

## **The Shaw Communications Issue**

At the Closing Gala of the Queer Film Festival I made some comments in my awards presentation speech regarding the issues between OUTtv and Shaw Communications. In addition, I also made some general comments that these issues relate to the current federal election as well, and in particular I expressed specific concerns about a potential Conservative majority government. I have been told by festival organizers that a significant number of people have made inquiries about the specific details of this issue. In response, I have therefore prepared this summary of the issues to make people aware of the situation faced by OUTtv and other broadcasters in regards to Shaw Communications and the current broadcasting environment in Canada, and how these issues relate to the upcoming federal election. I hope you will read this summary and consider the issues it raises.

OUTtv was originally licensed by the CRTC as Pride Vision in 2000 and began to air as a digital service in Canada in 2001. It was the world's first television channel licensed to directly serve the GLBT Community. Pride Vision was licensed along with a number of other channels to take advantage of the new digital broadcasting spectrum available on Canadian cable and satellite services.

The bids were competitive, but the licenses being offered by the CRTC (called Category 1) were considered potentially valuable as they would come with a "must carry" provision, along with beneficial packaging rules. Essentially this meant that the broadcasting distribution companies, being the cable carriers (such as Shaw, Rogers, Telus, etc.), and the satellite providers (Bell, Star Choice), would have to carry the services on their systems, and were required to package and market these channels in a positive and equitable manner.

Prior to its launch, Pride Vision met with general resistance from a few carriers, but with Calgary-based Shaw Communications, the country's second largest cable provider, the resistance was particularly vocal. Shaw's CEO, Jim Shaw Jr., commented at the time (to paraphrase), that he was very concerned about customer complaints being made because of the gay subject matter. The inference was that his customers did not want this channel and that he was unhappy with the CRTC for giving it a license with mandatory carriage provisions. Citing these concerns for customers when Pride Vision was launched, Shaw Communications refused to allow for "Free Previews" of the channel to its subscribers.

Shaw Communications took this action even though the CRTC licensing provisions clearly required them to do so. Pride Vision filed a formal complaint with the CRTC, which it ultimately won, upholding the right of Pride Vision to Free Previews. In their decision, the CRTC made it clear that they expected the carriers to carry the service on an equitable basis with other channels even though it obviously would contain Gay and Lesbian content. However, Pride Vision's problems did not end there.

The owners of Pride Vision were put under pressure from a number of carriers not to take full advantage of the Category 1 rules and to instead operate the service on a “stand alone”, direct subscriber basis. The majority owner was particularly vulnerable to pressure, as they owned other programming services that were not protected with Category 1 status. Partly for this reason and for other strategic reasons, the Pride Vision owners decided to broadcast more “aggressive” programming, including adult content, which essentially required them to switch to a stand-alone, pay-per-view channel. Both these changes proved to be a serious strategic mistake and ultimately led to failure of Pride Vision, which resulted in the sale of the majority of their interests in the channel in 2003.

The new owners re-branded the channel as OUTtv and moved to recapture the valuable Category 1 licensing rules in an aggressive fashion. Resistance from the Shaw Communications service and their satellite service, Star Choice, was immediate. More threats of complaints and arguments ensued until a settlement was reached in 2005 in the form of a written agreement. Shaw Communications and Star Choice agreed to carry OUTtv; however they insisted that instead of carrying OUTtv in normal package they would create a special “dual” package for OUTtv, which would be offered at the same time, so consumers could pick one set of channels with OUTtv or an identical one without OUTtv. This dual packaging arrangement, along with other issues are the subject of the latest complaint by OUTtv against Shaw Communications.

The main thrust of the current complaint is not the dual packaging but the inequitable marketing. Shaw Communications essentially uses the dual package to bury OUTtv, and does not bring its availability to the attention of potential subscribers. OUTtv can be found in some online materials, but, where it matters most at the customer service level, OUTtv is not directly offered to consumers. The only time it is offered is if the consumer specifically requests OUTtv by name. In other words, like a specialty pay per view channel instead of a properly packaged lifestyle channel, as OUTtv is licensed by the CRTC.

