



Broadcasting Decision CRTC 2003-518

Ottawa, 23 October 2003

Complaint by Wagg Communications against Shaw Communications Inc. alleging breaches of the *Broadcasting Distribution Regulations*

The Commission dismisses a complaint by Wagg Communications (Wagg) related to the refusal by Shaw Communications Inc. (Shaw) to carry exempt services operated by Wagg on certain of Shaw's broadcasting distribution undertakings. The Commission concludes that Shaw did not contravene section 21(3) of the Broadcasting Distribution Regulations (the Regulations) by not carrying the exempt undertakings operated by Wagg. The Commission further concludes that Shaw did not contravene section 9 of the Regulations, which prohibits a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.

The parties

1. Shaw Communications Inc. (Shaw) is controlled, by way of various holdings, by JR Shaw and family and is one of the largest operators of broadcasting distribution undertakings (BDUs) in Canada.
2. Wagg Communications (Wagg) operates a number of exempt broadcasting undertakings in Western Canada and is owned by Mr. Russ Wagg.

Background

3. On 30 November 2001, Wagg filed a complaint with the Commission related to BDUs operated by Shaw in Sault St. Marie, Ontario, Fort McMurray and Red Deer, Alberta and Courtenay, British Columbia. Wagg stated that it intended to begin broadcasting exempt real estate channels¹ in each of the above communities, and that Shaw had informed Wagg that it did not intend to carry the undertakings. Wagg submitted that, by refusing to carry its real estate channels, Shaw was in violation of the terms of the *Broadcasting Distribution Regulations* (the Regulations).

¹ Such undertakings qualify for exemption from the requirement to hold a broadcasting licence under the terms of the *Exemption Order Respecting Still Image Programming Service Undertakings* set out in appendix to *Final revisions to certain exemption orders*, Public Notice CRTC 2000-10, 24 January 2000.

4. The complaint involves section 21(3) and section 9 of the Regulations. Section 21(3) states:

If a licensee distributes on one or more analog channels the programming services of an exempt programming undertaking of which the licensee or an affiliate, or both, controls 15% or more of the total shares issued and outstanding, the licensee shall make available an equal number of analog channels for the distribution of programming services of third party exempt programming undertakings.

5. 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.

6. In *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 22 December 1997 (Public Notice 1997-150), the Commission set out a list of circumstances that could constitute an undue preference or disadvantage. One of the circumstances was the following:

The analog distribution by a Class 1 licensee of one or more exempt programming services in which a similar type of entity has an ownership interest of 15% or more, where the licensee is not making available an equal number of analog channels for the distribution of independently-owned exempt programming services.

7. Wagg considered that Shaw's carriage of the exempt Shaw TV Listings Channel and The Shopping Channel (TSC) on the cable systems noted above triggered the requirement set out in section 21(3) of the Regulations to make available an equal number of analog channels for the carriage of the Wagg exempt undertakings. Wagg further submitted that the carriage of TSC, which is controlled by Rogers Communications Inc. (Rogers), while refusing to carry the Wagg real estate channels, could constitute an undue preference or undue disadvantage, as described in Public Notice 1997-150.
8. On 29 January 2002, Commission staff provided a non-binding opinion letter to both parties stating that, prima facie, Shaw's denial of access for the Wagg real estate channels to the cable systems in question appeared to breach section 21(3) of the Regulations. Additionally, Commission staff stated, in the opinion letter, that, as TSC is owned by Rogers, which is the parent company and, therefore, an affiliate of Rogers Cable Inc., Rogers constitutes a "similar type of entity" to Shaw, as described in Public Notice 1997-150. Commission staff therefore considered that Shaw's carriage of TSC without making available a channel to an independently-owned exempt undertaking could constitute an undue preference and a breach of section 9 of the Regulations.

9. The file was eventually closed without prejudice on 3 May 2002 as Wagg, at that time, elected not to have the matter brought forward for disposition by the Commission.
10. On 18 March 2003, Wagg submitted a letter requesting that the Commission reopen the file and make a decision on this matter. Given the time that had passed from the filing of the original complaint, Shaw, on 25 March 2003, requested that Wagg update and provide details concerning its complaint. In a letter dated 7 April 2003, Wagg provided this update, and also indicated that it was now seeking access for exempt real estate undertakings to Shaw BDUs in Red Deer and Fort McMurray, Alberta and Parksville and Nanaimo, British Columbia. Shaw responded to Wagg's submission on 17 April 2003.
11. In the remainder of this decision, the Commission sets out the positions of the parties as well as its analysis and determinations related to the issues raised by Wagg's complaint.

