

**BEFORE THE CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY THE PUBLIC  
INTEREST ADVOCACY CENTRE (“PIAC”) and THE CONSUMERS’  
ASSOCIATION OF CANADA (“CAC”, with PIAC, “PIAC-CAC”)  
(APPLICANTS)**

## **REGARDING SHOMI TIED SELLING**

**PURSUANT TO PART 1 and SECTION 3 OF THE *CRTC RULES OF  
PRACTICE AND PROCEDURE* and SECTIONS 7, 24, 27, 28, 47, 55(c),  
and 56 of the *TELECOMMUNICATIONS ACT*, SECTION 9(4) of the  
*BROADCASTING ACT*, SECTIONS 3, 5 and 7 of the *DIGITAL MEDIA  
EXEMPTION ORDER*, and the *REGULATORY FRAMEWORK  
RELATING TO VERTICAL INTEGRATION***

**DIRECTED TO**

**ROGERS COMMUNICATIONS INC., ROGERS COMMUNICATIONS  
PARTNERSHIP, ROGERS MEDIA INC.,  
SHAW COMMUNICATIONS INC. and  
SHOMI PARTNERSHIP  
(RESPONDENTS)**

6 February 2015

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## 1. NATURE OF APPLICATION

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- 1) The Public Interest Advocacy Centre<sup>1</sup> (“**PIAC**”) and the Consumers’ Association of Canada<sup>2</sup> (“**CAC**,” collectively “**PIAC-CAC**”) file this Application with the Canadian Radio-television Telecommunications Commission (the “**Commission**” or the “**CRTC**”) under Sections 7, 24, 27, 28, 47, 55(c), and 56 of the *Telecommunications Act*,<sup>3</sup> Section 9(4) of the *Broadcasting Act*,<sup>4</sup> Sections 3, 5 and 7 of the *Digital Media Exemption Order* (the “**DMEO**”);<sup>5</sup> and the *Regulatory framework relating to vertical integration* (the “**VI Framework**”),<sup>6</sup> as well Part 1 and section 3 of the *CRTC Rules of Practice and Procedure*,<sup>7</sup> regarding the “shomi” service (“**Shomi**”) offered by Shomi Partnership, Rogers Communications Inc., Rogers Communications Partnership, and Rogers Media Inc. (“**Rogers**”), and Shaw Communications Inc. and Shaw Media (“**Shaw**”).
- 2) For the reasons which follow, PIAC-CAC contend that Rogers, Shaw and Shomi are offering the Shomi service in a manner which unduly prefers Rogers’ and Shaw’s own internet service (“**IS**”) and broadcasting distribution undertaking (“**BDU**”) services, vis-à-vis competitive internet service providers (“**ISPs**”) and BDUs, and in a manner designed to circumvent rules in place to promote competition and consumer choice, and to mitigate against the harmful effects of vertical integration.
- 3) Specifically, PIAC-CAC contend that Shomi is being offered in a manner that violates the *Broadcasting Act*, the DMEO, VI Framework, and the *Telecommunications Act*.
- 4) PIAC-CAC therefore requests that the Commission require Rogers, Shaw and Shomi to make the Shomi service available to all Canadians with IS access, regardless of the identity of their ISP or BDU, and, if applicable, their wireless service provider (“**WSP**”).
- 5) Rogers and Shaw are not the only two vertically integrated (“**VI**”) entities to launch an online video streaming service tied to a specific distribution service or distribution

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<sup>1</sup> PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. See Public Interest Advocacy Centre, online: <<http://www.piac.ca>>.

<sup>2</sup> CAC is an independent, non-profit, volunteer-based charitable organization with a mandate to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems. See Consumers’ Association of Canada, online: <<http://www.consumer.ca/index.php4>>.

<sup>3</sup> S.C. 1993, c. 38.

<sup>4</sup> S.C. 1991, c. 11.

<sup>5</sup> Broadcasting Order CRTC 2012-409 - *Amendments to the Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings*) (26 July 2012).

<sup>6</sup> Broadcasting Regulatory Policy CRTC 2011-601 - *Regulatory Framework for Vertical Integration* (21 September 2011).

<sup>7</sup> SOR/2010-277.

technology. The other two of Canada's "big four" VI entities, Vidéotron and Bell, have each launched online video streaming services. The Bell streaming service, CraveTV, is the subject of a Part I application filed concurrently with this application. PIAC-CAC understand that access to Vidéotron's streaming service, Club Illico (formerly known as Club Illico Unlimited) is available without having to subscribe to any affiliated IS or BDU service, and therefore does not raise concerns similar to Shomi or CraveTV.

- 6) If and when Rogers, Shaw and Shomi make the Shomi service available, as intimated in the Shomi public relations and marketing materials, only to other BDUs, PIAC-CAC believe that Rogers, Shaw and Shomi will be in contravention of the Commission's rules against undue preference, for the same reasons articulated by PIAC-CAC in the concurrent Part I application filed in respect of the CraveTV streaming service offered by Bell Media Inc. ("**Bell**").

## **2. ALLEGED FACTS**

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- 7) In this Section PIAC-CAC outlines the alleged facts on which this Application is based. Specifically, PIAC-CAC describe the relevant terms and conditions of the Shomi service, and the way Rogers, Shaw and Shomi have described the Shomi service and marketed it to Canadians.

### **(a) The Shomi Joint Venture**

- 8) On 26 August 2014 Rogers, through its Rogers Media division, and Shaw, through its Shaw Media division, announced a joint venture to provide an over-the-top (**OTT**) broadcasting service called "**shomi**."
- 9) Shomi was announced in both a press release,<sup>8</sup> and at a press conference.<sup>9</sup>
- 10) According to the press release announcing Shomi, "**shomi** is a joint venture owned equally by Rogers Communications and Shaw Communications. **shomi** will operate as a

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<sup>8</sup> Shomi initial press release "shomi what I'm missing: New streaming service to deliver superior user experience and most popular content to Canadians, this fall" (26 August 2014), online: <[http://about.rogers.com/About/Media\\_Relations/News/14-08-26/shomi\\_what\\_i\\_39\\_m\\_missing\\_New\\_streaming\\_service\\_to\\_deliver\\_superior\\_user\\_experience\\_and\\_most\\_popular\\_content\\_to\\_Canadians\\_this\\_fall.aspx](http://about.rogers.com/About/Media_Relations/News/14-08-26/shomi_what_i_39_m_missing_New_streaming_service_to_deliver_superior_user_experience_and_most_popular_content_to_Canadians_this_fall.aspx)>.

<sup>9</sup> Shomi Press Conference: Video, "WATCH: Rogers Media President Keith Pelley and Shaw Media Senior VP of Content Barbara Williams answers questions about the new "shomi" streaming service", link to article featuring video, online: <<http://globalnews.ca/news/1527665/what-is-shomi-and-how-does-it-work>>.

standalone entity with its own management structure."<sup>10</sup> Shaw and Rogers each issued identical press releases, in addition to the Shomi press release.

- 11) In the joint venturers' initial marketing, Shomi was described as a "subscription video-on-demand service."<sup>11</sup> In the Shomi Terms of Service, Shomi is described as a "subscription video-on-demand streaming service". Rogers and Shaw have described themselves as "distributors" of Shomi. Shomi describes Rogers and Shaw each as a "partner" (see Figure 3. Subscribing to Shomi, below).
- 12) According to the press release announcing Shomi, "shomi will launch in beta first to Rogers and Shaw Internet or TV customers. shomi will be available starting the first week of November [2014] at a suggested retail price of \$8.99 per month."<sup>12</sup> It is not clear if the \$8.99 price is, as stated, suggested, or required by the terms of the Shomi partnership agreement.
- 13) At a press conference on 26 August 2014 (the "**Shomi Press Conference**"), Rogers Media's President, Keith Pelley, stated that Shomi would be "in beta for the first six to twelve months."<sup>13</sup> Mr. Pelley also indicated his expectation that by November of 2014 distribution deals with other BDUs would be in place.

Mr. Pelley: As I mentioned this is – this is moving into a beta test, so that will evolve over the next six to twelve months. In terms of the set-top box, our goal, our goal in the new um – our goal is to launch with as many BDUs as we possibly can – we're in discussion with other BDUs. Right now it will launch on Rogers and Shaw, but we're comfortable by the time that we launch in early November there will be other BDUs and it will be available on the set-top box.<sup>14</sup>
- 14) In a subsequent press release announcing the launch of Shomi, Rogers and Shaw stated that "**shomi** is available in beta first to Rogers and Shaw Internet or cable customers, while conversations continue with other BDUs."<sup>15</sup>
- 15) The Shomi Terms of Service refer to the service being "provided by or on behalf of Shomi Partnership and its current and future affiliates."<sup>16</sup>
- 16) As of the date of this application, it appears that Shomi has not concluded any such distribution deals, and that access to Shomi is restricted to Rogers and Shaw cable and Internet customers.

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<sup>10</sup> Shomi initial press release, (emphasis original).

<sup>11</sup> Shomi initial press release.

<sup>12</sup> Shomi initial press release.

<sup>13</sup> Shomi Press Conference at 0:11.

<sup>14</sup> Shomi Press Conference at 3:33.

<sup>15</sup> Shomi press release, "It's time - #readyseshomi!" (3 November 2014) (emphasis original).

<sup>16</sup> Shomi Terms of Service, s. 1.

**(b) How Shomi markets itself**

- 17) Rogers and Shaw each appear to have separate and different promotional sites for Shomi (<https://shomi.rogers.com> and <http://www.shaw.ca/shomi>, respectively). The Shomi service itself appears available through a dedicated website, [www.shomi.com](http://www.shomi.com).
- 18) Shomi's marketing emphasis has been on content exclusivity, content differentiation, and content curation. Rogers, Shaw and Shomi claim Shomi's user interface is better than competitors (namely Netflix), and features Shomi staff acting like video-store staff in terms of making picks and recommendations (as opposed to a computer), and with celebrities curating their own lists of recommended content.<sup>17</sup>
- 19) As Shaw Media's Senior Vice-President of Content (now Executive Vice President, Broadcasting and President, Shaw Media) Barbara Williams explained at the Shomi Press Conference: "Most of the content that you will find on the service is exclusive to our service and we'll be working to have more and more exclusive content over time."<sup>18</sup>
- 20) Thus, one of the catchphrases Rogers-Shaw use in the marketing is "Shomi what I'm missing." The elements of competitive differentiation include the following appeals to potential subscribers:
- "the latest, most exclusive shows and selections personalized for you"
  - "the only subscription video-on-demand service created *for* entertainment lovers *by* entertainment lovers"
  - "Tired of the endless scrolling? Team of entertainment experts hand pick recommendations for you"
  - "Tired of watching outdated series? More than 11,000 hours of past seasons of the most popular TV shows"<sup>19</sup>
  - "Titles hand-picked by real humans"<sup>20</sup>
- 21) Another marketing emphasis of Shomi appears to be on the unlimited nature of the service.

