



## Broadcasting Decision CRTC 2019-1

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Reference: Part 1 application posted on 14 May 2018

Ottawa, 8 January 2019

*Public record for this application: 2018-0315-6*

### **Complaint against the Bell Fund relating to its governance and the funding guidelines of its TV Program**

*The Commission dismisses in part a complaint relating to the Bell Fund (the Fund).*

*Specifically, the Commission finds that the manner in which the Fund has structured its TV Program is consistent with the Commission's policies and need not be revised. However, in order to reflect the Commission's policy regarding certified independent production funds, the Commission directs the Fund to amend one of its bylaws as set out in this decision. Further, the Commission expects the Fund to be in compliance at all times with the requirement that two thirds of its board members be independent and to fill any vacancy among independent board members within 90 days of the vacancy.*

#### **Introduction**

1. On 10 May 2018, the Commission received a complaint by Blue Ant Media, the Canadian Broadcasting Corporation, the Canadian Media Producers Association, Groupe V Média, the Ontario Educational Communications Authority, the Ontario French-language Educational Communications Authority, OUTtv, Société de télédiffusion du Québec and TV5 Québec Canada (collectively, the applicants) relating to the Bell Fund (the Fund).
2. The applicants alleged that the Fund's process for determining which productions are funded under its recently launched TV Program does not meet the requirements set out in *Policy framework for Certified Independent Production Funds*, Broadcasting Regulatory Policy CRTC 2016-343, 25 August 2016 (the Policy). Specifically, they argued that the Fund's tiered approach within the TV Program unfairly favours applications received from producers working with larger broadcasters, including Bell Media Inc. (Bell Media), over producers working with smaller or public broadcasters.
3. In addition, the applicants submitted that the composition of the Fund's board of directors did not meet the requirement that at least two thirds of board members be independent as five of its eight board members were independents and three were representatives of the broadcasting distribution undertakings (BDUs) of Bell Canada (Bell) or its affiliates.

4. The applicants requested that the Commission:
  - determine that the Fund’s TV Program is in non-compliance with the governance rules established in the Policy, which requires that funding from certified independent production funds (CIPFs) not be self-serving;
  - direct the Fund to revise the structure, eligibility requirements and application process for the TV Program to comply with the requirements of the Policy to ensure that future applications are assessed independently of the ownership of the licensed Canadian broadcaster that will broadcast the content;
  - determine that the composition of the Fund’s board of directors is in non-compliance with the governance rules established in the Policy; and
  - direct the Fund to rectify this imbalance so that the proportion of independent board members meets the minimum requirement set out in the Policy.
5. The Commission received interventions in response to the complaint from the Association québécoise de la production médiatique (AQPM), the Independent Broadcast Group (IBG)<sup>1</sup> and the Quebec English-language Production Council (QEPC), to which the Fund and the applicants replied.

### **Regulatory framework**

6. As part of the current production funding system in Canada, the Commission mandates that financial contributions be made by BDUs to certain production funds. These include CIPFs, which are funds certified by the Commission as eligible to receive funding provided that their operations meet the criteria set out in the Policy.
7. Overall, the Commission oriented its Policy to ensure that CIPFs are provided with the necessary flexibility to operate in an increasingly multi-platform environment. The Policy also forms part of a much broader framework that includes support for the creation of programming that is suitable both for the domestic and international markets by prioritizing well-funded, high-quality and compelling content.
8. Aside from excluding the funding of sports, news and reporting and actualities, the criteria under which these funds are certified do not prescribe the manner in which CIPFs are to allocate funding. While the Commission does require that productions be made available by some means to Canadians and that funding decisions be sensitive to official language minority communities, it is otherwise prescriptive only in terms of ensuring the independence of the CIPFs, capping their administrative expenses and ensuring that the programming funded is accessible to persons with disabilities.

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<sup>1</sup> OUTtv Network Inc. also filed an intervention stating that it shared the concerns of the IBG, of which it is a member.