OUTtv is the only channel that Shaw Communications treats this way. To make matters worse, if you contact Shaw Communications and ask for “all digital channels” you get “all digital channels” except OUTtv. You have to say, “All digital channels and OUTtv.” Of course, no one at Shaw Communications advises you of this option. They simply omit to mention the availability. As a result, we get calls and complaints from potential subscribers saying they ordered “everything” and they got every digital channel except for OUTtv. Many people have commented that they thought we were not even carried on Shaw’s cable services.

Certainly one issue here is also that consumers who are interested in OUTtv must identify their interest directly to the Customer Service Representative (“CSRs”). This is different from other channels that you can get in “Lifestyle”, “Movie” or “Action” packages. The Shaw Communications approach forces potential subscribers to specifically identify themselves as being interested in OUTtv. This is not the case for any other Category 1 channel. It is also particularly troubling as a human rights issue when the customer is most often a gay person who must essentially identify themselves as such (or at least interested in Gay and Lesbian content) to a complete stranger.

Normally programming services try and deal with these sort of awareness problems by marketing directly to the CSRs and their affiliate relations people. OUTtv has a key employee who goes to conferences through out the year and meets with the CSRs from cable and satellite providers. This fall alone she will meet with more than 4000 people who operate the phones for the various cable companies and satellite services. This is an important marketing area as it gives us a chance to speak to the people on the front lines and tell them about OUTtv and how to sell it to potential subscribers. Unfortunately Shaw Communications does not allow OUTtv to meet with their CSRs. In fact, it is not clear that they let representatives from any channel meet with their CSRs.

Our group in Vancouver bought a majority interest in OUTtv in 2006. The other main shareholders are the Pink Triangle Press and Peace Point Entertainment Group. We were always amazed at how few subscribers OUTtv had on the Shaw Communications system in comparison to other major suppliers like Bell, Rogers, Telus and others. Even on other smaller carriers in the West, such as SaskTel and MTS, OUTtv soon had more subscribers than on Shaw. Our chair, Joy MacPhail, tried to reach out to the executives at Shaw directly, but it took months to even get a phone call returned. In the end, they remained immovable.

We have other complaints against Shaw Communications as well. Two years ago, we were channel 100 on their cable system. Then, without notice (contrary to CRTC guidelines), they moved us to channel 200. Then a few months later, again without notice, they moved us to channel 370, which places us squarely in their adult hard-core porn channel line-up. This is despite the fact that in our agreement with Shaw Communications we specifically agree not to play adult content. The obvious inference is that even GLBT lifestyle programming is equivalent to pornography in the opinion of Shaw Communications. In our place in Channel 100 we now find an infomercial channel selling consumer products which is owned by Corus Entertainment, which itself is largely owned by the Shaw family.

In April of 2008 we filed a formal complaint with the CRTC. The substance of the complaint was that OUTtv was being treated unfairly and differently than other Category 1 channels by Shaw. Included in our argument was a substantial amount of evidence from subscribers who had complained to us about how difficult it was to subscribe to OUTtv and how Shaw Communications CSRs did not properly advise people of OUTtv's availability. Combined with the channel placement changes and other marketing deficiencies the complaint contains a long, egregious list of poor conduct against OUTtv.

The other factual evidence that we filed was in regards to the financial impact of Shaw's behavior on OUTtv. Rather consistently OUTtv is getting between 9-15% of the digital subscribers to each distribution service across the country, meaning if a service has 100,000 digital subscribers in total, then OUTtv has roughly 9,000 to 15,000. These numbers are consistent on services such as Bell, Rogers, Telus, Videotron, SaskTel, MTS, Cogeco and others, where we are generally carried in a manner consistent with the CRTC rules and regulations. However on the Shaw Communications service we are less than 1% of the subscribers. Our

opinion is the reason for this is the combination of the ways in which Shaw Communications markets (by not properly marketing), packages and carries the OUTtv service. Shaw Communications rejects this argument and essentially argues that this is because “their consumer” does not want the channel. However they offer no evidence to support this assertion, presumably because there is none. The OUTtv matter is now before the CRTC and we expect a determination before the end of October, 2008.

