



7 July 2021

Filed online

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Secretary General,

Re: Part 1 application to renew the licence of OUTtv Network Inc. (2019-1026-6)

I. Introduction

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.
- 2 The Forum is intervening in support of the above-noted application. By way of background, the service now known as OUTtv was first licensed by the CRTC in 2000 as a national Category 1 specialty television service, to “provide national news and information, current affairs, lifestyle and entertainment programming designed to meet the needs of the gay and lesbian community.”¹ The CRTC noted that the service “will have the potential to be a ‘bridging’ service, creating understanding and thereby reducing stereotyping.”² The Commission also expected the service to

.... meet the needs of millions of friends and family members of gay, lesbian, bisexual and transgendered persons. These viewers will appreciate programming that accurately and fairly portrays the interests and lifestyles of their loved ones.³
- 3 After the CRTC approved a change in the ownership of the service in 2004⁴ its name changed (from PrideVision) to OUTtv.⁵ OUTtv’s ownership and effective control changed again in 2016.⁶
- 4 The Commission most recently considered OUTtv’s substantive performance in 2013, when it renewed the licence to the renewal of OUTtv’s licence in 2013.⁷ At that time the Commission noted

¹ *PrideVision - a new specialty channel*, [Decision CRTC 2000-456](#) (Ottawa, 14 December 2000), introductory remarks.

² *Ibid.*, “Contributions to diversity”.

³ *Ibid.*

⁴ *PrideVision – Acquisition of assets*, [Broadcasting Decision CRTC 2004-191](#) (Ottawa, 28 May 2004).

⁵ *OUTtv - Licence amendment*, [Broadcasting Decision CRTC 2008-66](#) (Ottawa, 20 March 2008), at para. 2.

⁶ CRTC, *Administrative Decision 2016-11-25* (see <https://crtc.gc.ca/ownership/eng/cht201.pdf>, at 1).

... that although the licensee reported losses from 2008 to 2011, its financial situation has improved over the years. The licensee reported a substantial increase in its number of subscribers between 2008 and 2012 as well as in its total revenues. It also reported that the service achieved a modest profit in 2012.⁸

- 5 The CRTC renewed OUTtv’s licence administratively in 2020, to 31 August 2021.⁹
- 6 OUTtv is seeking the renewal of its licence and “wide discretionary distribution” by broadcasting distribution undertakings (BDUs) so that they continue “to provide access for OUTtv and ... distribute the service in widely available pre-selected discretionary packages, when they are offered.”¹⁰ If its request regarding distribution is approved, OUTtv anticipates that while its wholesale fee would decrease by 42%, from 35¢ to 20¢ .

II. Rationale for granting OUTtv’s application

- 7 The Forum’s main grounds for supporting OUTtv’s application are set out below. Briefly, FRPC argues that the requests made by OUTtv in its application are not premature because the current licensee has (at the time of writing) been in control of the service for five years. The Forum also notes OUTtv’s steady and strong commitment to Canadian programming and the fact that OUTtv has met its commitments to implement Parliament’s broadcasting policy despite eleven years of challenges in obtaining access to Canadian BDU subscribers. Finally, the Forum argues that when faced with nearly identical non-compliance issues in the past the CRTC has accepted licensees’ commitments to become and remain compliant and has forborne from imposing sanctions on them, and respectfully submits that a similar approach should be taken with respect to OUTtv.

A. *This application is not premature*

- 8 In 2008 the CRTC denied an application by OUTtv’s to amend its licence to reduce its exhibition of Canadian programming:

Firstly, the licensee requested a reduction, from 65% to 50%, in the minimum portion of the broadcast day that it must devote to the exhibition of Canadian programs. The minimum portion of the evening broadcast period that it must devote to the exhibition of Canadian programs would remain at 50%. The licensee also requested that its commitment regarding the broadcast of original productions as a portion of the total Canadian programming broadcast be reduced from a minimum of 65% to a minimum of 32.5%.¹¹

⁷ *Various independent pay and specialty Category A services – Licence renewals*, Broadcasting Decision CRTC 2013-468 (Ottawa, 30 August 2013).