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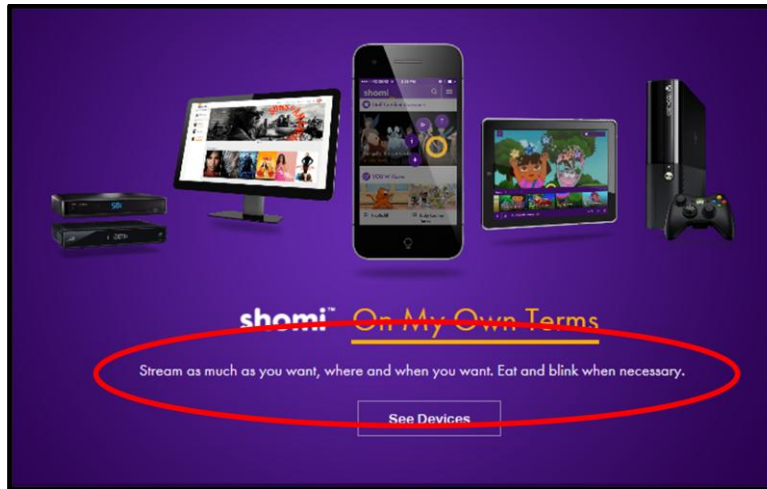
<sup>17</sup> See e.g., Shomi Press Conference.

<sup>18</sup> Video: Global News, "Shaw and Rogers discuss their new 'shomi' streaming service" (26 August 2014), online: <<http://globalnews.ca/video/1527538/shaw-and-rogers-discuss-their-new-shomi-streaming-service>>, Barbara Williams, at 4:54 et seq.

<sup>19</sup> Appendix "A" – Shomi initial announcement (emphasis original); see also Video: Shaw and Rogers discuss their new 'shomi' streaming service', *supra* note 18.

<sup>20</sup> Shaw, "Shomi" (Accessed 4 February 2015), online: <<http://www.shaw.ca/shomi>>.

**Figure 1. "Stream as much as you want, where and when you want."**



- 22) Much of Rogers', Shaw's and Shomi's marketing emphasis is about differentiating Shomi from Netflix, the U.S.-based over-the-top ("OTT") streaming service. At the Commission's TalkTV hearing, Rogers' Mr. Pelley stated, in an exchange with the Chairman about simultaneous substitution, the following:

7730 THE CHAIRPERSON: Fair enough, but some might conclude, though, that the factual study did not take into account the potential. Maybe it wouldn't occur.

7731 And this is my question, that because the reality would be you wouldn't have exclusivity that you probably could ask -- pay less for the programming rights or is that not how the market would work?

7732 MR. PELLEY: Yeah, well, you know, I think -- I think, Mr. Chair, that would probably be a realistic scenario 10 years ago. But the world has changed and it's evolving with many different players.

7733 And if you followed what transpired at the May screenings this year, Netflix bid aggressively for first run U.S. programming. So if, in fact, we were out of simsub the revenue would decline significantly. We wouldn't be able to pay as much to those U.S. studios. We wouldn't secure the rights.

7734 It would affect not only the conventional business and all of the revenue that was driven but it would affect shomi and our ability to compete with an over-the-top service like Netflix

- 23) The first question asked and answered in the Shomi "FAQs" [frequently asked questions] on Rogers' marketing website for Shomi is: "How does shomi compare to Netflix?"<sup>21</sup>

<sup>21</sup> See question "How does shomi compare to Netflix?": Rogers, "shomi FAQs: General Product Information" (Accessed 4 February 2015), online: <<http://www.rogers.com/web/support/shomi/information/2?setLanguage=en>>.

There is a subsequent question about why Shomi charges sales tax when Netflix does not.<sup>22</sup>

- 24) At the Shomi Press Conference, Rogers' Mr. Pelley stated, in response to questioning that "this [Shomi] is an alternative to Netflix or competition to Netflix or how do you see them?" stated that "I definitely think it's a competitor, it's definitely an SVOD [subscription video-on-demand]."<sup>23</sup>
- 25) Mr. Pelley later joked that "I think we have a show in development called Purple is the New Black,"<sup>24</sup> an obvious reference to the Netflix-created program Orange is the New Black.<sup>25</sup>
- 26) Ms. Williams, in emphasizing Shomi's exclusivity, mentioned Shomi having content that "Netflix frankly has not been able to get their hands on,"<sup>26</sup> and then used set-top box ("**STB**") access to differentiate Shomi, stating that STB access makes "it a very different opportunity than what Netflix is, and it actually keeps people engaged in that cable subscription."<sup>27</sup>
- 27) Other media reports have reported on Rogers and Shaw executives discussing Shomi's positioning vis-à-vis Netflix.<sup>28</sup>

### **Set-top box access**

- 28) Those who are eligible to subscribe to the Shomi service (*i.e.*, Rogers and Shaw internet and TV customers) may access Shomi content in two ways. Shomi may be accessed via an internet connection provided through an ISP, or what is commonly referred to as "**over-the-top**" or "**OTT**" access), and via a set-top box ("**STB**").
- 29) When Shomi is consumed via an IS, subscribers are liable for any data charges incurred according to their internet or mobile service agreement. When Shomi is consumed via STB, there is no metered usage charge; access is included as part of the subscriber's television service.

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<sup>22</sup> See question "Netflix does not charge its customers sales tax, so why does shomi?": Rogers, "shomi FAQs: General Product Information" (Accessed 4 February 2015), online: <<http://www.rogers.com/web/support/shomi/information/2?setLanguage=en>>.

<sup>23</sup> Shomi Press Conference at 0:52.

<sup>24</sup> Shomi Press Conference at 3:30.

<sup>25</sup> Shomi Press Conference at 3:05.

<sup>26</sup> Shomi Press Conference at 5:17.

<sup>27</sup> Shomi Press Conference at 5:30 (emphasis added).

<sup>28</sup> See *e.g.*, The Canadian Press, "Rogers, Shaw launch video-on-demand service called Shomi" (8 August 2014), online: <<http://thechronicleherald.ca/artslife/1232019-rogers-shaw-launch-video-on-demand-service-called-shomi>>.



- 30) Responding to the question “How does shomi compare to Netflix?” in the Shomi FAQ, Rogers concludes: “Plus, **shomi** is available on your set-top box so you won't incur any data charges.”<sup>29</sup> Responding to the question about compliance with the CRTC requirements, Rogers then states its expectation that “Most of our customers will access **shomi** through the set top box and then online through username/password authentication.”<sup>30</sup>
- 31) In order to benefit from the zero-rated data charge for STB access to Shomi, subscribers must have Rogers or Shaw TV service.
- 32) Rogers, Shaw and Shomi appear to be emphasizing STB access to Shomi (as distinguished from OTT access) as a competitive differentiator.
- 33) At the Shomi Press Conference both Rogers’ Mr. Pelley and Shaw’s Ms. Williams said the following:

Mr. Pelley: And one of the interesting things about the set-top box – that was when – when the research came down, that was something that was really – it really resonated with, with consumers – that they wanted it on the set-top box – and that’s a real advantage that we have. So we’re comfortable that we will have other BDUs signed up by the time of launch. Packaging or pricing – packaging and so forth will be announced at a – at a later date – and in terms of the actual distribution model – all of that will be evaluated during the actual beta testing – so you know we can’t emphatically tell you exactly right now – we know that we’re going to launch to – if we were to launch today we’d launch to 4.5 million Canadians – by the time we get to launch other BDUs we’re convinced would be involved.<sup>31</sup>

Ms. Williams: “it really speaks to the power that I think a partnership like this brings to a service like this, with a background we have in television, with the expertise we have in content, you know, accumulation, and the opportunity we have to promote this service across all of our current properties we’re in a very powerful position to make sure that a) Canadians are well aware of that and b) they understand that there is something distinctive about this offering that, that they can’t currently get. And just to emphasize Keith’s earlier point, *the fact that it’s offered on the set-top box is not only something that consumers were really clear with us that they wanted, but it makes it a very different opportunity than what Netflix is, and it actually keeps people engaged in that cable subscription*.”<sup>32</sup>

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<sup>29</sup> *Supra* note 21 (emphasis original).

<sup>30</sup> See question “Does shomi comply with Canadian Radio-television Telecommunications Commission (CRTC) requirements?”: Rogers, “shomi FAQs: General Product Information” (Accessed 4 February 2015), online: <http://www.rogers.com/web/support/shomi/information/2?setLanguage=en> (emphasis original).

<sup>31</sup> Shomi Press Conference at 4:00.

<sup>32</sup> Shomi Press Conference at 5:30 (emphasis added).

- 34) On that basis PIAC-CAC allege that Rogers and Shaw are explicitly using Shomi, tied to a BDU subscription that then allows consumption of Shomi content on a zero-rated basis, as a way to shore up their BDU businesses, in the face of a perceived competitive threat from Netflix.
- 35) In this regard PIAC-CAC distinguish Shomi from Vidéotron's online streaming service, which may be accessed on a standalone basis, *i.e.*, without requiring a Vidéotron cable or internet service, any other BDU service, or any specific ISP's service, which is currently the case for Shomi, as discussed in the next section.

### Availability

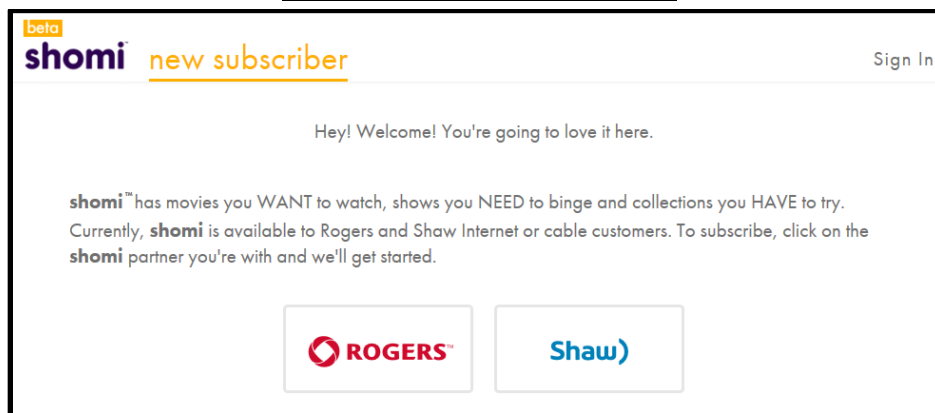
- 36) The Shomi website refers to Shomi as "A new kind of streaming service" that is "Currently available in limited beta release to Rogers and Shaw Internet or TV customers."<sup>33</sup>

**Figure 2. Shomi Homepage**



- 37) In addition to only being available to Rogers and Shaw cable and internet customers, Rogers, Shaw and Shomi are offering their customers a free 30-day trial.