## Issues

9. In order to determine whether the relief sought by the applicants is warranted, the Commission must first determine if the operation of the Fund is inconsistent with the requirements of the Policy. In particular, the Commission must determine the following:
- Is the Fund as a whole operating in a way that inappropriately prevents certain parties from accessing its programs and funding?
  - Do the funding guidelines for the TV Program meet the criteria set out in the Policy and the Commission's overall policy objectives?
  - Is the board's governance in line with the criteria in the Policy?

### **Is the Fund as a whole operating in a way that inappropriately prevents certain parties from accessing its programs and funding?**

10. The Fund is a not-for-profit organization operating since 1997 as a CIPF. Bell and its affiliates are currently the only contributors to the Fund.
11. According to information it makes publicly available, the Fund has supported more than 2,000 projects and allocated approximately \$200 million in funding over the last 20 years. In the 2017-2018 fiscal year, the Fund replaced its previous funding programs with five pilot programs and funding envelopes, which are described on its website as follows:
- **Short Form Digital Series Non-Fiction:** funding to original digital video for online distribution, specifically the production of scripted non-fiction (i.e. documentary and lifestyle/factual programming); only series with a maximum length of 15 minutes per episode and a minimum of six episodes will be supported.
  - **Short Form Digital Series Fiction:** funding to original digital video for online distribution, specifically the production of scripted fiction (drama, comedy and children's and youth programming, excluding animated series); only series with a maximum length of 15 minutes per episode and a minimum of six episodes will be supported.
  - **Webdocs Development:** funding to support the development of original digital non-fiction; such content is primarily designed to inform but may also educate and entertain, providing an in-depth critical analysis of a specific subject or point of view through the integration of interactive digital technologies and platforms.
  - **Slate Development:** funding to help independent production companies diversify their development both in terms of numbers of projects and variety of platforms and media by offering financial support for the planning and development of original intellectual property.
  - **TV Program:** funding to support the production of great, market-driven Canadian content in the genres of lifestyle, drama and comedy series.

12. The specific guidelines, evaluation criteria and application procedures for each funding envelope are also available on the Fund's website.
13. Overall, the current structure of the Fund allows access to its funding by a variety of producers and production companies, as well as broadcasters via partnerships with those independent producers. There is no evidence on the record of this proceeding that the Fund as a whole inappropriately excludes certain parties or prioritizes projects that are specifically intended to be broadcast by Bell or its affiliates.
14. Accordingly, the Commission considers that the Fund as a whole is not operating in a way that inappropriately prevents certain parties from accessing its programs and funding.

**Do the funding guidelines for the TV Program meet the criteria set out in the Policy and the Commission's overall policy objectives?**

15. The Fund's TV Program allocates funding based entirely on a broadcaster's reported Canadian programming expenditures (CPE), excluding sports and news programming. The allocation formula is as follows:
  - 65% of the funding is reserved for major production funders (MPFs), defined as broadcaster groups whose CPE was at least \$125 million for English programming and \$50 million for French programming;
  - 20% of the funding is reserved for private broadcasters, defined as broadcasters who are not part of an MPF and whose CPE was less than \$125 million for English programming or \$50 million for French programming; and
  - 15% of the funding is reserved for the Canadian Broadcasting Corporation and educational broadcasters.
16. Similarly to the Canada Media Fund, even though classes of broadcasters are grouped within a funding envelope and funding is attributed to the broadcasters' programs, the actual funding is paid directly to the producer of the eligible project.

**Positions of parties**

17. The applicants questioned the use of CPE as a criterion for determining the envelopes. Specifically, they submitted that the MPF envelope was not proportionate to the CPE of the MPFs in the 2016 fiscal year and that using historical CPE was problematic, flawed and self-serving since it resulted in the largest broadcast groups being treated more favourably than other broadcasters. They also submitted that no justification was provided for using a streamlined approach in the case of MPFs.
18. The intervenors raised similar concerns about the structure, eligibility requirements and application process of the TV Program, arguing that it guaranteed privileges and advantages for the MPFs. More specifically, the AQPM and the QEPC expressed concern with the imbalance in the overall distribution of envelopes and the diversity

of programming, while the IBG argued that Bell Media's discretion to allocate funding to its own productions and not others meant that it was not focused on productions but rather on different categories of broadcasters, giving larger broadcasters more flexibility.