⁸ *Ibid.*, at para. 30.

⁹ *OUTtv – Administrative renewal*, [Broadcasting Decision CRTC 2020-242](#) (Ottawa, 6 August 2020).

¹⁰ *OUTtv, Supplementary Brief* (30 September 2019), at 3.

¹¹ *OUTtv - Licence amendment*, Broadcasting Decision CRTC 2008-66 (Ottawa, 20 March 2008), at paras. 3-4.

9 The CRTC denied OUTtv’s application on the basis that the short time between the service’s change in ownership and its amendment application made the amendments “premature”.¹²

10 Seventeen years have passed since OUTtv’s ownership changed in 2004, and another five years have passed since it changed in 2016. The Forum respectfully suggests that the issue of prematurity does not bear on the present application.

B. Commitment to Canadian programming

11 The Forum respectfully submits that OUTtv has encouraged the development of Canadian expression and has served the multifaceted needs, interests, circumstances and aspirations of Canadians as required by subsections 3(1)(d) and 3(1)(i) of the *Act*:

3(1) It is hereby declared as the broadcasting policy for Canada that

...

(d) the Canadian broadcasting system should

...

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

....

(i) the programming provided by the Canadian broadcasting system should

(i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,

....

12 According to the CRTC’s statistical and financial summaries for individual discretionary programming services, OUTtv’s Canadian programming expenditures increased 22.5% from 2013 to 2019 and amounted to \$15 million over this period. It has “become one of the bigger exporters of Canadian content, at least in terms of number of titles.”¹³ OUTtv also increased employment opportunities for Canadians – its full-time (or equivalent staff) grew from 10 people in 2013, to 18 in 2019.

13 OUTtv’s increase in Canadian programming expenditures and employment opportunities are particularly noteworthy as, over the same period, its revenues decreased by 13% (from \$5.2 million in 2013, to \$4.5 million in 2019).

¹² *Ibid.*, at para. 9.

¹³ *Ibid.*, at 25.

14 The Forum respectfully submits that OUTtv's contribution to the broadcasting system in terms of programming focussed on the needs and interests of Canada's LBGTO community, commitment to the exhibition of and expenditures on Canadian programming, and the employment opportunities it has created all justify approval of its renewal application.

C. Issues related to distribution

15 OUTtv has asked the CRTC to ensure that it is able to obtain wider distribution by BDUs. It notes that a stronger position within Canada will enable it to develop more programming for Canada, which is vital for Parliament's broadcasting policy. Developing more programming domestically will also strengthen OUTtv's capacity to export its programming abroad, thereby helping to build awareness of Canadian values.¹⁴

16 The challenge for this service in particular is that while OUTtv has helped to implement Parliament's broadcasting policy for Canada, it has been unable to obtain consistent equitable treatment from BDUs. The CRTC has on three occasions found that the service has received inequitable treatment by BDUs, limiting Canadians' knowledge of and therefore their access to OUTtv's programming.

17 In 2001 the CRTC upheld a complaint by OUTtv that Shaw Cable and Star Choice were subjecting its service to an undue disadvantage, contrary to the CRTC's regulations.¹⁵

18 In 2008 the CRTC found that Shaw Cablesystems Ltd.'s marketing of OUTtv subjected the service "to a disadvantage by marketing this service in a manner that is different than the manner in which it markets other Category 1 digital specialty television services",¹⁶ by changing the channel on which it distributed the service without

¹⁴ OUTtv, *Reply to Deficiency Letter (Abridged)*, DM#3960281 (16 December 2020) at 22.