It is only fair to point out that generally Shaw Communications is an equal opportunity offender. Shaw Communications has also moved around other channels including the Aboriginal channel, APTN, and has a terrible reputation with other Canadian programming services with whom we have spoken. Most recently the CRTC took the extraordinary step of putting them on probation at their license renewal granting them only a 2 year extension instead of the usual 7, primarily because of their constant poor treatment of Canadian programming services. This is an extraordinary measure and demonstrates the significant amount of abuse handed out to the Canadian programming services. Yet, it continues.

To be clear, the Broadcasting Act marketing rules exist because it is understood that channels cannot easily market themselves directly to consumers. The distribution companies, like Shaw Communications, control the consumer relationship and wield considerable influence at the point of purchase. The power of this direct relationship is the reason these companies have been so successful in moving from cable and telephone into satellite, Internet and mobile services over the past few decades. They have your name and your number.

There is no public policy rationale for this arrangement. The cable company has no more legitimate right to control this relationship than the programming service. However, since the cable and telephone technology requires a direct hook-up to your home, they get the direct relationship. This is despite the fact that everyone knows you order cable and satellite for the programming. Historically we granted the carriers a monopoly in the marketplace in order to support the enormous expenses and risks associated with building the expensive infrastructure required for cable, telephone and satellite networks. Furthermore, in order to ensure fairness for the programming services, we also created a regulatory framework that is overseen by the CRTC to ensure that the content providers are treated in a fair manner consistent with a broadcasting policy that serves all Canadians.

These regulations recognize the fundamental reality that consumers rely heavily on their cable or satellite provider for information on the programming services available to them. In a 20 or even 50 channel basic cable universe the programming services have a greater ability to self market through mass media. However in the 100+ digital channel age the reality is that the carriers have the ability to “make or break” a programming service through a combination of marketing, channel placement, packaging and advertising. Therefore, the digital age has made the distribution carriers more powerful and more in need of clear and proper regulation, not less regulation and more “free market”. No market is free which one party controls the communications with the consumer.

The reality is that in the digital age, programming services have fewer and fewer opportunities to reach the consumer directly. Mass media marketing is very expensive and less and less effective. In fact, the combination of these economic forces in part underlies the strategic advantage of media consolidation, seen most recently in the purchase of the CHUM channels by CTV Globe Media and the Alliance Atlantis channels by CanWest Global. The power and control of the distribution entities, now multi-billion dollar companies in Canada, have often pressured programming services to combine in order to gain enough economic strength to be able to negotiate with the larger carriers.

## **Why does this matter?**

The issues that OUTtv is dealing with should matter to all Canadians.

First and foremost, members of the Gay and Lesbian Community should be offended by the treatment that a GLBT television service has been subjected to. More to the point, we estimate that if Shaw Communications packaged OUTtv in the same manner as other carriers we would have roughly an additional \$40,000 per month. Some smaller carriers initially followed Shaw's example and have been challenged as well. The net result is that OUTtv has lost millions of dollars in potential subscriber revenue and hundreds of thousands of dollars in legal costs as a result of this improper behavior. Per OUTtv's CRTC Conditions of License, at least 49% of this money would have to be spent on original Canadian programming for the GLBT community. This means that a significant number of Canadian-produced Gay and Lesbian films, documentaries, life-style shows and other programs do not exist because of Shaw Communications' actions. Of course, these actions also hurt OUTtv's goals of promoting diversity and tolerance, and providing programming for the GLBT community.

