Broadcasting Regulatory Policy CRTC 2012-385

PDF version

Route reference: 2011-788

Additional references: 2011-788-1, 2011-788-2 and 2011-788-3

Ottawa, 18 July 2012

Review of the Local Programming Improvement Fund

The Commission finds that the local programming improvement fund (LPIF) has assisted local television stations over the past two years in maintaining and enhancing local programming in non-metropolitan areas. However, for the reasons set out in this policy, the Commission also finds that it would be inappropriate to maintain the LPIF in the long term.

To mitigate the effects of eliminating this source of funding for local stations, the Commission will phase out the fund over the next two broadcast years. This will provide conventional stations with sufficient time to adapt to the evolving broadcasting environment. Specifically, the Commission will:

- *for the 2012-2013 broadcast year, reduce the contribution rate from 1.5% to 1%;*
- *for the 2013-2014 broadcast year, reduce the contribution rate to 0.5%; and*
- *as of 1 September 2014, discontinue the LPIF.*

Further, given the Commission's continuing concerns over the affordability of broadcasting services for consumers and in light of the positions expressed by a number of parties in this proceeding, the Commission directs all licensed broadcasting distribution undertakings (BDU)s to report to the Commission within 60 days of the date of this policy:

- *to describe the measures they have taken or will take, commencing 1 September 2012, to reduce subscriber bills by amounts corresponding to the reduced contribution levels described above, including evidence that they have notified subscribers concerning these reductions; or*
- *to submit evidence that subscribers have never paid contributions associated with the LPIF.*

Dissenting opinions by Commissioners Duncan, Lamarre and Poirier, as well as a concurring opinion by Commissioner Morin, are attached to this policy.

Introduction

1. In Broadcasting Public Notice 2008-100, the Commission concluded that licensed broadcasting distribution undertakings (BDUs) should be required to contribute 1% of their gross revenues derived from broadcasting activities in the previous broadcast year to the Local Programming Improvement Fund (LPIF). LPIF funding was intended to provide support for incremental expenditures on local programming. In order to qualify for such support, stations were required to provide local programming that included original local news. The Commission stated that following a comprehensive review of the LPIF in the third year of the fund's operation, it would determine whether the fund should be maintained, modified or discontinued.

2. In Broadcasting Regulatory Policies 2009-406 and 2009-406-1, the Commission re-examined its LPIF policy and made specific determinations as to its implementation. Taking into consideration a range of factors, including the economic downturn and the Commission's intention to impose harmonized local programming levels on conventional television stations in metropolitan and non-metropolitan markets, the Commission concluded that for the 2009-2010 broadcast year:

   - the required contribution should be increased to 1.5% of gross broadcasting revenues; and

   - the requirement for incremental spending on local programming would be waived.

3. As set out in Broadcasting Regulatory Policy 2010-167, broadcasters subsequently submitted that the temporary revised terms and conditions had contributed to maintaining the operation of small-market stations that might otherwise have closed. Accordingly, the Commission concluded that the 1.5% BDU contribution rate and the suspension of the requirement for incremental spending on local programming would remain in effect until it had completed its comprehensive review of the LPIF in the third year of its operation.

4. Accordingly, in Broadcasting Notice of Consultation 2011-788, the Commission announced a public hearing beginning on 16 April 2012 to review its policies and regulations relating to the LPIF, the performance of the fund and its effectiveness in supporting the production of local programming.

5. The Commission received and considered comments from a wide range of parties. The Commission also accepted written responses to questions posed at the hearing and final written comments after the hearing from parties to the proceeding. This policy is based on the complete record of the current proceeding, which is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Positions of parties

6. With the exception of Bell Canada (Bell), which argued that there continued to be a need for a modified LPIF, the vertically integrated companies (VIs)—namely,

Quebecor Media Inc., Rogers Communications Inc. (Rogers) and Shaw Communications Inc. (Shaw)—and independent BDUs submitted that the LPIF provided short-term transitional funding relief that was no longer required due to the following changes in the broadcasting environment and the associated regulatory regime:

- an increase since 2008 in vertical integration, with a majority of private broadcasters now being affiliated with the country's largest BDUs;
- increased viewership potential for small-market stations as a result of carriage on direct-to-home satellite systems, which in turn increases advertising revenue potential;
- an overall recovery in certain types of advertising revenues as the economy improved following the 2008-2009 recession;
- increased potential for additional advertising revenue from new media sources;
- group-based licensing, which provides large broadcast groups with additional flexibility in meeting their Canadian programming expenditure (CPE) requirements, including the ability to transfer up to 100% of the required CPE for a qualifying specialty service to a local station within the same group; and
- implementation of the digital transition, with the result that local stations no longer need to earmark funds to convert their analog transmitters to digital.