**Figure 3. Subscribing to Shomi**



<sup>33</sup> Online: <<http://discover.shomi.com>>.

**Figure 4. Shomi Promotion**



- 38) Visitors to the Shomi website who are not Rogers and Shaw Internet or TV customers can click a link which indicates that Shomi will inform that visitor when Shomi becomes available.

**Figure 5. Information Sign-up for non-Rogers-Shaw Customers (1 of 2)**

- 39) Clicking on the link to be informed about when Shomi will become available, visitors are then asked to provide an email address, and to select their “current cable and internet provider(s).” Listed by name are the incumbent BDU and ISPs other than Rogers and Shaw, and a generic “other” option.

**Figure 6. Information Sign-up for non-Rogers-Shaw Customers (2 of 2)**

Let me know when I can get my eyeballs on shomi™

Enter your email address

Your current cable and internet provider(s)

Select all that apply

Cogeco

Videotron

Bell

Eastlink

Telus

MTS

SaskTel

Other

Submit

I'm saying yes to getting updates about shomi™

- 40) Rogers and Shaw stated that Shomi will be available initially on tablet, mobile, online, Xbox 360 and set top boxes.
- 41) Consumers who subscribe only to Rogers wireless service (*i.e.*, those who do not have a BDU or Internet service from Rogers or Shaw) are not eligible to subscribe to Shomi. However, if a user is subscribed to a Rogers or Shaw BDU or Internet service, they can sign up for and access Shomi on a wireless device through an app.<sup>34</sup> Shaw does not provide mobile wireless service, but Shomi subscribers who are eligible by virtue of a Shaw cable or internet subscription can access Shomi on Shaw's Wi-Fi network.

### Rogers' marketing, pricing and promotion of Shomi

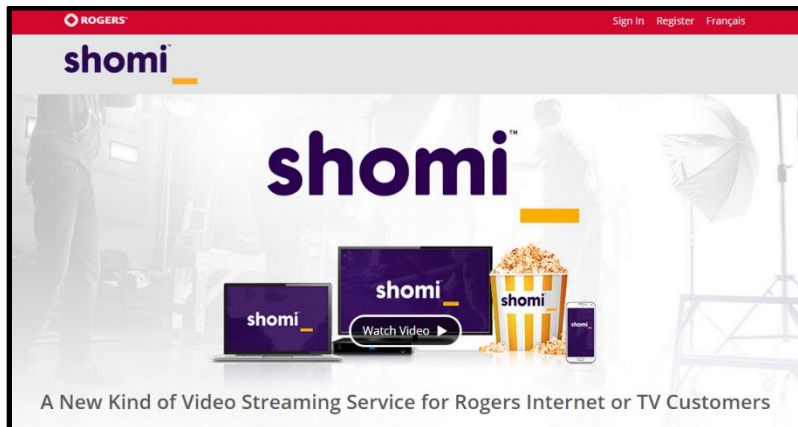
- 42) In Rogers' press release announcing the launch of Shomi, Rogers stated that "Rogers offers another great service: shomi now available to Internet and cable customers."<sup>35</sup> In that press release, shomi was described as a "subscription video-on-demand service."

<sup>34</sup> See Android apps: <https://play.google.com/store/apps/details?id=com.shomi.phone&hl=en>, <https://play.google.com/store/apps/details?id=com.shomi.tablet&hl=en> and iPhone & iPad app: <https://itunes.apple.com/ca/app/shomi/id925878292?mt=8>.

<sup>35</sup> Rogers news release, "Rogers offers another great service: shomi now available to Internet and cable customers" (3 November 2014), online: [http://about.rogers.com/About/Media\\_Relations/News/14-11-03/Rogers\\_offers\\_another\\_great\\_service\\_shomi\\_now\\_available\\_to\\_Internet\\_and\\_cable\\_customers.aspx](http://about.rogers.com/About/Media_Relations/News/14-11-03/Rogers_offers_another_great_service_shomi_now_available_to_Internet_and_cable_customers.aspx).

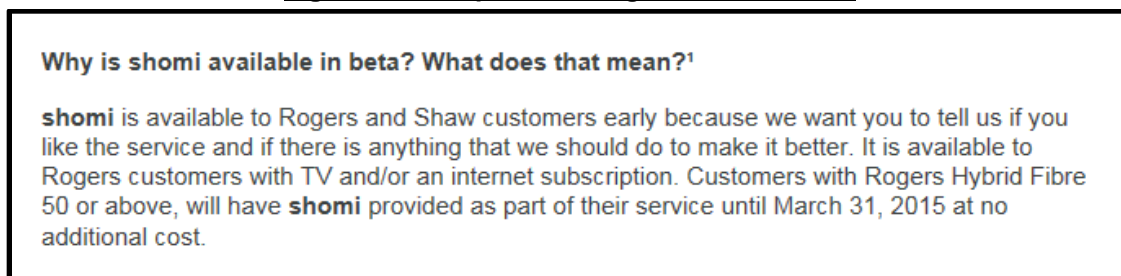
- 43) Rogers' Shomi is described in online search results as "A new video streaming service for Eligible **Rogers** Customers." On Rogers' Shomi page, Shomi is described as "A New Kind of Video Streaming Service for Rogers Internet and TV Customers."

**Figure 7. Rogers' Shomi Website**



- 44) Shomi is "included," that is, free, for Rogers customers with Hybrid Fibre 50 internet package or higher.<sup>36</sup>
- 45) Shomi is free until March 31, 2015 with "an eligible internet package" which starts at the Hybrid Fibre 10 (\$51.99/month).<sup>37</sup>
- 46) Rogers' promotional site for Shomi contains a 'FAQs' section<sup>38</sup> which speaks to some of the questions this Part I application raises about why Rogers (and by implication Shaw, and their partnership Shomi) are restricting access to their streaming service. Two examples are as follows.

**Figure 8. Excerpts from Rogers' Shomi FAQs**



<sup>36</sup> See: Rogers Support, "When can I start watching shomi?" (Accessed 4 February 2015), online: <<http://www.rogers.com/web/support/shomi/support/5>>.

<sup>37</sup> *Ibid.*

<sup>38</sup> Rogers, "shomi FAQs: General Product Information" (Accessed 4 February 2015), online: <<http://www.rogers.com/web/support/shomi/information/2?setLanguage=en>>.

**I am a Wireless only customer - Why am I not eligible?**

While **shomi** is in beta, we've kept it limited to TV and Internet customers so we can gain feedback and refine the experience. Since launch, we've received overwhelming interest from all Rogers customers and are examining how to include more Rogers customers in the beta period.

- 47) PIAC-CAC believes these statements support PIAC-CAC's view that access to Shomi is being tied and restricted by Rogers and Shaw in a manner designed to favour the joint venturers' BDU and IS businesses. This restriction gives Rogers and Shaw, large VI service providers who control access to key platforms, a competitive head-start against other service providers such as independent BDUs and independent ISPs who may wish to offer Shomi to their subscribers. The restriction also disadvantages internet-only Canadians (so-called "cord-cutters" and "cord-nevers") who would like to pay for Shomi on a standalone basis, but do not subscribe to Rogers' or Shaw's IS.

**Shaw's marketing, pricing and promotion of Shomi**

- 48) In a Shaw press release announcing the launch of Shomi, Shaw stated that "There's never been a better time to be a Shaw customer."<sup>39</sup> In that press release, Shomi was described as a "subscription video-on-demand service."
- 49) Shaw's Shomi is described in online search results as "A new video streaming service for Eligible **Shaw** Customers."
- 50) Shaw is currently offering a free three-month trial for Internet customers, and a free one-month trial for TV customers. It is unclear if the Shaw trials require a minimum level of service.

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<sup>39</sup> Shaw news release, "Shaw releases shomi" (3 November 2014), online: <<http://newsroom.shaw.ca/corporate/newsroom/news/2014.11.03-shaw-launches-shomi/>>.

**Figure 9. Shaw's Shomi offer**

The banner features a dark purple background with white text. At the top, it says "Commence binge-watching now". Below that, it lists trial durations: "THREE-MONTH TRIAL INCLUDED for Internet customers" and "ONE-MONTH TRIAL INCLUDED for TV customers". The banner is split into two columns. The left column is for users who "Already have Shaw Internet or TV?", instructing them to visit their account to sign in or register. The right column is for users who "Don't have Shaw Internet or TV?", instructing them to add an internet or TV plan to their cart. Both columns have a corresponding button: "Start your trial" and "Build your plan". At the bottom, it states "Regular price \$8.99\* / month."

- 51) The pricing for Shomi (exclusive of required base TV or internet plans) is \$8.99 per month, the equivalent standard (i.e., non-promotional) price for Netflix access by Canadians.<sup>40</sup>
- 52) Shaw also markets the availability of Shomi at one of Shaw's 40,000+ hotspots.

**Figure 10. Shaw's Co-branding of Shomi and Shaw Go WiFi**

The banner has a blue background with a grid pattern. On the left, it says "Take it with you" and explains that Shaw Go WiFi users can access Shomi. It mentions that Shaw Internet customers get free access to over 40,000 hotspots. A "Learn More" link is provided. On the right, there are two cartoon characters: a white dog-like character and a white robot character, both with blue accents. A "Shaw Go" logo is also visible.

- 53) PIAC-CAC understands from the Shaw Go WiFi Terms of Service that while "access" to the hotspots is "free," usage of the service counts against the users' monthly data allotment.
- 54) The minimum entry level internet plan for Shaw customer access to Shomi is "Internet 5" which is available at \$25.00/month for 6 months, which is based on a 50% discount. At that service tier, a user would be able to watch 30 hours at the "best" (2 GB/hour) setting, before incurring overages. The minimum entry level TV plan appears to be "Personal TV" which is currently offered at "39.90\*" a month. It is not clear if this a time-limited, promotional rate.