All Canadians should also worry about the misuse of power demonstrated by this large corporation. Remember Shaw Communications was built in a highly protected environment of economic regulation. If they had to compete in a free market, their cable operation would be wiped out by U.S. companies like Comcast or Time Warner, and their satellite system Star Choice would likely be driven out of business by U.S. Satellite provider DirectTV. The last thing they want is to face real free market competition. They are prepared to take all the benefits of protection but not play by the rules when it doesn't suit their interest regarding Canadian programming services. It is total hypocrisy.

Companies like Shaw Communications represent the worst of our corporate champions of deregulation. They required protection to be built, but once they reached the size that they didn't need protection anymore (except from foreign competition), they became the advocates of unfettered free market principles. Then they misuse that power to increase their monopoly at the expense of innovative businesses and the consumer.

Over the past few decades we have seen this pattern repeat itself in many industries, from financial services to media and broadcasting. Instead of innovating and improving existing services, these companies have expanded into new markets that would not have been open to

them had it not been for the protection we granted them. Has anyone tried Shaw's terrible video-on-demand service? They are more interested in selling their new digital phone system than making their cable service properly work for the consumer. Why? Because they don't have to.

## **Why does this matter now?**

In just over a week Canadians go to the polls to elect a new government. Right now the biggest question seems to be whether the Conservative Government is going to get a majority or a minority. If they do gain a majority, it could be the end of the Canadian broadcast system and independent programming services like OUTtv.

Over the past year the CRTC has been conducting an inquiry into the future of the Broadcasting Act and the regulations regarding broadcasting distribution and programming services. The Report from the Commission is due out the end of October, after the election. The CRTC Report is not binding on the government, but will lay out a comprehensive set of recommendations regarding the current system.

No doubt the CRTC will try to find a balance between the competing interests of the distribution and programming services in a manner that it feels is consistent with meeting the objectives of the Broadcasting Act which is, broadly speaking, to serve the Canadian citizens and our culture in all its diversity. No doubt the recommendations will not please everyone, but it would be a big surprise if the CRTC buys into the deregulation that the broadcasting carriers like Shaw Communications have demanded.

The formal hearings took place in the spring of this year in Ottawa. Generally, the carriers argued for fewer regulations and fewer restrictions for themselves. The programming services, predictably, mostly argued that their situation was untenable without proper and enforceable regulation. I attended along with our chair, Joy MacPhail, for OUTtv. At the hearings we spoke out forcefully of the concerns we had about unfettered deregulation and the impact on independent services such as OUTtv.

However during the proceedings, one of the most bizarre things that happened was a letter that Jim Shaw Jr. sent to the Prime Minister directly. This is unprecedented. After the first week or so of open proceedings, Jim Shaw Jr. apparently didn't like the direction that the CRTC was going with the proceedings, and he asked the Prime Minister to intervene directly. Essentially he thought the hearings were all about deregulation and he wasn't happy that the CRTC Commissioners were openly canvassing all possibilities. So, instead of having the courtesy of showing up at the proceedings, he wrote to the Prime Minister directly to express his views. This was widely reported in the papers at the time and prompted the larger programming services, CTV Globe Media and CanWest Global, to respond in turn with their own letters to the Prime Minister. Clearly the CRTC became frustrated with Mr. Shaw's attempt to circumvent the process. However since that time no one in the media has bothered to discuss this issue again.

My main point here is – why does Jim Shaw Jr. think he can circumvent the regulatory process by appealing directly to the Prime Minister? More to the point, what kind of a relationship does he have with Mr. Harper that we don't know about? What does Mr. Shaw think (or has been promised) is going to happen to the broadcasting system if the Conservatives gain a majority government? Someone needs to ask this question. Now.

No one, to my knowledge, has asked Stephen Harper yet what his plans are for the Canadian broadcasting system. Based on their current aggressive cuts for a number of arts programs, you have to conclude that a majority Conservative government would be devastating for the Canadian broadcasting industry as we know it. How can we trust that Mr. Harper is not going to give in to the likes of Jim Shaw Jr.? In my opinion, we can't.

This is why these issues matter now to all Canadians more than ever before.