7. Shaw also indicated that local programming was an important part of its programming strategy for its Global stations and that it would continue to focus on local programming even if it did not receive any LPIF funding. Shaw further noted that a significant amount of tangible benefits resulting from recent acquisitions have been allocated to producing additional local content in certain small markets.

8. The above-noted parties argued that the fund should either be abolished or phased out beginning as early as 1 September 2012. Should the Commission decide to phase out the LPIF, Rogers originally proposed a three-year phasing out of the fund with annual contribution rates of 1%, 0.75% and 0.5% respectively. At the hearing, Rogers proposed a further decrease in the annual contribution rates to 0.4%, 0.3% and 0.2% and argued that VI and Canadian Broadcasting Corporation (CBC) stations should be ineligible to receive funding.

9. Like Shaw and the independent BDUs, Rogers argued that VIs should not be eligible since such entities possess the efficiencies and synergies to be able to produce high-quality local programming without subsidy. In the case of the CBC stations, Rogers submitted that the CBC did not need additional subsidies from Canadian consumers to operate small-market television stations. Rogers also noted that the CBC has a statutory mandate and an obligation to reflect the various regions of

Canada and to serve official language minority communities (OLMCs). Rogers submitted that only independent broadcasters should be eligible for LPIF funding during its proposed phase-out as such a measure would allow them to adapt before the proposed elimination of the fund in three years.

10. MTS Allstream and Canadian Cable Systems Alliance Inc. also argued that only independent and non-CBC stations should receive LPIF funding and proposed contribution rates of 0.3% and 0.25% in the event that the Commission decided not to abolish the LPIF immediately.

11. With respect to the issue of the eligibility of VIs, Bell argued that LPIF eligibility should be based on the characteristics of a community, not the characteristics of a broadcaster serving that community. Bell stated that this principle was consistent with the way that the Commission originally established LPIF eligibility in that communities with a population of fewer than one million qualified for funding. Bell submitted that if VIs were to become ineligible, diversity of voices would suffer.

12. For its part, the CBC argued that there had been no change in the Commission's mandate since Broadcasting Public Notice 2008-100 when the Commission decided to create the LPIF, nor any significant change to the broadcasting system which would displace or reduce the importance of local programming. The CBC argued that there was therefore no basis for shifting resources away from local programming by modifying or eliminating the LPIF. However, in the event that the Commission decided to reduce or discontinue LPIF funding, the CBC stated at the hearing that, subject to the availability of resources, it would continue to meet its objectives under the *Broadcasting Act*, including to reflect the different needs and circumstances of each official language community and the particular needs and circumstances of English and French linguistic minorities.

13. Small and medium-sized independent broadcasters such as CHEK Media Group and Channel Zero Inc. maintained that the LPIF was essential to their survival and growth. A number of groups from the production community also argued for the importance of continuing the LPIF, whether in its current or in a modified form, while the Fédération des communautés francophones et acadienne du Canada and other community associations submitted that OLMCs should continue to receive pertinent local programming in their language.

Commission's analysis and decision

14. In Broadcasting Public Notice 2008-100, the Commission stated that it would conduct a comprehensive review of the LPIF in its third year of operation. The Commission initiated this review in Broadcasting Notice of Consultation 2011-788 and held a public hearing in April 2012. Having conducted this review, it is the Commission's view that the LPIF has successfully contributed to maintaining and in several cases increasing local programming, as well as to sustaining the local stations that provide such programming both through and following the economic downturn. LPIF funding has also allowed the industry to transition through a number of structural and

technical changes, including the conversion to digital broadcasting and increasing ownership consolidation.