<sup>40</sup> Netflix, "Choose the plan that's right for you", 'standard plan', online <<https://www.netflix.com/getstarted?locale=en-CA>>.

55) In all cases of promotional access to Shomi it appears that data usage will count toward internet usage caps, with the exception of Shomi content when consumed via the set-top box.

**(c) VI Entities versus Netflix**

56) Rogers and Shaw are not the only vertically integrated entities to launch an online streaming service tied to a specific distribution service or distribution technology. Vidéotron and Bell have each launched online streaming services. The Bell online streaming service, CraveTV, is the subject of a Part I application filed concurrently with this application. PIAC-CAC understands that access to Vidéotron’s streaming service, Club Illico (formerly known as Club Illico Unlimited) is available without having to subscribe to any affiliated IS or BDU service.<sup>41</sup>

57) A table comparing the VI entities’ online streaming services to Netflix is provided below.

**Figure 11. VI Entities’ Online Streaming Services versus Netflix**

Service	Monthly Price	Currently Available To	Competitive Differentiation
Netflix	\$8.99	Anyone with Internet connection	More content, newer movies
shomi (Rogers)	\$8.99	Rogers and Shaw Internet or TV customers	Emphasis on user interface and video-store clerk-like curation of content
shomi (Shaw)			
CraveTV (Bell)	\$4.00 (additional packages up to \$15)	TV customers of Bell or Bell Aliant, TELUS, Eastlink (Bell FibeTV also requires Fibe Internet) Bell Satellite TV customers	Emphasis on TV (less about movies, no kids TV)
Club Illico (Vidéotron)	\$9.99	=Anyone with Internet connection -STB access reserved for Vidéotron subscribers with a “new generation” STB	French content

<sup>41</sup> According to Vidéotron’s FAQ, online: <<http://support.videotron.com/residential/television/faq-club-illico>>:

▼ I am not a Videotron customer. Can I still benefit from the Club illico offer?

- **Online and via the illico.tv app for the iPad and Android tablet: yes.** On illico.tv, you’ll have access to all our Club illico content. The rate remains the same at \$9.99/month, taxes not included.
- **On your TV: no.** In order to access Club illico on your TV, you must be a Videotron customer with a new generation terminal.

PIAC telephoned Vidéotron customer service on 21 January 2013 and confirmed that once a person signs up for Club Illico, they receive a Customer Centre Identifier which they can then use online at illico.tv or on the Android/iPad apps to access the content. There is no need to have a TV subscription or a Vidéotron internet service in order to obtain a Customer Centre Identifier.



- 58) PIAC-CAC contend, for reasons expanded upon in the next section, that Rogers, Shaw and Shomi Partnership are engaged in anti-competitive tied selling by tying Shomi access to the subscription of an affiliated (Rogers or Shaw) BDU or ISP service.
- 59) As well, Rogers, Shaw and Shomi Partnership are using the “beta” label as a means to gain an anti-competitive “head start” to gain an unfair disadvantage vis-à-vis other BDU and ISP competitors.
- 60) Ultimately, this harms competition, the business case of independent BDUs and independent ISPs, and consumers who wish to fine-tune their viewing experience, choose the access platform of their choosing, and reduce their monthly communications expenses.

### **3. ISSUES and GROUNDS of APPLICATION**

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- 61) In the view of PIAC-CAC, the marketing and provisioning of Shomi raise a number of regulatory issues:
  - Issue 1. What is Shomi?
  - Issue 2. What rules apply to Shomi?
  - Issue 3. On what technical and regulatory basis is it appropriate for Shomi, when accessed via a set-top box, to be treated differently for billing purposes than when Shomi is accessed via a wireless or Internet connection?
  - Issue 4. On what technical and regulatory basis is it appropriate for Shaw and Rogers to offer their Shomi service exclusively to their IS and BDU customers?
  - Issue 5. Is Shomi being structured, marketed and provisioned in a manner that circumvents rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration?
  - Issue 6. What is the consumer harm in allowing Rogers, Shaw and Shomi to tie access to online streaming to the purchase of an affiliated ISP or BDU service?
  - Issue 7. In the alternative, if the structuring, marketing and provisioning of Shomi are technically compliant with current Commission frameworks, should the Commission undertake reform?
- 62) PIAC-CAC contend that Shomi is an online streaming service that is tied to the consumption of telecommunications (internet access) service and broadcasting (BDU) service, invoking several different regulatory frameworks.

- 63) PIAC-CAC further contend that the regulatory frameworks invoked by Shomi contain prohibitions on undue preferences and tied selling, and that Rogers, Shaw and Shomi Partnership are in violation of those rules.
- 64) PIAC-CAC further contend that there is no technical or regulatory basis for Shomi to be treating BDU-access to Shomi content differently than IS-access to Shomi content. Furthermore, there is no technical or regulatory basis for Rogers, Shaw and Shomi to be restricting access to Shomi content on the basis of a subscription to a Rogers or Shaw internet or BDU service, or any specific internet or BDU service, for that matter.
- 65) Ultimately, PIAC-CAC's contention that Rogers, Shaw and Shomi Partnership are structuring their online streaming services in a manner designed to circumvent rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration.
- 66) In the alternative, if the Commission finds that Rogers, Shaw and Shomi Partnership are technically compliant with each of the rules, then the Commission should reform those rules within its authority.
- 67) PIAC-CAC addresses each of these issues below.

### **Issue 1. What is Shomi?**

- 68) Rogers and Shaw variously describe Shomi as a “subscription video-on-demand service” (Rogers),<sup>42</sup> and a “video streaming service” (Shaw),<sup>43</sup> “as well as a “subscription video-on-demand streaming service” (Shomi).<sup>44</sup>
- 69) In the Rogers’ FAQs for Shomi, Rogers appears to have attempted to anticipate or pre-empt a regulatory challenge by claiming compliance with CRTC rules, arguing that when consumed through a STB Shomi is provided via a subscription video on demand extension to Rogers’ video-on-demand licence, and when access is via the internet Shomi is a digital media undertaking under the DMEQ.<sup>45</sup>

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<sup>42</sup> See question “Does shomi comply with Canadian Radio-television Telecommunications Commission (CRTC) requirements?”: Rogers, “shomi FAQs: General Product Information” (Accessed 4 February 2015), online:

<<http://www.rogers.com/web/support/shomi/information/2?setLanguage=en>>.

<sup>43</sup> See question “What is shomi?”: Shaw, “shomi Frequently Asked Questions” (2 February 2015), online: <<https://community.shaw.ca/docs/DOC-3736#whatishomi>>.

<sup>44</sup> Shomi Terms of Service.

<sup>45</sup> [Supra](#) note 42.

**Figure 12. Shomi FAQ Question On Regulatory Compliance**

**Does shomi comply with Canadian Radio-television Telecommunications Commission (CRTC) requirements?**

**shomi** will launch as an Subscription Video On Demand (SVOD) extension under our Video On Demand (VOD) license and our VOD service will continue to comply with all applicable CRTC requirements. Most of our customers will access **shomi** through the set top box and then online through username/password authentication.

For our customers who subscribe to Rogers Hi Speed Internet only, **shomi** will operate under the digital media exemption order and is therefore exempt from regulation. The CRTC has encouraged the industry to offer new and innovative multi-platform digital services like **shomi** that provide a Canadian alternative to existing Over The Top (OTT) content services available to consumers.

More generally, we believe that any OTT services that operate in Canada should operate under the same rules. We participated in the Talk TV proceedings in 2014 and argued for regulatory parity between OTT services that are affiliated with a broadcasting licensee and other OTT services. We expect a decision early in the new year.

- 70) By stating in that FAQ response that “For our customers who subscribe to Roger Hi Speed Internet only, **shomi** will operate under the digital media exemption order and is therefore exempt from regulation,” PIAC-CAC believe that Rogers is setting itself (and perhaps Shomi) up to argue that Shomi for internet only customers is a digital media broadcasting undertaking. But when Rogers says Shomi is “exempt from regulation,” PIAC-CAC note that this is factually and legally untrue. As the Chairman of the CRTC has noted, there is an important distinction between being “unlicensed” and “unregulated.”<sup>46</sup>
- 71) Shomi’s website title refers to Shomi as “A New Kind of Video Streaming Service.”<sup>47</sup> PIAC-CAC contend that ***Shomi is a subscription-based online streaming service tied to a specific ISP or BDU service or class of BDU services.*** Accordingly, a range of regulatory requirements attach to the structuring, marketing and provisioning of the Shomi service, as discussed in the next section.

**Issue 2. What rules apply to Shomi?**

- 72) The second issue, related to the first one, is ***What rules apply to Shomi?*** PIAC-CAC contend that Rogers' and Shaw's provisioning of Shomi invokes several different regulatory frameworks, depending on the mode of access.
- 73) In linking access to an online streaming service to the purchase of either an affiliated IS or BDU service, immediately either or both the *Broadcasting Act*, the *Telecommunications Act*, and rules and frameworks made thereunder, are invoked.

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<sup>46</sup> CRTC 2014-190 Let's TalkTV Transcript, Volume 7 (16 September 2014) at 15864; CRTC 2013-190 Application by Astral Media Inc. for authority to change its effective control, and control of its licensed broadcasting subsidiaries, to BCE Inc. Transcript, Volume 3 (8 May 2013) at 4258.

<sup>47</sup> Online: <<https://my.shomi.com/subscribe>>.

### **Broadcasting Act**

- 74) Rogers and Shaw, the joint venture partners constituting Shomi, own both “programming undertakings” and “distribution undertakings” and are therefore are governed by the *Broadcasting Act*, regulations and rules made thereunder.
- 75) Rogers and Shaw, as BDUs are also bound by the *Broadcasting Distribution Regulations*, which include a prohibition against undue preference or disadvantage.<sup>48</sup>
- 76) Shomi, as an on-demand programming service accessed via STB, is also bound by rules for VOD services. Section 10 of the VOD standard conditions of licence include a prohibition against undue preference or disadvantage.<sup>49</sup>

### **VI Framework**

- 77) Rogers and Shaw are both affiliates within “vertically integrated” entities (owning both programming and distribution assets), and thus subject to the VI Framework promulgated under the *Broadcasting Act*.
- 78) In the VI Framework decision, the Commission expressed concerns about consumer harm and reduced competition if VI entities were able to exercise exclusivity on new media (*i.e.*, online) over programming designed primarily for services including VOD services (emphasis added):

21. In light of the above, the Commission considers that permitting VI entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and VOD services would result in harm to consumers and the competitiveness of the industry. The Commission further considers that the same harm would result if industry players that are not VI entities exercised such exclusivity.