Compliance with section 21(3)

Positions of parties

12. Wagg submitted that the distribution, by Shaw, of the exempt undertakings TSC and the Shaw TV Listings Channel invoked the requirement set out in section 21(3) of the Regulations for Shaw to "make available an equal number of analog channels for the distribution of programming services of third party exempt programming undertakings" (the 1:1 requirement). Wagg therefore argued that, as an operator of third party exempt programming undertakings, it should not be denied access to the four Shaw cable systems in question.
13. In its response letter, dated 17 April 2003, Shaw argued that "the carriage of TSC and the TV Listings Channel on the specified four Shaw cable systems is consistent with the requirements of the Regulations and does not trigger the 1:1 linkage requirements for exempt programming services set out in section 21 of the Regulations."
14. Shaw submitted that to characterize the Shaw TV Listings Channel as a programming undertaking was inaccurate because the service was "predominantly alphanumeric," and therefore did not fall under the definition of "broadcasting" set out in the *Broadcasting Act* (the Act). Shaw therefore considered that the Shaw TV Listings Channel should not be considered as an exempt programming undertaking that is subject to the 1:1 requirement set out in section 21(3) of the Regulations.
15. Shaw further stated that it currently distributes, on the systems in question, a number of exempt programming undertakings in which it does not control 15% or more of the shares. These undertakings include TSC, the provincial legislature channels and the portion of the CPAC service related to the coverage of the proceedings of the House of Commons. Shaw therefore submitted that, even if the Commission were to find that the Shaw TV Listings Channel did, in fact, constitute an exempt programming undertaking, it would, in any case, meet the 1:1 requirement established under section 21(3) without carrying the Wagg real estate undertakings.

The Commission's analysis and determinations

16. The Commission notes that the 1:1 requirement set out in section 21(3) of the Regulations is triggered when a licensee distributes “an exempt programming undertaking of which the licensee or an affiliate, or both, controls 15% or more of the total shares issued and outstanding...”
17. The Commission notes that Shaw does not control 15% or more of the total shares issued and outstanding for TSC. TSC is, rather, controlled by Rogers. The Commission therefore finds that carriage of TSC by Shaw systems does not trigger the 1:1 requirement set out in section 21(3) of the Regulations. The carriage of TSC, however, does raise the issue of undue preference under section 9 of the Regulations, which is discussed in the next section of this decision.
18. The Shaw TV Listings Channel is clearly controlled by Shaw. However, Shaw has argued that, because the Shaw TV Listings Channel is predominantly alpha-numeric in nature, it does not constitute broadcasting, as defined in the Act, and therefore, is not an exempt programming undertaking.
19. The Act defines “broadcasting” and “program” as follows:

“broadcasting” means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that *consist predominantly of alphanumeric text* [emphasis added].
20. The Commission must, therefore, determine whether the Shaw TV Listings Channel consists “predominantly of alphanumeric text.” In its letter to the Commission dated 10 January 2002, Shaw stated that the Shaw TV Listings Channel employs a split screen on all four cable systems in question. One half of the screen displays channel listings, whereas the other half displays advertising of both a pictorial and an alphanumeric nature. The programming for the channel is provided by Corus Entertainment Inc. (Corus), an affiliate of Shaw. In turn, Corus markets the service to potential advertisers and collects the advertising revenue. Corus charges the Shaw cable services for this product, however the cost to the cable operator is somewhat offset by the advertising revenue collected.

21. It is evident, from the information set out above, that the Shaw TV Listings Channel includes both alphanumeric and still images. In *Regulation of full Channel TV services (e.g. alphanumeric services)* Telecom Decision CRTC 97-2, 5 February 1997, the Commission addressed such services as follows:

Pursuant to its mandate under the *Broadcasting Act*, the Commission interprets the term “predominantly” as being used in its ordinary sense, to signify that which is more influential or powerful. For example, even where a moving image occupies one quarter-of the screen, the service may be characterized as a “program” if the moving image is the focus of attention.

22. In the Commission’s view, it is the still image material broadcast on the Shaw TV Listings Channel that is the focus of attention. The Commission therefore finds that Shaw TV Listings Channel is not primarily alphanumeric in nature and therefore qualifies as an exempt programming undertaking under the terms of the *Exemption Order Respecting Still Image Programming Service Undertakings* set out in the appendix to *Final revisions to certain exemption orders*, Public Notice CRTC 2000-10, 24 January 2000. The carriage of the Shaw TV Listings Channel therefore triggers the 1:1 requirement set out in section 21(3) of the Regulations.
23. However, although Shaw’s distribution of the Shaw TV Listings Channel triggers the 1:1 requirement, the Commission notes that Shaw is already distributing on the four systems in question both the provincial legislature channels and TSC, both of which qualify as third party exempt programming undertakings for the purposes of section 21(3) of the Regulations. The Commission therefore finds that Shaw is not in breach of the requirements of section 21(3) by not carrying the real estate channels provided by Wagg since it is already making available the required number of analog channels to third party exempt programming undertakings.