15. However, the Commission considers that the success described above has ultimately been achieved primarily at a cost to Canadians who pay the subscriber fees from which the LPIF is derived. While the implementation of the LPIF was appropriate to address the issues facing local stations at the time at which the LPIF was introduced, the Commission is of the view that reliance on LPIF funding is not sustainable in the long term in the context of the new broadcasting environment. The Commission considers that on a going forward basis the broadcast industry as a whole will need to evolve and innovate in order to continue to provide high-quality local programming whether through the traditional types of programming offered by local stations or by other means.

16. Further, the Commission notes that in the years since the economic downturn, there has been a general rebound in the aggregate advertising revenues of conventional television stations, with a number of LPIF-eligible stations returning to levels similar to those preceding the recession. While the current trend is observably positive, the Commission remains sensitive in particular to the issues facing small-market and independent stations and will continue to monitor their situation.

17. With respect to the CBC and its ongoing service to OLMCs, the Commission will discuss this matter with the CBC at its upcoming licence renewal.

18. The Commission finds that it would be inappropriate to maintain the LPIF in the long term. However, to mitigate the effects of eliminating this source of funding for local stations, the Commission will phase out the fund over the next two broadcast years. This phase-out will provide conventional stations with sufficient time to adapt to the evolving broadcasting environment. Specifically, the Commission will:

   - for the 2012-2013 broadcast year, reduce the contribution rate from 1.5% to 1%. All other fund conditions will remain unchanged, with the exception of the change noted in paragraph 19 of this policy.

   - for the 2013-2014 broadcast year, reduce the contribution rate to 0.5%. All other fund conditions will remain unchanged, with the exception of the change noted in paragraph 19 of this policy.

   - as of 1 September 2014, discontinue the LPIF.

19. In response to numerous parties who expressed concern with the general absence of publicly disclosed LPIF information and as agreed to by the LPIF recipients at the hearing, the Commission will release on an annual basis the amount of LPIF received by each recipient station.

20. In Broadcasting Notice of Consultation 2012-386, also issued today, the Commission has sought comments on the wording of proposed amendments to the *Broadcasting Distribution Regulations* to implement the phase-out described above.

21. Further, given the Commission's continuing concerns over the affordability of broadcasting services for consumers and in light of the positions expressed by a number of parties in this proceeding, the Commission directs all licensed BDUs to report to the Commission within 60 days of the date of this policy, i.e. by **17 September 2012**:

    - to describe the measures they have taken or will take, commencing 1 September 2012, to reduce subscriber bills by amounts corresponding to the progressively reduced contribution levels described in paragraph 18 of this policy, including evidence that they have notified subscribers concerning these reductions; or

    - to submit evidence that subscribers have never paid contributions associated with the LPIF.

22. The Commission wishes to emphasize that it expects that any additional fees currently collected by BDUs from their customers in relation to the LPIF should be reduced or credited to these customers as the LPIF rate declines.

Secretary General

Related documents

- *Call for comments on proposed amendments to the* Broadcasting Distribution Regulations *– Provisions relating to the Local Programming Improvement Fund*, Broadcasting Notice of Consultation CRTC 2012-386, 18 July 2012

- *Review of the Local Programming Improvement Fund*, Broadcasting Notice of Consultation CRTC 2011-788, 19 December 2011, as amended by Broadcasting Notices of Consultation CRTC 2011-788-1, 9 March 2012; 2011-788-2, 13 April 2012; and 2011-788-3, 20 April 2012

- *Amendments to the* Broadcasting Distribution Regulations *and other Commission Regulations*, Broadcasting Regulatory Policy CRTC 2011-455, 29 July 2011

- *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2009

- *Policy determinations resulting from the 27 April 2009 public hearing*, Broadcasting Regulatory Policy CRTC 2009-406, 6 July 2009, as corrected by *Policy determinations resulting from the 27 April 2009 public hearing – Correction relating to the allocation of Local Programming Improvement Fund funding*, Broadcasting Regulatory Policy CRTC 2009-406-1, 4 March 2010

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

Dissenting opinion of Commissioner Elizabeth Duncan

I respectfully disagree with the majority's decision to phase out the Local Programming Improvement Fund (the LPIF or the Fund) over the next two years. For the reasons set out below, I would have preferred that the program be continued, but in the manner originally envisaged in Broadcasting Public Notice 2008-100, for a three year period, with a comprehensive review in the third year. However, I do agree with the majority decision to reduce the BDU contribution to 1% effective 1 September 2012.