19. More generally, the applicants remained of the view that the process for determining which productions are funded does not meet the criteria established in the Policy and continued to express concern with the composition of the Fund's board of directors.
20. In response, the Fund stated that it took into consideration the other funding sources currently available to the public broadcaster and educational broadcasters in designing the TV Program. Further, in regard to the IBG's concerns, the Fund noted that section 5.1(d) of its TV Program guidelines states that in the event that the applicant is a broadcaster-affiliated company, only up to 25% of the available funds in an MPF envelope or 25% of the total funding available in the selective fund can be accessed by these companies.
21. The Fund also noted that multiple independent producers, including the complainants, have benefited from its programs, including the TV Program. Finally, it submitted that the evaluation of eligible applications followed a rigorous and transparent process and was based on objective criteria that ensured that they were assessed independently of ownership.

#### **Commission's analysis and decision**

22. The Fund's criteria and process for evaluating applications to the TV Program are clear and transparent to all applicants since they are posted on the Fund's website. While weighted toward producers who partner with larger broadcasters, these criteria also provide funding to producers who partner with smaller broadcasters or public broadcasters.
23. As noted earlier, the Policy does not specify the manner in which such funds are to allocate funding or prioritize their funding decisions. Accordingly, the Fund's decision to prioritize the funding of projects that will be broadcast or distributed by larger broadcasters is not inconsistent with the Policy.
24. In fact, it appears to the Commission that the allocation method used by the Fund's TV Program already supports the broadcast of productions on multiple platforms in partnership with a variety of broadcasters in a manner that is not self-serving or that inappropriately favours any of the contributors. In that light, it could be argued that placing additional restrictions on the Fund would be inconsistent with the Policy and the Commission's overall policy approach to funding audiovisual content made by Canadians.
25. The Commission's view is supported by the funding decisions for the TV Program announced on 5 July 2018. The Fund disbursed nearly \$2 million to support nine independent productions from British Columbia, Nova Scotia, Ontario and Quebec (i.e. three drama and two lifestyle series in the English-language market and two drama and two comedy series in the French-language market).

26. Accordingly, the Commission finds that the manner in which the Fund has structured its TV Program is consistent with the Policy and the Commission's overall policy framework and that the Fund need not revise the structure, eligibility requirements or application process for the TV program.

### **Is the board's governance in line with the certification criteria in the Policy?**

#### **Positions of parties**

27. In their application and reply, the applicants noted that the Fund's board has been operating with eight members, including three employees of Bell or its affiliates. The applicants submitted that this ratio did not meet the requirement that at least two thirds of board members be independent.

28. For its part, the QEPC questioned whether the Fund's board is sufficiently independent from Bell, while the AQPM and the IBG noted the appearance of a conflict of interest as Bell services will benefit from the TV Program.

29. In reply to the questions raised regarding the composition of the board, the Fund noted that a seat on the board became vacant in May 2017 and indicated that it would fill the vacancy by no later than 31 August 2018. Regarding the appearance of a conflict of interest, it noted that non-independent board members are required by its conflict of interest guidelines to declare any conflict of interest and recuse themselves from participating in any discussions or voting with respect to any projects related to Bell Media.

#### **Commission's analysis and decisions**

##### ***Composition of the board***

30. To reflect the reality that vertically integrated companies can operate both as BDUs that provide financial support to CIPFs and broadcasters benefiting from this financial support, the Commission determined in the Policy that:

- at least two thirds of board members must be independent; and
- independent board members shall cast no fewer than two thirds of the votes in a meeting.

For the purposes of the governance of the funds, the following persons are not considered independent: employees, officers, directors or immediate family members of officers or directors of a non-governmental contributor or its affiliates.