Concerns related to section 9 of the Regulations

Positions of parties

24. As indicated earlier, section 9 of the Regulations stipulates that no licensee shall “give an undue preference to any person, including itself, or subject any person to an undue disadvantage.”
25. Wagg considered Rogers to be a “similar type of entity” to Shaw, as described in Public Notice 1997-150. It therefore considered that the distribution of TSC by Shaw, while denying carriage of Wagg’s exempt undertakings conferred an undue preference on Shaw and an undue disadvantage on Wagg, contrary to section 9 of the Regulations. In its letter of 17 December 2001, Wagg submitted that “Shaw and Rogers have a very close business relationship, they trade entire cable systems like kids trade hockey cards. The undue preference that has been expressed by the CRTC in the past is more relevant now than ever before.”

26. Shaw, in discussing the possibility of undue preference in its response letter of 17 April 2003, submitted that:

TSC is an affiliate of Rogers and, arguably, Shaw and Rogers operate “similar types of distribution undertakings.” Accordingly, the distribution of TSC on our cable systems could potentially constitute an undue preference, per the statement in Public Notice CRTC 1997-150.

27. Shaw argued, however, that there was no evidence that Shaw’s cable systems have actually conferred an undue preference on TSC, or subjected any person, including Wagg, to an undue disadvantage. In particular, Shaw stated that there has been no cooperation or collusion between Shaw and Rogers with respect to the distribution of TSC. According to Shaw, the carriage of TSC was based on its “historic carriage” and the “proven value” that this service has provided its customers. Shaw indicated that TSC had been carried by the four systems in question for over ten years, prior to Rogers’ ownership of the service.
28. Shaw further stated that its “position to no longer distribute exempt still image advertising services, including those owned by Shaw or an affiliate, is consistent with the goal of managing scarce channel capacity in a manner to promote the maximum distribution of licensed and authorized programming services.”

The Commission’s analysis and determinations

Preference and/or disadvantage

29. The Commission notes that, in its response to the Wagg complaint, Shaw acknowledged that TSC is an affiliate of Rogers, and that Shaw and Rogers operate similar types of distribution undertakings. Hence, under the terms of Public Notice 1997-150, the distribution of TSC by Shaw systems could potentially constitute an undue preference.
30. The Commission finds that it is clear that a preference has been given to Rogers, through the distribution of TSC over Wagg and that Wagg has been subjected to a disadvantage.

Undue preference and/or disadvantage

31. In addition to finding that there is a preference or disadvantage, the Commission must determine whether, under all the circumstances, the preference or disadvantage is undue. In essence, this means that the Commission has to find that Shaw’s actions have had or are likely to have material and serious consequences that were contrary to the public interest for Wagg and/or the Canadian broadcasting system.

32. The Commission notes that, in a letter decision dated 31 May 2000, concerning an alleged breach of section 9 of the Regulations that involved Torstar Corporation (Torstar) and Southmount Cable Limited (Southmount), it stated that “in situations where a licensee distributes services of an exempt programming undertaking in which a similar type of distribution undertaking has control of 15% or more of the exempt undertaking, there is no automatic requirement for the licensee to make an equal number of analog channels available for the distribution of the services of other exempt programming undertakings. Such a requirement would be imposed, however, where there is evidence of undue preference or undue disadvantage.”
33. The Commission notes that Wagg has not provided any evidence that Shaw had received any special compensation from TSC for its distribution. The Commission further notes that Shaw described its continued carriage of TSC as being based on its “historic carriage” and the “proven value” that TSC has provided to Shaw’s customers. The Commission can therefore not conclude that Shaw’s actions have had or are likely to have material and serious consequences that are contrary to the public interest for Wagg and/or the Canadian broadcasting system.
34. In light of the above, the Commission finds that, there is no evidence that Shaw’s distribution of TSC, while not distributing the Wagg exempt undertakings, has given an undue preference to any person, including Shaw, or subjected Wagg to an undue disadvantage.

Other arguments – Change in distribution environment

35. The Commission notes that, as the record in this case does not disclose a breach of either section 21(3) or section 9 of the Regulations, it is not necessary to go into a more general argument raised by Shaw. Shaw submitted that the broadcasting environment has changed sufficiently since the time that section 21(3) of the Regulations was enacted and Public Notice 1997-150 spoke of the access rights that should be accorded third party exempt programming undertakings. Shaw considered that, in today’s environment, it is more appropriate to maximize spectrum utilization by giving preference to the distribution of licensed programming services, including new digital services, over exempt services such as those offered by Wagg.
36. As it is the Commission’s normal practice to consider substantive changes to its announced policy in the context of a public process wherein comments from all interested parties may be considered, the Commission is not prepared to comment further on this argument.

Secretary General

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