To best explain my position, I look back to the underlying rationale of the Commission's decision to establish the LPIF as set out in Broadcasting Public Notice 2008-100.

In that public notice, the Commission recognized that the business case for local over-the-air (OTA) television had changed significantly over the period 1998 to 2007 through the expansion of Canadian and non-Canadian viewing choices offered by direct-to-home (DTH), digital terrestrial broadcasting distribution undertakings (BDUs) and other digital media. The Commission considered that this fragmentation of viewing and advertising revenues was a major reason for increased consolidation in the industry. Further, the Commission considered that one of the consequences of consolidation was that it appeared to allow the larger ownership groups to achieve operating synergies by concentrating production resources in major centres, at the expense of smaller local markets.

During the proceeding leading to Broadcasting Public Notice 2008-100, the Commission was presented with evidence regarding the importance to Canadians of local programming and, in particular, of local news. The Commission found that this evidence was consistent with its view that it is local media that provides most Canadians with critical information for their understanding of local, national and international issues. Further, the Commission stated that local media help to shape Canadians' views and equips them to be active participants in the democratic life of the country.

In that same proceeding, the Commission examined broadcaster spending on local programming by market size and found that in the six metropolitan markets with a population of over one million, spending on local programming, after adjusting for the consumer price index, had increased by 11.8% between 1998 and 2007, while in markets of less than one million, local program spending had declined by 15.6% over the same period. Further, over the same period, profit before interest and taxes (PBIT) margins for the private OTA sector had declined from 15.9% to 9.2% in the metropolitan markets and from 3.2% to -4.0% in the non-metropolitan markets.

In Broadcasting Public Notice 2008-100, the Commission considered that it was in the public interest for the Canadian broadcasting system to include healthy local stations to enrich the diversity of information and editorial points of view. In particular, the Commission considered that viewers in French-language markets should not be disadvantaged by the smaller size of those markets.

According to the Commission, it appeared that local stations in all smaller markets were not capable of investing in local programming. It indicated that if this trend were to continue, it was highly likely that local television stations would either close down or reduce even further the quality of local programming offered to viewers.

Based on these findings the Commission established the LPIF and set out the overall objectives of the Fund as follows:

- to ensure that viewers in smaller Canadian markets continue to receive a diversity of local programming – particularly local news programming;

- to improve the quality and diversity of local programming broadcast in these markets; and

- to ensure that viewers in French-language markets are not disadvantaged by the smaller size of those markets.

The Commission further determined that the LPIF would be funded through a contribution by licensed Class 1 terrestrial BDUs and DTH undertakings of 1% of their gross revenues derived from broadcasting activities.

The Commission determined that the use of LPIF funding was to be incremental to the station's current expenditures on local programming and that LPIF funds could be used to produce additional original local programming or to improve the quality of local programming. This determination is referred to as the incrementality requirement. The Commission further indicated that although all categories of programming would qualify, a priority should be given to local news and public affairs programs.

In Broadcasting Public Notice 2008-100, the Commission stated that LPIF funding would be available for the 2009-2010 broadcast year.

Subsequently, as a result of the global economic crisis, the Commission announced in Broadcasting Regulatory Policy 2009-406 that it would be appropriate to increase the LPIF contribution by BDUs from 1% to 1.5% of gross revenues derived from broadcasting activities and to eliminate the requirement for incrementality for the 2009-2010 broadcast year. The Commission determined that the increased LPIF funding would provide sufficient support to ensure that Canadians in non-metropolitan markets would continue to receive local programming in the 2009-2010 broadcast year, and would help ensure the continued viability of stations that were particularly affected by the seriousness of the economic downturn in 2008.

In Broadcasting Regulatory Policy 2010-167, the Commission extended both the required BDU contribution rate of 1.5% of gross revenues derived from broadcasting activities and the suspension of the requirement for incremental spending on local programming until it had completed its review of the LPIF in the third year of operation.

As a result of these later decisions, the incrementality requirement as conceived in Broadcasting Public Notice 2008-100 was never implemented. Broadcasters were not required to spend the LPIF funds on increased and/or improved local programming but were able to use these funds in their complete discretion, including as a means by which to address pressures arising from the downturn in the economy.