¹⁵ Re: Complaint by PrideVision against Shaw Cablesystems Ltd. and Star Choice Television Network Ltd. regarding "Free Previews" - Undue Disadvantage, [Broadcasting Decision CRTC 2001-612](#) (Ottawa, 28 September 2001):

Given the highly competitive and challenging environment in which these services are being launched, the Commission considers the initial preview period crucial to the long term success of the new digital services. Further, in the Commission's view, the additional steps required to sample PrideVision will act as a strong disincentive for subscribers to view the service during the preview period, which will be reflected in PrideVision's subscriber levels after the preview is over. Accordingly, the disadvantageous treatment afforded PrideVision, if continued, would have an unduly negative impact on the service relative to other digital services. Shaw Cable and Star Choice subscribers should therefore receive the PrideVision preview on the same basis as they receive all other Category 1 services.

Taking into account all of the above, the Commission, by a majority vote, concludes that Shaw Cable and Star Choice are subjecting PrideVision to an undue disadvantage in relation to other Category 1 services and, thus, are in breach of section 9 of the Regulations.

...

¹⁶ *Complaint by 6166954 Canada Inc., licensee of OUTtv, against Shaw Cablesystems Ltd. pursuant to section 9 of the Broadcasting Distribution Regulations*, [Broadcasting Decision CRTC 2008-299](#) (Ottawa, 4 November 2008):

providing required notifications,¹⁷ and by treating free previews of its service in an inequitable manner compared to other Category 1 programming services.¹⁸ While OUTtv had at the time of its complaint asked the CRTC to order the distribution of its service, the Commission’s decision noted that it had not held the public hearing that is a precondition of such orders.¹⁹

- 19 In 2012 the CRTC upheld OUTtv’s complaint that Telus Communications Company’s marketing of OUTtv granted a preference to operators of other programming services and subjected it to a disadvantage was likely “to continue to have a “material adverse impact on OUTtv Network and a negative impact on the achievement of the Canadian broadcasting policy objectives”.²⁰
- 20 The Forum respectfully notes that while it may be hoped that broadcasters take all CRTC determinations into account, the CRTC’s own decisions suggest that more than a decade after the CRTC first upheld an undue-disadvantage complaint by OUTtv, the service continued to encounter differential treatment placing it at a disadvantage. This disadvantage has the direct consequence of reducing OUTtv’s awareness among potential subscribers: OUTtv was unprofitable in 2016, 2017, 2018 and 2019. Disadvantages imposed on OUTtv by BDUs also have the indirect consequence of imposing additional administrative costs on OUTtv – unlike discretionary services controlled by BDUs, independent services such as OUTtv must devote more of their time and resources to the challenge of obtaining carriage (or even marketing). As well as reducing their revenues, BDU decisions to deny services such as OUTtv fair distribution treatment also impose costs they would not otherwise bear (potentially diverting resources that could have been used for Canadian program production).
- 21 The concern regarding OUTtv’s distribution by BDUs must, in the Forum’s view, also be considered in terms of Parliament’s broadcasting policy. The ability of even a few (albeit very large) private broadcast distributors to restrict Canadians’ awareness of and access to OUTtv actually constrains the CRTC’s ability to meet its mandate of ensuring that Parliament’s broadcasting policy for Canada is implemented.
- 22 The Forum respectfully submits, therefore, that the CRTC should grant OUTtv’s request for wider distribution by BDUs, to ensure that OUTtv is able to continue to assist with the implementation of Parliament’s broadcasting policy. This request would, we assume, fall within the scope of subsection 9(1)(h) of the Act:

20. ... the Commission finds that Shaw is subjecting OUTtv to a disadvantage by marketing this service in a manner that is different than the manner in which it markets other Category 1 digital specialty television services.

¹⁷ *Ibid.*, para. 30.

¹⁸ *Ibid.*, para. 37.

¹⁹ Subsection 12(2) of the current *Broadcasting Act* permits the CRTC to issue orders, while subsection 18(1)(d) requires the Commission to “hold a public hearing in connection with ... the making of an order”.

²⁰ *Complaint by OUTtv Network Inc. against TELUS Communications Company alleging undue preference and disadvantage*, [Broadcasting Decision CRTC 2012-672](#) (Ottawa, 10 December 2012), at para. 46.

9 (1) Subject to this Part, the Commission may, in furtherance of its objects,

...