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<sup>48</sup> *Broadcasting Distribution Regulations*, SOR/97-555, s. 9:

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

(2) In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

<sup>49</sup> Appendix to Broadcasting Regulatory Policy CRTC 2011-59 - Standard conditions of licence, expectations and encouragement for VOD undertakings, S. 10:

10. The licensee shall not give an undue preference to any person, including itself, or subject any person to An undue disadvantage. In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that has given the preference or subjected the person to the disadvantage.

22. Accordingly, the Commission has decided that no person operating under the Exemption order for new media broadcasting undertakings (New Media Exemption Order) may offer programming designed primarily for conventional television, specialty, pay or VOD services on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service. Rights for such programming shall be acquired on terms that allow them to be made available to competitors as part of a licensing agreement, or other such arrangements, thereby ensuring the availability of the programming to consumers of competing distributors on fair and reasonable terms. The Commission considers that this approach will ensure that the most popular programming is available to consumers subject to normal commercial terms and that consumers will be able to receive their preferred programming from a variety of distributors.

23. However, to encourage innovation in programming, the Commission finds that exclusivity may be offered for programs that are created specifically for new media platforms.

- 79) The Commission recently repeated these concerns in the *Mobile TV* decision - Broadcasting and Telecom Decision CRTC 2015-26.<sup>50</sup>

#### DMEQ

- 80) Shomi, when consumed via IS (as an online streaming service), may be characterized as a “digital media broadcasting undertaking” (“**DMBU**”) under the DMEQ. While exemption

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<sup>50</sup> Broadcasting and Telecom Decision CRTC 2015-26 - *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv* (29 January 2015) [*Mobile TV*] at paras. 55, 58-59:

55. The Commission acknowledges that no complaints or interventions were filed by competing service providers. It nevertheless considers that Bell Mobility’s and Videotron’s arguments are not persuasive: not only do they fail to address the impact of the significant difference in data charges on consumers, they also do not address the potential for significant harm in the future to other audiovisual content services accessible on subscribers’ mobile devices that are subject to data caps. Given the considerable difference in the data charges in question, the Commission is not convinced by the arguments provided by Bell Mobility and Videotron that there has been no material impact, or that such an impact is unlikely in the future, either on consumers or on the growth of other services.

[...]

58. In light of the above, the Commission finds that the preference given in relation to the transport of Bell Mobility’s and Videotron’s mobile TV services to subscribers’ mobile devices, and the corresponding disadvantage in relation to the transport of other audiovisual content services available over the Internet, will grow and will have a material impact on consumers, and other audiovisual content services in particular. As an example, it may end up inhibiting the introduction and growth of other mobile TV services accessed over the Internet, which reduces innovation and consumer choice.

59. The Commission also considers it significant that Bell Mobility and Videotron are in a position to treat the transport of their mobile TV services in such a significantly different fashion when compared to other audiovisual content services, given the leverage that comes from owning both the means of transport and the rights to the content.

under the DMEO has the effect of exempting DMBUs from any or all of the requirements of Part II of the *Broadcasting Act* or of a regulation thereunder, it does not imply that DMBUs have no obligations.

- 81) The original *New Media Exemption Order* was amended in 2009<sup>51</sup> to include an undue preference, and amended again in 2012 to give effect to decisions made in the VI Framework decision, notably prohibitions on “anti-competitive head starts” and certain types of exclusivity.
- 82) All combined, the DMEO has a prohibition against undue preferences (Section 3), against exclusivity (Sections 5-6), and against “head starts” (Section 7).

*DMEO prohibition against undue preference*

- 83) As is found in other applicable statutes and regulatory frameworks applicable to Rogers, Shaw and Shomi, the DMEO contains a prohibition against undue preference. The undue preference provision states:

3. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

- 84) The *New Media Exemption Order* (as it was then titled) was amended in 2012 to implement determinations made by the Commission in the VI Framework decision.

*Exclusivity*

- 85) The 2012 DMEO update introduced the following prohibition against exclusivity.

5. Subject to paragraph 6, the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

6. The undertaking does not acquire, exercise, renew or otherwise extend rights to television programming on an exclusive or otherwise preferential basis unless:

a) the undertaking is not prevented, directly or indirectly, from making that television programming available to subscribers of all service providers

<sup>51</sup> Broadcasting Order CRTC 2009-660 - *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* (22 October 2009).

providing access to the same platform over which the undertaking broadcasts the programming; or

b) such rights were acquired prior to 8 March 2011 and such rights are not exercised further to an extension of contractual term, by renewal or otherwise, taking effect after 7 March 2011.

- 86) In other words, a DMBU must not tie its programming to the subscription to a specific mobile service or IS.

Anti-competitive “head start” rule

- 87) The 2012 DMEO update introduced a prohibition against anti-competitive “head starts,” the “no head start” rule.

- 88) The Commission describes anti-competitive “head starts” as “situations where a programming service is launched on a given broadcasting distribution undertaking’s (BDU’s) distribution platform prior to the service having been made available for distribution to other BDUs on commercially reasonable terms.”<sup>52</sup>

- 89) The “no head start” rule reads as follows (underscore added):

7. An undertaking that has acquired exclusive rights to television programming from a new programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer’s subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.

- 90) The “no head start rule” also applies to “television programming distributed on new media distribution platforms such as mobile and retail Internet.”<sup>53</sup>

- 91) The DMEO defines “television programming” and “new programming service” as follows:

“television programming” means programming designed primarily for conventional television, specialty, pay or video-on-demand services.

“new programming service” means a licensed pay television or specialty service that has not previously been distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service.

<sup>52</sup> Broadcasting Order CRTC 2012-409 at para. 8.

<sup>53</sup> Broadcasting Regulatory Policy CRTC 2011-601 at 71.

- 92) PIAC-CAC contend, based on statements made by Rogers' Mr. Pelley, and the Rogers Shomi FAQs which emphasize STB access as the predominant Shomi access platform, that Shomi is "television programming" in that it is programming designed primarily for conventional television, specialty *and* video-on-demand services. PIAC-CAC note however that Shomi does not meet the definition of a "new programming service" – Shomi is a VOD, not a "licensed pay television or speciality service," and therefore technically may be outside of the "no head start rule."
- 93) The Commission addressed the deliberate exclusion of VOD services from the DMEO's "no head start" rule in Broadcasting Order CRTC 2012-409, agreeing with concerns expressed by three VI entities (Bell, Quebecor and Shaw) that to include VOD services in the "no head start rule" would not be consistent with the Commission's determinations in the VI Framework decision (Broadcasting Regulatory Policy 2011-601). PIAC-CAC question whether the Commission anticipated the type of service Shomi represents, and therefore whether the "anti-competitive head start" rule should logically apply in the circumstances of a so-called "beta" offering of an uncertain duration and unclear justification.
- 94) In the 2012 DMEO update, however, the Commission emphasized that the exclusivity rule (described above) captured VOD services.<sup>54</sup> A DMBU must not tie its programming to the subscription to a specific mobile service or IS, and Shomi access is tied to IS.

### ***Telecommunications Act***

- 95) Rogers and Shaw, in their capacity as providers of IS, are governed by the *Telecommunications Act*, and Commission decisions promulgated thereunder. Most notably, the prohibition on unjust discrimination and undue preferences in section 27(2).
- 96) When the alleged unjust discrimination and undue preference is in relation to the transmission of programs, section 28 of the *Telecommunications Act* requires the Commission to "have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act*."<sup>55</sup>

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<sup>54</sup> Broadcasting Order CRTC 2012-409 at para. 12:

The Commission agrees with those interveners that stated that the application of the "no head start" rule should be restricted to programming from pay and specialty undertakings. In the Commission's view, this would be in keeping with the determinations set out in Broadcasting Regulatory Policy 2011-601. The Commission notes that, notwithstanding the above, the prohibition surrounding exclusivity of access over mobile and retail Internet platforms, which is discussed below, captures programming designed primarily for conventional television and VOD services.

<sup>55</sup> *Broadcasting Act*, s. 28:

Transmission of broadcasts



- 97) Shomi is therefore not solely a DMBU, nor is it “exempt from regulation” as Rogers characterizes it in its Shomi FAQs.
- 98) Rather, Rogers, Shaw and Shomi Partnership and their affiliates are under an obligation not to unduly prefer themselves, and unjustly discriminate against non-affiliates and other customers. Furthermore, they are bound by the VI Framework (and consequent amendments to the DMEQ) which were brought forward to address concerns about vertical integration and anti-competitive behaviour.
- 99) To find that it is acceptable to tie access to a hybrid SVOD-online streaming service to the consumption of an affiliated IS or BDU service, on the basis of narrow and literal interpretations of the relevant rules that suggest the entities breaching the rule (*i.e.*, Rogers, Shaw, and Shomi Partnership) are not directly subject to the rule in question, would be artificial and disconnected from the converged and vertically integrated nature of Rogers, Shaw and more broadly, the communications market in Canada.
- 100) PIAC-CAC further contend that in preferring affiliated IS and BDU service, to the detriment of customers of other ISPs and BDUs wishing to access that online content, Shomi Partnership (and its constituent partners Rogers and Shaw) are impairing the development of a competitive market for telecommunications services *and* broadcasting content, and that this undue preference does not further the broadcasting policy objectives.

**Issue 3. On what technical and regulatory basis is it appropriate for Shomi, when accessed via a set-top box, to be treated differently for billing purposes than when Shomi is accessed via a wireless or Internet connection?**

- 101) PIAC-CAC contend that the distinction between access modes is increasingly becoming blurred, and in the context of converged VI entities, a distinction that appears designed to favour a certain class of customers that chooses affiliated BDU service offerings, at the harm of customers of independent ISPs.
- 102) Rogers has claimed in its FAQs that “most” of its customers “will access **shomi** through the set top box and then online through username/password authentication,” which suggests that perhaps Rogers is placing an emphasis on BDU-linked subscriptions to

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**28.** (1) The Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable in relation to any transmission of programs, as defined in subsection 2(1) of that Act, that is primarily direct to the public and made

(a) by satellite; or

(b) through the terrestrial distribution facilities of a Canadian carrier, whether alone or in conjunction with facilities owned by a broadcasting undertaking.