I agree with the majority that during the recent period of economic uncertainty, the LPIF assisted local television stations to maintain and, in some instances, enhance and increase local programming in non-metropolitan areas. Further, in my view, it may have enabled stations that might otherwise have been closed, to remain operational.

However, as a result of the elimination of the incrementality requirement, the Fund has not operated as originally envisaged in Broadcasting Public Notice 2008-100. This, in my view, has meant that the benefits for non-metropolitan markets, to be derived from the Fund, have not been given an opportunity to be realized.

BDU LPIF contributions for the broadcast year ending 31 August 2011 totalled $106.6 million dollars; however, local programming expenditures by LPIF recipient stations for that year increased by only $24.5 million. Without the full amount of the contributions being directed to local programming expenditures, it is not possible to ascertain the full potential benefit to viewers in non-metropolitan markets.

Further, advertising revenues in non-metropolitan markets, adjusted for inflation, continue their downward trend from 2003 levels. In addition, despite signs of economic recovery, PBIT levels for private stations receiving LPIF, when their LPIF funding is excluded, are still negative.

I expect those BDU customers who saw increases in their monthly invoices when the LPIF was introduced will be delighted to see the reduction in their monthly invoices as a result of this decision. However, I think they would likely be even happier to reap the benefits of improved and increased local programming as originally envisioned in Broadcasting Public Notice 2008-100. Unfortunately, this will not be allowed to happen.

I agree with my colleagues that the broadcast industry as a whole will need to evolve and innovate in order to continue to provide high quality local programming, whether through the traditional types of programming offered by local stations or by other means. I believe strong local programming in metropolitan and non-metropolitan markets will be the basis of that innovation.

To sum up, the LPIF as envisioned in Broadcasting Public Notice 2008-100 was never implemented. In my view, there was no evidence presented in the current proceeding to show that the needs of Canadians living in non-metropolitan markets, as identified in Broadcasting Public Notice 2008-100, have been adequately addressed. Further, economic conditions in those markets as a whole continue to be poor and are likely to remain so, at least in the short term. I therefore consider the majority decision premature and would have preferred LPIF as it was originally set out in Broadcasting Public Notice 2008-100, i.e., including the incrementality requirement, to operate for a three-year period commencing 1 September 2012, with a comprehensive review in the third year to determine whether the Fund should be maintained, modified or discontinued.

Dissenting opinion of Commissioner Suzanne Lamarre

1. I respectfully dissent from the decision taken by the majority. In my opinion, the way in which this decision was rendered is contrary to the powers that Parliament has delegated to and the obligations it has imposed on the CRTC. Therefore, I cannot support it.

The Commission's mandate and obligations

2. The Commission's mandate includes, among other things, the responsibility to regulate and supervise the Canadian broadcasting system, and it is within the context of this mandate that the Local Programming Improvement Fund (hereinafter the LPIF or "the Fund") was to be reviewed. The Commission's mandate must moreover be executed in accordance with specific terms, most of which are contained in the *Broadcasting Act* (hereinafter "the Act"). Let us review these terms.

3. First, we must review the legislative provisions and the obligations of the Commission most relevant to the decision before the Commission. In my opinion, these include three concepts: the framework, i.e., section 5 of the Act; the purpose, i.e., subsection 3(1) of the Act; and the additional obligations, i.e., section 41 of the *Official Languages Act* and the policies already established by the Commission.

The framework

> **5.**(1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the **Commission shall regulate and supervise** all aspects of the Canadian broadcasting system **with a view to implementing the broadcasting policy** set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).
>
> (2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that
>
>> (*a*) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;
>>
>> (*b*) takes into account regional needs and concerns;
>>
>> (*c*) is readily adaptable to scientific and technological change;
>>
>> (*d*) facilitates the provision of broadcasting to Canadians;
>>
>> (*e*) facilitates the provision of Canadian programs to Canadians;

> (*f*) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
>
> (*g*) **is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.**

(3) The Commission shall give **primary consideration to the objectives of the broadcasting policy** set out in subsection 3(1) if, in any particular matter before the Commission, **a conflict arises** between those objectives and the objectives of the regulatory policy set out in subsection (2). [my emphasis]

4. In light of subsection 5(2) of the Act, it is clear that in taking the measures necessary to fulfill its mandate to supervise the Canadian broadcasting system, the Commission must consider the different realities of English- and French-language communities, whether they are in a majority position or not, consider the needs of all the regions, preserve opportunities for innovation, encourage the broadcasting of programs by and for Canadians and consider the possible administrative burden for broadcasting undertakings.