(h) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting;

...

- 23 While the Forum notes that the CRTC's general practice in the context of its 9(1)(h) requirements has been to issue mandatory orders under subsection 12(2), subsection 18(1)(d) provides that the CRTC may only issue subsection 12(2) orders after a public hearing. The CRTC is, however, apparently considering OUTtv's 2019 renewal application using its Part 1 process, suggesting that it may hold neither an appearing or a non-appearing hearing on this matter. The Forum also notes, however, that subsection 9(1)(h) does not specifically stipulate that the CRTC issue a mandatory order (following a public hearing) – it refers only to the concept of 'requirement'.²¹
- 24 The Forum respectfully submits that the CRTC should require BDUs to offer OUTtv wider distribution on reasonable terms and conditions.

D. Issues related to compliance

- 25 The CRTC's correspondence with OUTtv raised two allegations of non-compliance in relation to the submission of its annual returns.²² We note that in the first instance mentioned by the Commission, OUTtv in fact submitted its annual return on time – but was then asked questions by the CRTC. As for the second instance mentioned by the Commission, OUTtv explained that it had filed preliminary financial statements “as final versions had not yet been completed” due to the fact that OUTtv was in the midst of a change in ownership.
- 26 The Forum notes that issues related to broadcasters' annual returns are perennial. In 2019, for instance, Zoomer Media admitted that it submits only partial financial statements to the CRTC with its annual returns (and wrote that it has its statements audited in December),²³ and also that at times its information was inaccurate.²⁴
- 27 While the Forum strongly supports regulatory compliance, we note that the CRTC ultimately decided that “no further action” was necessary with respect to Zoomer's non-compliance regarding annual returns because this was “the first instance of non-compliance by ZoomerMedia in regard to the requirement relating to the filing of

²¹ Subsection 9(4), meanwhile, refers expressly to the specific concept of order: “The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part”. Assuming coherence in the language used by Parliament, it appears that Parliament specifically chose not to rely on the concept of orders in connection with subsection 9(4).

²² OUTtv, *OUTtv Reply to Deficiency Letter – Abridged*, DM#3960281 (16 December 2001).

²³ Zoomer Media, Part 1 Applications 2019-1027-4/2019-1025-8, DM#3793636, at 8.

²⁴ Zoomer Media, Part 1 Applications 2019-1027-4/2019-1025-8, DM#3793642, at 2-4, DM#3793643, at 3 and DM#3793644 at 4-5.

annual returns and the annual returns are now complete”.²⁵ It is our understanding that this is also the case for OUTtv.

III. Conclusion

28 When the CRTC licensed Canada’s first discretionary service focussed on the needs of the “gay and lesbian community”,²⁶ it noted that the service “will have the potential to be a ‘bridging’ service, creating understanding and thereby reducing stereotyping.”²⁷ it also expected the service to

.... meet the needs of millions of friends and family members of gay, lesbian, bisexual and transgendered persons. These viewers will appreciate programming that accurately and fairly portrays the interests and lifestyles of their loved ones.²⁸

29 The Forum respectfully submits that the Commission’s decision to license the service now known as OUTtv has served the public interest by enabling it to offer programming throughout its current licence term which has implemented Parliament’s 1991 broadcasting policy. Its licence renewal application should therefore be granted.

30 Granting OUTtv’s reasonable request for wider distribution, moreover, will enable OUTtv to live up to the potential presciently foreseen by the CRTC over two decades ago, and strengthen the diversity of programming available from Canadian broadcasters. The Forum supports OUTtv’s application.

Sincerely yours,



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²⁵ ONE: GET FIT and VisionTV – Licence renewals, [Broadcasting Decision CRTC 2020-248](#) (Ottawa, 10 August 2020), at para. 14.

²⁶ *PrideVision - a new specialty channel*, [Decision CRTC 2000-456](#) (Ottawa, 14 December 2000), “Nature of service”.

²⁷ *Ibid.*, “Contributions to diversity”.

²⁸ *Ibid.*