Shomi, as opposed to IS-linked subscriptions to Shomi. Indeed, in another FAQ response, Rogers stated that “With **shomi**, there are no price tiers, no hassles and when using your cable box, no data usage charge.”<sup>56</sup>

- 103) PIAC-CAC recognize that there may be differences in some of the content available on Shomi when accessed via STB versus Shomi when accessed via IS due to licensing issues. However, Rogers and Shaw are taking advantage of the distinction to characterize Shomi as an “unregulated” DMBU streaming service that is linked primarily to the consumption of BDU service by emphasizing access via a STB which, unlike access via IS, does not incur data charges. PIAC-CAC suggest that the implied marketing proposition to customers is this: “*Worried about data charges for Shomi access? If you consume our BDU service you won’t have to pay more for data.*”
- 104) PIAC-CAC contend that this is a way to influence or induce the purchase of a cable subscription, despite evidence (including from Rogers executives, cited below) that customers want to be in control of what they watch and how they watch it (mode of access).

**Issue 4. On what technical and regulatory basis is there for Shaw and Rogers to offer their service exclusively to their BDU and IS customers?**

- 105) PIAC-CAC contend that there is no technological reason for making access to the Shomi service exclusive to customers of a particular ISP or BDU, and that the marketing literature of at least Rogers and Shomi illustrate a clear emphasis on access to the Shomi service being an early competitive differentiator. Were there technological reasons (capacity limitations, for example) for offering the Shomi service exclusively to Rogers and Shaw customers, or business reasons (for example, customer billing), PIAC-CAC believe that Rogers and Shaw and Shomi would have stated those. Were there to be capacity limitations then Rogers and Shaw could simply have limited the initial number of subscriptions available. PIAC-CAC doubt that billing issues would be related to the exclusive offering given the exclusivity is being offered “free.”
- 106) PIAC-CAC believes that the reason Rogers, Shaw and Shomi are not providing open access to their online streaming service is two-fold: (i) to prefer their own IS and BDU services, and (ii) eventually to prefer those service providers who have BDU business divisions, at the expense of independent ISPs, and to obtain a head-start against other content competitors.

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<sup>56</sup> See question “How many devices can you use at one time on the app?”: Rogers Support, “shomi™ FAQs: General Product Information” (Accessed 4 February 2015), online: <<http://www.rogers.com/web/support/shomi/information/2?setLanguage=en>>.

107) In the August 2014 press conference Rogers' Mr. Pelley stated that deals would be in place by the time of launch in November. As of the date of the filing of this application, however, no such deals appear to have been struck, and Shomi remains under the cover of a "beta" label which PIAC-CAC believes Rogers-Shaw are using in an anti-competitive manner.

**Issue 5. Is Shomi being marketed and provisioned in a manner that circumvents rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration?**

108) PIAC-CAC contend that Rogers, Shaw and Shomi are structuring their Shomi service in a manner designed to circumvent rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration.

**VI Framework**

109) Furthermore, what Rogers, Shaw and Shomi are doing to discriminate against customers of unaffiliated ISPs is precisely the type of harm the Commission was concerned about in its decision to adopt the VI Framework.

19. The Commission considers that the record of this proceeding demonstrates that VI entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. **As a result, a consumer would have to subscribe to the distribution platform owned by the VI entity to have access to the exclusive content. The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.**

22. Accordingly, the Commission has decided that no person operating under the *Exemption order for new media broadcasting undertakings* (New Media Exemption Order) may offer programming designed primarily for conventional television, specialty, pay or VOD services on an exclusive or otherwise preferential basis in a manner that is **dependent on the subscription to a specific mobile or retail Internet access service**. Rights for such programming shall be acquired on terms that allow them to be made available to competitors as part of a licensing agreement, or other such arrangements, thereby ensuring the availability of the programming to consumers of competing distributors on fair and reasonable terms. The Commission considers that this approach will ensure that the most popular programming is available to consumers subject to normal commercial terms and that consumers will be able to receive their preferred programming from a variety of distributors.<sup>57</sup>

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<sup>57</sup> VI Framework at paras. 19 and 22 (emphasis added).

110) PIAC-CAC also believes that conditioning access to the Shomi service on the purchase of an affiliated BDU service, which appears to be what Rogers and Shaw each wish to emphasize in their respective marketing initiatives, should logically fall into the VI Framework prohibition on restrictive access arrangements given expression in the DMEO's provisions in respect of undue preference, exclusivity, and anti-competitive head starts.

## **DMEO**

111) PIAC-CAC contend that in tying access to Shomi to a particular IS (Rogers or Shaw), Rogers, Shaw and Shomi are violating section 3 (undue preference), section 5 (exclusivity) and section 7 (anti-competitive head starts).

112) PIAC-CAC contend that Rogers, Shaw and Shomi are violating the prohibition against undue preference in the DMEO by conditioning access to the service on the purchase of an affiliated IS or BDU service. The effect of this is to prefer their own services which restrict choice in the marketplace, impairs competition, and harms consumers.

113) As PIAC-CAC explain in the context of Issue 6, the Rogers and Shaw emphasis appears to be on BDU distribution of their service, not IS distribution, and on promises to conclude distribution deals with other BDUs have not been fulfilled during the so-called "beta" phase. There is therefore a lack of choice that results from independent ISPs being unable to compete against ISP affiliates of BDUs who are able to offer Shomi.

114) If customers of independent ISPs are unable to access Shomi OTT because independent ISPs do not have an affiliated BDU that is able to offer Shomi, then independent ISPs run the risk of losing customers to the converged ISP/broadcasting entity, and entrenching the dominance of those large entities over the marketplace, at a resulting loss in competition and increase in prices.

115) Additionally, because Rogers, Shaw and Shomi Partnership have not delivered on promises to conclude other distribution agreements, with BDUs or ISPS, they appear to be into a several-month head start against other competitors.

116) Regarding tied selling, the Commission was clear in the DMEO decision:

[...] digital media broadcasting undertakings can exercise exclusive rights to programming designed primarily for conventional television, specialty, pay or VOD services without having to make such programming available to competing digital media broadcasting undertakings, provided that they do not

restrict access to that programming on the basis of a consumer's specific mobile or retail Internet access service, as the case may be.<sup>58</sup>

- 117) Although Rogers, Shaw and Shomi Partnership have mentioned concluding more distribution deals (with, it seems, primarily if not exclusively oriented to BDUs and not ISPs), Rogers and Shaw did not, as indicated, have such deals in place by November of 2014, nor by the time of this application, which in PIAC-CAC's view suggests that competing distribution systems are being denied access to popular programming.
- 118) PIAC-CAC anticipate that Rogers, Shaw and Shomi Partnership may try to argue that Shomi access does not "require" a cable subscription, given that potential subscribers may obtain eligibility for Shomi access by purchasing a Rogers or Shaw IS
- 119) PIAC-CAC contend that the absence of the reference to BDUs in the exclusivity rule does not allow Rogers, Shaw and Shomi Partnership to unduly prefer themselves, or a class of broadcasters, and to disadvantage those service providers outside that class, and customers of those service providers. Activity which may not be expressly forbidden under the exclusivity provision of the DMEQ does not mean it cannot be engaged in without any regard for the anti-discrimination provision.
- 120) Regarding the anti-competitive head start rule, it is PIAC-CAC's view that Rogers, Shaw and Shomi Partnership appear to be using the "beta" label as a means to gain an anti-competitive "head start" to gain an unfair disadvantage vis-à-vis other BDU and ISP competitors. As explained earlier, PIAC-CAC question whether the Commission anticipated the type of service Shomi represents, and therefore whether the "anti-competitive head start" rule should logically apply in the circumstances of a so-called "beta" offering of an uncertain duration and unclear justification.
- 121) In the alternative, if Shomi is operating in a regulatory lacuna, the Commission should develop appropriate rules to bring such services within the appropriate regulatory framework. This may be a case where time is of the essence as the undue advantages Rogers, Shaw and Shomi Partnership may be gaining from their exclusive and tied structuring, marketing and provisioning of Shomi during the so-called "beta" phase may be considerable.

### ***Telecommunications Act***

- 122) PIAC-CAC also contend that the tied selling of Shomi to IS constitutes an undue preference that Rogers and Shaw (directly and indirectly through their Shomi Partnership) are granting themselves, and that Shomi is providing to its two partners. This undue preference serves to favour the subscription to, and consumption of, the Shomi partners'

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<sup>58</sup> DMEQ at para. 24 (emphasis added).

IS offerings over the IS offerings of ISPs that cannot, by virtue of Rogers, Shaw and Shomi's tied (and for now, entirely exclusive to them) distribution model, offer customers and potential customers as compelling of a value proposition because they do not have an affiliated BDU (or programming service). As a result, cord-shavers, cord-cutters, and BDU-subscribers who wish to reduce their cable bills through content stacking and customization of content consumption, face limited choice in the Canadian communications marketplace.

- 123) That Shomi (or its constituent partners) may be "broadcasting by a broadcasting undertaking" does not render the *Telecommunications Act* inapplicable. As the Commission clearly and unanimously decided in *Mobile TV*, the status of an entity under the *Broadcasting Act* cannot be used to shield an entity from its obligations under the *Telecommunications Act*. Specifically, "Section 4 of the *Telecommunications Act* does not apply as a shield to the application of the *Telecommunications Act*" where the respondents are "acting as Canadian carriers in providing transport and data connectivity services required for the delivery" of the TV service at issue.<sup>59</sup>
- 124) Furthermore, in requiring the Commission to have regard for the *Broadcasting Act's* broadcasting policy for Canada in assessing undue discrimination in the context of terrestrial carriage by a Canadian carrier, Section 28 of the *Telecommunications Act* explicitly contemplates the possibility of broadcasting carriage being used in a way to violate the *Telecommunications Act*.
- 125) In the recent *Mobile TV* decision, the Commission decided that one carrier, preferring its affiliate's content

*might* support certain objectives of the broadcasting policy. However, the disadvantage to consumers in accessing other Canadian programs on their mobile devices, and to these other programs, could not be said to further these objectives. Accordingly, the Commission considers that the preference or disadvantage cannot be justified in regard to the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.<sup>60</sup>

- 126) As PIAC-CAC argue in the next section, the possibility that a potential Shomi subscribers can choose between IS or BDU service as their gateway to Shomi is not a true choice.

*Tied selling cannot be justified in regard to the broadcasting policy objectives*

- 127) The Canadian broadcasting policy objectives include the following:

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

<sup>59</sup> *Mobile TV* at para. 25.

<sup>60</sup> *Mobile TV* at para. 60 (emphasis added).