5. Because the Commission's mandate involves implementing the broadcasting policy for Canada set out in subsection 3(1) of the Act, it is logical that subsection 5(3) stipulates that if a conflict arises between the framework (subsection 5(2) of the Act) based on which the Commission render its decisions and the objectives of the policy it must attain (subsection 3(1) of the Act), the objectives of the policy shall take precedence.

The purpose

6. Let us now turn to the parts of subsection 3(1) that are most relevant in this case.

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

> […]
>
> (*b*) the **Canadian broadcasting system**, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and **provides, through its programming, a public service essential** to the maintenance and enhancement of national identity and cultural sovereignty;
>
> (*c*) **English and French language broadcasting**, while sharing common aspects, operate under **different** conditions and may have different requirements;
>
> (*d*) the Canadian broadcasting system should

> (i) **serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,**
>
> (ii) encourage the development of Canadian expression by providing **a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity**, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

[…]

(*e*) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

[…]

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

> (i) be varied and comprehensive, **providing a balance of information, enlightenment and entertainment** for men, women and children of **all ages, interests and tastes**,
>
> (ii) **be drawn from local**, regional, national and international sources,
>
> […]
>
> (iv) provide a reasonable opportunity for the **public to be exposed to the expression of differing views on matters of public concern**,
>
> […]

(2) It is further declared that the **Canadian broadcasting system constitutes a single system** and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority. [my emphasis]

Additional obligations

7. The Commission also has obligations under section 41 of the *Official Languages Act*. The most relevant part here is the following:

41. (1) The Government of Canada is committed to

> (*a*) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
>
> (*b*) fostering the full recognition and use of both English and French in Canadian society.
>
> (2) **Every federal institution has the duty** to ensure that **positive measures are taken for the implementation** of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces. [my emphasis]

8. It should be noted that the Honourable Luc Martineau recently highlighted in a Federal Court decision that the CRTC is one of the federal institutions that falls under subsection 41(2) of the *Official Languages Act*. He further concluded that there are no inconsistencies between the objectives imposed by Parliament under the *Broadcasting Act* and those imposed under the *Official Languages Act*.[1]

9. Finally, because this proceeding involved re-examining the LPIF, for purposes of predictability, the objectives of the Fund and the initial expectations regarding the Fund expressed by the Commission must also be considered. The reader may wish to consult the complete original text on the matter.[2] I would now like to draw attention to two excerpts that are fundamental to the decision, namely paragraphs 359, 380 and 381.

Overall objectives of the LPIF (paragraph 359)

> 359. The overall objectives of the LPIF are the following:
>
> - to ensure that viewers in smaller Canadian markets continue to receive a diversity of local programming – particularly local news programming;
> - to improve the quality and diversity of local programming broadcast in these markets; and
> - to ensure that viewers in French-language markets are not disadvantaged by the smaller size of those markets.

Evaluation of the LPIF (paragraphs 380 and 381)

> 380. In addition to requiring the submission of annual reports, the Commission will conduct, through a public process, a comprehensive review of the LPIF following its third year of operation. This public process will seek additional

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[1] *Commissioner of Official Languages and Amellal v. CBC/Radio-Canada*. See in particular paragraphs 56 to 58.

[2] See paragraphs 355 to 384 of *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008.

evidence in order to determine whether the fund is fulfilling its objectives. The quantifiable criteria to be used in this assessment could include the following:

- the number of original local news stories broadcast during the three years prior to the implementation of the LPIF and the number of original stories broadcast in each year of the fund's operation;
- evidence of increased audiences to local news and other local programming, including comparisons with audience data from before the implementation of the LPIF;
- evidence of increased resources allocated to local newsgathering;
- evidence of the increased diversity of local programming offered; and
- other quantifiable evidence of audience satisfaction, such as public opinion polling.

