terrestrial pay-per-view service*, Decision CRTC 2000-737, 24 November 2000, 14 December 2000.
24. In its response to the complaints filed by SaskTel and MTS, Shaw PPV admitted that it has offered Viewer's Choice to the complainants on terms that were different from those under which it has offered the service to its own affiliated cable BDUs well as to other affiliated and non-affiliated cable BDUs in western Canada. Shaw PPV, nevertheless, maintained that those differences were justified because of the requirements imposed by U.S. rights holders for PPV programming for the distribution of such programming by DSL providers.
25. Shaw PPV, however, did not provide any substantive documentation to support its arguments. The generic agreement filed by Shaw PPV as evidence of its need for guaranteed revenues and the proposed revenue splits did not specify any terms, did not identify any parties and was labelled as requiring executive review and approval. Furthermore, Shaw PPV was unable to provide any examples of executed agreements with U.S. rights holders, as requested by the Commission. Moreover, Shaw PPV did not file documentation, as requested by the Commission, detailing the methodology used to determine the proposed payment guarantees and revenue splits.
26. The Commission considers that the facts clearly demonstrate that Shaw PPV's offer to SaskTel and MTS gives a preference to Shaw's cable BDUs and other affiliated and unaffiliated cable BDUs in western Canada, and subjects SaskTel and MTS to a disadvantage that is significant in the circumstances. In the Commission's view, the terms of the proposed affiliation agreement offered to SaskTel and MTS by Shaw PPV

make it difficult, if not impossible, for either of the complainants to offer a fully competitive cable service, particularly in view of the relatively early stage of launch of their respective services. The Commission does not consider that Shaw PPV has justified this preference and disadvantage. Accordingly, the Commission concludes that Shaw PPV's actions confer an undue preference on other terrestrial BDUs and subject both SaskTel and MTS to an undue disadvantage, contrary to section 6.1(1) of the Pay Television Regulations.

27. The Commission requires Shaw PPV to provide Viewer's Choice to SaskTel and MTS on an expedited basis, under reasonable terms and conditions. In the Commission's view, reasonable terms require that the per-event fees charged to either SaskTel and or MTS, including any guaranteed minimum payments, should be substantially similar to per-event fees charged to Shaw's own cable BDUs.
28. In the event that Shaw PPV does not take the necessary steps on an expedited basis, the Commission may convene a public hearing to examine why it should not issue a mandatory order or use other enforcement measures at its disposal.
29. The Commission notes that SaskTel and MTS also alleged that Shaw had breached section 9 of the Distribution Regulations; however, insufficient evidence was provided by the complainants to substantiate that allegation.

Request for confidentiality

30. Pursuant to section 20 of the CRTC Rules of Procedure, the parties have requested that the Commission treat as confidential certain documents dealing with financial and statistical figures established between Shaw and the two BDUs, and various email messages exchanged during discussions between the parties concerning the negotiation of agreements. Paragraph 20 of *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, stipulates that the applicants must prove that the public interest would be better served if the information or documents were deemed confidential.
31. The Commission is of the view that the parties have demonstrated that the potential harm which could result from the disclosure of the terms of such commercially sensitive agreements is greater than any public benefit of full disclosure. The request for confidential treatment is therefore allowed.
32. In accordance with CRTC policy, all correspondence related to this complaint, other than confidential information, is to be placed on the public file.

Secretary General

This decision is to be appended to the licence. It is available in alternative format upon request, and may also be examined at the following Internet site: <http://www.crtc.gc.ca>