31. Article 24 of bylaw no. 1 of the Fund states:

The board shall consist of a minimum of five (5) and a maximum of nine (9) directors. Unless otherwise provided in this by-law, a majority of votes shall decide any resolution arising at any meeting of the board provided that **at least two thirds (2/3) of the directors present and voting are not representatives of BDUs.**

32. This does not reflect what is set out in the Policy, which is that independent board members shall cast no fewer than two thirds of the votes in a meeting.
33. In response to questioning on the record, the Fund agreed to change article 24 of bylaw no. 1 such that it aligns with the Policy and reads as follows:

The board shall consist of a minimum of five (5) and a maximum of nine (9) directors. Unless otherwise provided in this by-law, a majority of votes shall decide any resolution at any meeting of the board provided that Independent Board members shall cast no fewer than two thirds (2/3) of the votes in a meeting.

34. Accordingly, the Commission **directs** the Fund to amend article 24 of its bylaw no. 1 as set out above and to file the revised bylaw with the Commission within 30 days of its approval by the board of directors. Once received, the amended bylaw will be published on the Commission's website.

#### ***Board vacancy***

35. Since May 2017, the board of the Fund has been composed of eight members, five of which are independents, including the Chair, and three of which are representatives of Bell's BDUs or its affiliates. As such, independents comprised 62.5% of the board, slightly under the two-thirds requirement. When questioned in this proceeding regarding the vacancy and the apparent discrepancy with the Policy, the Fund explained that it had recently undergone a review of its operations and was in the midst of launching its new funding envelopes to meet the requirements of the Policy. As such, the nominee for the vacant position was not considered at the last annual general meeting.
36. On 14 August 2018, the Fund indicated that the vacancy had been filled with an independent director, that the nomination would be formalized at an upcoming board meeting and that a public announcement would follow. According to the Fund's website, a sixth independent board member has since been named.
37. In light of the above, the Commission **directs** the Fund to provide written confirmation within 30 days of this decision that the vacant independent board position has been filled, including the name of the board member and the date appointed. Once received, the written confirmation will be published on the Commission's website.

#### ***Voting and appearance of conflict of interest***

38. The Policy further states that CIPF funding decisions must be made free of conflicts of interest or the appearance of conflicts of interest. As such, it requires that the board establish an effective and efficient process to ensure that applications for funding of productions are appraised objectively and without actual or perceived conflicts of interest.

39. Since May 2017, it has been impossible for the Fund to meet the requirement that independent board members cast at least two thirds of the votes during a meeting whenever all members were present as only 62.5% of the board members were independent. However, the Fund stated that although there had been a vacancy caused by the resignation of one of its independent Board members, representatives of Bell recused themselves from the consideration of projects relating to Bell or its affiliates. As such, when decisions were made on such projects, all of the voting board members were independent, mitigating the impact of the vacancy among independent board members.
40. Additionally, the Fund submitted its *Conflict of Interest Guidelines for Board of Directors and Management* (the Guidelines), which provides direction to board members on the proper procedure to follow when projects from Bell or its affiliates are presented. Article 3 of the Guidelines states that “every director, officer, employee or agent of the Fund who declares a conflict may not thereafter be involved directly or indirectly in any discussion or review of the project [...] and must not partake in any decision related to such project.”
41. The evidence provided by the Fund demonstrates that Bell representatives recused themselves from voting on projects relating to Bell or its affiliates, as required by the Guidelines. Accordingly, despite the fact that the composition of the board did not meet the requirements of the Policy for a period of over a year, the Commission is satisfied that a mechanism was and remains in place to remove any real or perceived conflicts of interest relating to the review of projects proposed by Bell or its affiliates.
42. The Commission expects the Fund to continue to operate in a manner consistent with its amended bylaws, the Guidelines and the Policy as it relates to the governance of the Fund at all times and to fill any vacancy among independent board members within 90 days of the vacancy.

## **Conclusion**

43. In light of the above, the Commission **dismisses in part** the complaint relating to the Fund.
44. Specifically, the Commission considers that the Fund as a whole is not operating in a way that inappropriately prevents certain parties from accessing its programs and funding. Moreover, the Commission finds that the manner in which the Fund has structured its TV Program is consistent with the Commission’s policies and need not be revised. However, in order to ensure the independence of the Fund’s board of directors and funding decisions, the Commission **directs** the Fund to amend its governance structure and bylaws as set out in this decision.

Secretary General