- (d) the Canadian broadcasting system should
  - (iv) be readily adaptable to scientific and technological change;
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
  - (i) contribute significantly to the creation and presentation of Canadian programming, and
  - (ii) be responsive to the evolving demands of the public; and
- (t) distribution undertakings
  - (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
  - (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
  - (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

128) PIAC-CAC do not deny that the licensed broadcasting system, as part of what former Commissioner Cugini<sup>61</sup> and former Chairman von Finckenstein<sup>62</sup> previously, and current Commissioner Shoan recently termed a “regulatory bargain,”<sup>63</sup> produced Canadian

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<sup>61</sup> Speech by Rita Cugini, Regional Commissioner for Ontario, Canadian Radio-television and Telecommunications Commission to the International Institute of Communications’ International Regulators Forum, Johannesburg, South Africa (1 October 2011).

<sup>62</sup> Speech by Konrad von Finckenstein, Q.C., Chairman, Canadian Radio-television and Telecommunications Commission to the International Institute of Communications’ Telecommunications and Media Forum Washington, D.C. (14 December 2011).

<sup>63</sup> The Library of Parliament described it thus:

The traditional approach to supporting the development of Canadian content and its availability to Canadians has been based on the scarcity of spectrum – the limited availability of radio frequencies. To have access to the spectrum, a broadcaster requires a licence from the CRTC. In return, the broadcaster must adhere to Canadian content regulations, which set minimum levels of spending on Canadian programs and minimum numbers of hours for airing Canadian programs.

Notably, the Library of Parliament observed the following challenges facing the regulatory regime:

When Parliament adopted the *Broadcasting Act* in 1991, many of the technologies that are in widespread use today did not exist. The changes brought about by the adoption of digital technologies have created challenges for implementing the objectives of the Act. While the traditional objectives of the broadcasting policy – Canadian ownership, a mix of public and private broadcasting, the production and distribution of Canadian content, and the use of Canadian creative resources – remain in place, there is on-going debate about how best to achieve these objectives. Technological changes have made the situation more complicated.

Library of Parliament, *Background Paper: Canadian Broadcasting Policy* (26 June 2011, updated 6 August 2014).

content, and in that production achieves a number of other Canadian broadcasting policy objectives, including s. 3(1)(s)(i) (excerpted above), s.3(1)(d)(iii) and ss. 3(1)(e)-(f).

- 129) Yet PIAC-CAC contend that there is no compelling reason, in policy, to sanction the tied sale of online access to video content with specific IS or BDU services, or as argued in the concurrently filed application in respect of Bell's TV, a specific mode of access (BDU). To do so, to condone preserving a model that Canadians clearly have expressed a growing disinterest in, is to fail to adapt to technological change, and to fail to respond to the evolving demands of the public.
- 130) As Chairman Blais recently observed, "It's regrettable [...] that English Canada still lacks a true Canadian Internet streaming video-on-demand service that does not require a cable subscription."<sup>64</sup>
- 131) PIAC-CAC agree, however they also, as explained earlier, anticipate that Rogers, Shaw and Shomi Partnership may try to argue that Shomi access does not "require" a cable subscription, given that potential subscribers may obtain eligibility for Shomi access by purchasing a Rogers or Shaw IS. As PIAC-CAC argue in the next section, this is not a true choice, but one that appears to be engineered to fit Rogers, Shaw and Shomi's anti-competitive structuring within the DMEO.

#### **Choice between BDU or IS: Not really a choice**

- 132) While the DMEO says nothing about tying DMBU access to a specific BDU, which is *de facto* what Rogers, Shaw and Shomi appear to be doing, PIAC-CAC do not believe that giving consumers the "choice" to subscribe to a Rogers or Shaw IS or BDU service saves Rogers, Shaw or Shomi from being in contravention of the DMEO's exclusivity provision.
- 133) First, and as argued in the concurrently filed Part I Application regarding CraveTV, PIAC-CAC believe that there is no sound basis for approving or blessing the tying of paid online access to content to the purchase of a BDU subscription, but rather, that the tying of paid online access to a BDU subscription cannot be justified in regard to the broadcasting policy objectives.
- 134) Second, Rogers and Shaw appear to be favouring the "BDU or cable Shomi" over the "IS / OTT Shomi." Rogers and Shaw have clearly emphasised how "cable Shomi" comes with no data charges, and the references to concluding distribution deals with other distributors seems to emphasize, if not exclusively mention, BDU distributors and *not* ISPs.

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<sup>64</sup> Speech, Jean-Pierre Blais to the London Chamber of Commerce on Let's Talk TV and the future of television (29 January 2014).



- 135) PIAC-CAC believe that Rogers, Shaw and Shomi are marketing Shomi like an OTT service, that when consumed via STB access through a BDU service lets customers avoid paying data fees they otherwise would have to pay if Shomi was accessed through the internet. The “catch” is that customers must purchase BDU services they might not otherwise wish to, and also continue to require a subscription to an IS.
- 136) The true “OTT” model is to offer the content online and unrestricted, as is the model of Netflix and Vidéotron, with a value proposition that allows Canadians to view content on demand with only IS (with an IS of their choosing), and without the need for an expensive BDU service. PIAC-CAC elaborate on the consumer harm of the Rogers, Shaw and Shomi approach in the context of the next issue.

**Issue 6. What is the consumer harm in allowing Rogers, Shaw and Shomi to tie access to online streaming to the purchase of an affiliated ISP or BDU service?**

- 137) The consequence of Rogers’ and Shaw’s marketing and provisioning of Shomi are a reduction in consumer choice.
- 138) That reduction in consumer choice takes several forms.
- 139) First, there is a lack of practical choice between Rogers and Shaw BDU service and internet service. In light of Rogers’ and Shaw’s emphasis on STB Shomi, the practical choice facing consumers who want Shomi only, is to choose a Rogers or Shaw BDU subscription, instead of a Rogers or Shaw IS, because the latter will cost more, all things considered equal, due to data cap overage charges.
- 140) Second, there is a lack of choice between alternative BDUs, because Rogers, Shaw and Shomi have not delivered on their promises to conclude other distribution agreements, and in so doing appear to be into a several-month head start against other BDU competitors.
- 141) Third, there is a lack of choice that results from independent ISPs being unable to compete against ISP affiliates of BDUs who are able to offer Shomi. The harm that flows from this is that independent ISPs, whose plight PIAC-CAC believe was well-established on the record of the *Review of wholesale services and associated policies* (TNC 2013-551) proceeding, is exacerbated.
- 142) If customers of independent ISPs are unable to access Shomi OTT because independent ISPs do not have an affiliated BDU that is able to offer Shomi, then independent ISPs run the risk of losing customers to the converged ISP/broadcasting entity, and entrenching the dominance of those large entities over the marketplace, at a resulting loss in competition and increase in prices.

- 143) Allowing Roger, Shaw, and Shomi to create this closed system is counter to what Rogers' Mr. Engelhart said to the Commission about consumers wanting to be in control.<sup>65</sup>

7300 You asked about shomi. One of the things that's changing is people want to watch deep library content and they want to watch -- they want to binge watch. They don't want to do appointment television anymore. So that's led to the extraordinary success of Netflix. You know, we tend to -- we tend to focus on the fact that Netflix is internet-delivered but the real secret sauce that accounts for their success is they've discovered a type of programming that people weren't getting. They weren't getting that deep library content. They weren't being allowed to binge watch.

7301 So if we're going to be in the TV business we have to deliver that same experience and that's the idea behind shomi. It's to give people what they want when they want, how they want.

- 144) The way Rogers, Shaw and Shomi are offering only closed-access to the online service via primarily a BDU-subscription, however, does not "give people what they want when they want, how they want," nor necessarily at a price they want to pay, because it ties customers and prospective customers to a particular company's distribution platform (be it OTT or BDU, but in both cases, it appears, through a converged communications entity). This, PIAC-CAC contend, represents a risk to consumers.
- 145) It may be that Rogers' (and Shaw's) positioning is to give its existing customers "what they want when they want, how they want it," which brings PIAC-CAC back to its contention about undue preference, and how Rogers-Shaw are unduly preferring their own customers by giving the exclusive paid access to content on the basis of their consumption of other affiliated services.
- 146) This does not serve customers of independent ISPs, or customers of non-Shaw or non-Rogers BDUs who wish to "stack" content.
- 147) One broadcasting consultant, blogging in what appears to be a personal capacity, about Shomi and Bell's CraveTV, framed her frustration as such:

I would like to be able to be a Rogers cable, internet and wireless subscriber (well, maybe not but I am anyway) and subscribe to CraveTV. CraveTV is only available to Bell, Telus and a few smaller BDUs and is unlikely to be available to subscribers of their competition. While Shomi and CraveTV are very similar in how they work, and both have lovely interfaces on the mobile platforms (though both were buggy on their web platforms), I would like to have the option to subscribe to CraveTV if I want to and not be locked in to Shomi because of my cable provider.

So, as a Canadian and a lover of television, CRTC regulation and the BDU business models are not working for me right now.<sup>66</sup>

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<sup>65</sup> CRTC 2014-190 Let's TalkTV Transcript, Volume 4 (11 September 2014) at paras 7300-7301.

- 148) PIAC-CAC believe that the exclusive offering of Shomi to customers of affiliated BDU and ISP services is anti-competitive and designed to protect Rogers' and Shaw's legacy cable businesses at a time when internet delivery of broadcasting content, on demand, is proving more and more popular with Canadians. PIAC-CAC contend that to allow Rogers and Shaw to drag their heels in the face of that development goes against the broadcasting policy objectives for Canada.

**Issue 7. In the alternative, if the structuring, marketing and provisioning of Shomi are technically compliant with current Commission frameworks, should the Commission undertake reform?**

- 149) PIAC-CAC believe that Rogers, Shaw and their Shomi Partnership and the Shomi service are contravening the DMEQ, VI Framework, and *Telecommunications Act*. As PIAC-CAC argued in the Mobile TV Undue Preference proceeding,<sup>67</sup> no matter which way Bell and other vertically integrated service providers turn—be it the *Telecommunications Act* or *Broadcasting Act* or forbearance orders or exemption orders made respectively under each—the VI entities must not give their own services an undue preference to the detriment of their customers and competition in the marketplace for OTT services.
- 150) The Commission appeared, in its decision in *Mobile TV*, to recognize that legal status under one statute (the *Broadcasting Act*) cannot be used to shield violations of another statute (the *Telecommunications Act*) when the acting capacity in question is under the *Telecommunications Act*.<sup>68</sup>
- 151) In Commissioner Shoan's concurring opinion on *Mobile TV* in which he wholly agrees with the result of the majority's decision, Commissioner Shoan also questioned why the majority relied solely on the *Telecommunications Act*, and did not apply the *Broadcasting Act*. While in that case PIAC-CAC believe the issue was appropriately dealt with under the *Telecommunications Act*, the structuring and provisioning of Shomi, by tying it to a BDU service, begs the type of broader analysis invited by Commissioner Shoan.

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<sup>66</sup> Kelly Lynne Ashton, "You Can't Always Get What You Want . . ." (12 January 2015), online: Butter Tarts and Brown Drinks (blog), online: <<http://wonktacular.com>>.

<sup>67</sup> Commission File No. 8622-B92-201316646 – Application by Benjamin Klass requesting the fair treatment of Internet services by Bell Mobility (Klass application) and applications by CAC-COSCO-PIAC regarding Rogers' Anyplace TV service and Videotron's Illico.tv Service, intervention of PIAC-CAC at para. 11.

<sup>68</sup> *Mobile TV* at para. 25:

The Commission therefore rejects Bell Mobility's and Videotron's arguments that the relief claimed pursuant to the *Telecommunications Act* should be denied on the basis that they are not subject to that Act. Section 4 of the *Telecommunications Act* does not apply as a shield to the application of the *Telecommunications Act* in this case given that Bell Mobility and Videotron are acting as Canadian carriers in providing transport and data connectivity services required for the delivery of their mobile TV services, as discussed above.

152) At the same time, PIAC-CAC note the Commission's previous decisions (Broadcasting Decisions 2012-645<sup>69</sup> and 2014-486<sup>70</sup>) in respect of the operation of the *Digital Media Exemption Order*, and concerns expressed about too strict an interpretation of those frameworks in the face of technological and structural change, and favouring one form of business model over another.<sup>71</sup>

**'Shomi... What's different?'**

153) PIAC-CAC contend that the various regulatory frameworks relating to subscription video-on-demand services and digital media broadcasting undertakings and vertical integration may not have expressly contemplated the type of tied offering which PIAC-CAC argue Shomi represents.

154) As described previously, PIAC-CAC believe that Shomi is a *subscription-based online streaming service tied to a specific ISP or BDU service or class of BDU services*. In that sense, Shomi is, consistent with one of Shomi's own marketing slogans which states "shomi what's different."

155) To the extent that Shomi is something different, from a regulatory perspective, and something which impairs competition and restricts consumer choice, then this challenges the sufficiency of the current frameworks.

156) In PIAC-CAC's view, Rogers and Shaw, converged VI entities, with both broadcasting (programming and distribution) and telecommunications assets, are pushing the limits of the respective statutes, and testing the Commission's stewardship of the converged system. This can be seen in the VI practices that precipitated the Mobile TV Undue

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<sup>69</sup> See Broadcasting Decision CRTC 2012-645 - *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* (27 November 2012).

<sup>70</sup> Broadcasting Decision CRTC 2014-486 - *Complaint by Leiacomm against Bell Media Inc. alleging undue preference and disadvantage* (22 September 2014), Dissent of Commissioner Shoan.

<sup>71</sup> See e.g., Commissioner Shoan's dissent in *Leiacomm*; see also TELUS's reaction to *Movie Central* (blogged):

Shaw was able to exploit a loophole in the CRTC's vertical integration framework by making its "on the go" service contingent to the "television" subscription to the Movie Central service. In such circumstances, the rules in the [DMEQ] could not apply because the service was not restricted "based on a consumer's subscription to a specific mobile or retail Internet access service". Rather, Shaw restricted its Movie Central on the go service to subscribers to the Movie Central service on its cable TV service. TELUS therefore argued that in the circumstances the Pay Television Regulations should to apply since the Movie Central on the go service was an extension to the Movie Central pay TV service but the CRTC refused to accept this argument and the complaint was denied on very technical grounds leaving the loophole gaping open. ("[Why vertical integration in Canada's communications market should be a concern to Canadians](#)", 26 March)

Preference proceeding and resulting *Mobile TV* decision, this application, and the concurrently filed application in respect of CraveTV. As one leading academic has observed:

The conventional regulatory approach may dictate that the CRTC consider broadcast, wireless, and broadband services separately, but the silo approach makes little sense when both the technologies and the dominant industry players overlap every step of the way.<sup>72</sup>

- 157) The Commission, applying both the *Telecommunications Act* and the *Broadcasting Act*, should not allow Rogers and Shaw to exploit siloed regulatory frameworks to prefer their own telecommunications services, their own broadcasting content, and their own distribution services, and to discriminate against competitive ISPs and BDUs and their customers.
- 158) Like the *Mobile TV* decision, this is “about all of us and our ability to access content equally and fairly, in an open market that favours innovation and choice.”<sup>73</sup>
- 159) Allowing Rogers and Shaw to tie access to Shomi to subscription to the joint venturers’ BDU and telecommunications services unduly prefers those services, and impairs Canadians’ choice of BDU and telecommunications service provider. Were Rogers and Shaw serious about competing against such other true OTT players, then Rogers and Shaw would offer their Shomi service on a standalone basis, as true OTT services like Netflix and Vidéotron’s Club Illico do. As it is, Shomi cannot and should not benefit from the DMEQ given Rogers’ and Shaw’s explicit linking of access to it to the purchasing of affiliated telecommunications and broadcasting distribution services.
- 160) PIAC-CAC conclude by repeating their view that it would be artificial and disconnected from the converged and vertically integrated nature of communications in Canada today to find, based on inappropriately literal interpretations of the relevant rules, that it is acceptable for a hybrid SVOD-OTT service, to tie access to that service to the consumption of an affiliated BDU or ISP service, on the basis that the entity breaching the rule (in this case Rogers, Shaw and Shomi, in their broadcasting act personas, licensed and unlicensed) is not directly subject to the rule in question.

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<sup>72</sup> Michael Geist, “Why Canada’s Communication Policy Misses the Forest for the Trees” (9 December 2014), online: <<http://www.michaelgeist.ca/2014/12/canadas-communication-policy-misses-forest-trees>>.

<sup>73</sup> Speech, Jean-Pierre Blais to the London Chamber of Commerce on Let’s Talk TV and the future of television (29 January 2014).

## 4. NATURE OF DECISION SOUGHT

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161) In light of the foregoing, PIAC-CAC request that the Commission:

- (i) declare that Rogers', Shaw's and Shomi Partnership's marketing and provisioning of the Shomi streaming service constitutes an undue preference under the DMEO, because Rogers, Shaw and Shomi are conditioning access to the Shomi service on subscription to an affiliated telecommunications or broadcasting service and unduly disadvantaging unaffiliated ISPs and BDUs, to the detriment of competition and to consumers;
- (ii) direct that Rogers, Shaw and Shomi Partnership make the Shomi streaming service available to any Canadian consumer in a geographic area in which Shomi has rights via an IS of their choice, at the same rate as offered to Rogers, Shaw and Shomi customers;
- (iii) confirm that the DMEO prohibition against tied selling also applies to broadcasting distribution, or amend the DMEO accordingly;
- (iv) prohibit Rogers, Shaw and Shomi Partnership from restricting access to the Shomi service to customers of affiliated or selected ISPs and BDUs; and
- (v) require Rogers, Shaw and Shomi Partnership to stop offering and providing the Shomi service until all BDUs who wish to offer it are able to offer it on commercially reasonable terms.

### **Alternative relief**

162) In the alternative, if the Commission finds that Rogers' and Shaw's and Shomi Partnership's provisioning of Shomi provisioning of the Shomi service is compliant and consistent with the regulatory frameworks referenced herein PIAC-CAC requests that the Commission undertake a review of the DMEO with a view to (i) prohibiting this undue preference to affiliated BDUs and ISPs, and (ii) enlarging the undue preference prohibition to include preferences to affiliated BDU services.

163) In 2009 the Commission stated it would review the DMEO every 5 years "or such time as events dictate."<sup>74</sup> PIAC-CAC contend that a review of the DMEO at this juncture, and in light of Commissioner Shoan's concurring opinion in *Mobile TV*, would be timely.

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<sup>74</sup> Broadcasting Regulatory Policy CRTC 2009-329 at para. 26:

26. As new media's significance in the Canadian broadcasting system continues to evolve, further consideration of its appropriate regulatory treatment will be warranted. In Public Notice 1996-59 (Policy regarding the use of exemption orders), the Commission indicated that

## 5. COMMISSION'S JURISDICTION

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- 164) PIAC-CAC contend that the Commission has the necessary jurisdiction to grant the relief sought herein.
- 165) Section 24 of the *Telecommunications Act* grants the Commission authority to impose any conditions on the offering and provision of any telecommunications service by a Canadian carrier.

### Conditions of service

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

- 166) Despite the Commission's forbearance from the regulation of retail IS,<sup>75</sup> and mobile wireless data services,<sup>76</sup> the Commission has retained its powers to sanction unjust discrimination under section 27(2) of the *Telecommunications Act*.
- 167) Section 9(4) of the *Broadcasting Act*, in requiring the Commission to exempt broadcasting undertakings from any or all the requirements of Part II of the Act where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the Canadian broadcasting policy objectives, gives the Commission discretion to impose "such terms and conditions as it deems appropriate" on any required exemption, and indeed the Commission has conditioned the DMEO on compliance with a prohibition against undue preference, and may amend the DMEO if necessary.

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the review of exemption orders will normally take place five years from the date of issuance of the order and will be subject to the Commission's standard public process. Given the pace of change in the new media environment, and in accordance with established policy, the Commission expects to conduct the next review of the broadcasting in new media environment within five years, or at such time as events dictate.

<sup>75</sup> Telecom Order CRTC 99-562 – *Forbearance from retail internet services* (25 June 1999) at para. 40:

In light of the foregoing and consistent with its previous IS forbearance rulings, the Commission will, in the case of carriers that have Utility segment operations and have implemented the Split Rate Base regime, unconditionally:

[...]

- retain its powers under subsections 27(2), 27(3) (except to the extent that that provision refers to powers that are forborne), and 27(4) of the *Act* to provide an additional safeguard against carriers granting any undue preference

<sup>76</sup> Telecom Decision CRTC 2010-445 - *Modifications to forbearance framework for mobile wireless data services* (30 June 2010) at paras. 7-8: "the offering and provision by Canadian carriers of mobile wireless data services shall be subject to the Commission's powers and duties under section 24 and subsections 27(2), 27(3), and 27(4) of the *Act*."