381. Following this comprehensive evaluation, which will also take into account the status and impact of the transition by broadcasters from analog to digital transmission, the Commission will determine whether the LPIF should be maintained as originally defined, modified or discontinued.

10. From these different provisions stem the guiding principles that must direct and inspire the Commission in this decision. The Commission must consider the broadcasting system as a whole from which the various parts cannot be disassociated one from another, but which must rather be combined in such a way as to ensure that **the whole provides a variety of programming for all audiences**, not simply programming that will please a particular majority. This programming must serve to safeguard, enrich and strengthen Canada's cultural, political, social and economic structure through the creation and broadcast of its content. To achieve these objectives, the programming **offered** must originate from a variety of sources in terms of both time and space.

The analysis made by the Commission to conclude that the LPIF should be discontinued

11. To reach a decision consistent with its powers and obligations, the Commission must analyze the evidence before it and draw conclusions in line with the principles described above.

12. Before those principles are even applied, however, the analysis of the evidence made by the majority decision in the section entitled "Position of parties" is deficient in two ways in my opinion: first, it is incomplete, and second, the weight assigned to various interventions does not comply with the guiding principles of the Act.

Detailed analysis of the evidence

13. The analysis of the evidence set out in the majority decision highlights the positions of the following parties:[3] vertically integrated undertakings (4 interveners), independent BDUs and their representatives (8 interveners), small broadcasters and their representatives that support the LPIF (19 interveners, including some that did not benefit from the LPIF at the time of the hearing), the CBC, the production sector (20 interveners) and various community associations representing OLMCs[4] (13 interveners), for a total of 65 interveners.

14. This analysis of some 65 interventions is incomplete for three reasons: first, of the interveners considered, some were represented in an incomplete manner; second, only 65 interventions out of a total of 1,352[5] filed with the Commission were retained for the purposes of the Commission's analysis, i.e. barely 4.8% of the total received; and third, entire categories of interveners were simply excluded from the analysis. I will attempt to complete the picture with what follows.

15. The interveners retained in the majority analysis said a great deal more than that which was described and this "more" is relevant to the issue at hand. A case in point, while small independent broadcasters supported the LPIF, some that currently benefit from the Fund asked that the CBC no longer be eligible, thereby adding their voices to those of Shaw, Rogers and QMI. The same goes for almost all independent BDUs, but this is not noted in the majority decision. Furthermore, some independent broadcasters that currently benefit from the Fund chose to remain neutral on this issue. The majority decision fails to specify which independent broadcasters are not currently eligible for the Fund and why they are seeking to become so.

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[3] To calculate these totals, all interventions filed in the public record were individually analyzed and categorized by the author of this opinion. It is possible that this analysis and categorization would be slightly different had they been performed by someone else. However let me assure the reader that the analysis and categorization were performed with the greatest concern for rigor and objectivity. In addition, out of respect for the majority decision, the totals presented in the paragraph of this opinion in which this note is found are as inclusive as possible, taking the chosen categorization into account.

[4] The last sentence of paragraph 13 of the majority decision states that "the Fédération des communautés francophones et acadienne du Canada and other community associations submitted that OLMCs should continue to receive pertinent local programming in their language." In my calculations of the number of interveners that could be considered OLMC community associations, I used both those representing French-language minority communities (12) and those representing English-language minority communities (3). English-language minority communities do not currently benefit from the LPIF, but due to broadcasters located in Montréal, they nonetheless receive local programming in their own language. The interventions filed by ELAN (intervention #1309) and the Quebec English Production Committee (intervention #1270) were assigned to OLMC representative groups and not the production industry, due to the significant OLMC-related statements contained in their interventions.

[5] The Commission announced on its website that it had received 1,335 interventions as part of this proceeding. However, in my review of these interventions, I counted 1,352, as stated in this opinion.

16. Among the 1,287 interventions (95.2% of the total) not considered in the analysis of the positions of parties in the majority decision are interventions by individuals (972 interventions), municipal, provincial and federal elected representatives (46 interventions), university and college community members (13 interventions), radio station operators (4 interventions) and a variety of interveners (250 interventions) linked in some way to the business or cultural community, including SMEs, chambers of commerce, retail businesses, local cultural organizations, daily newspapers, charity organizations and foundations, tourist organizations, employee unions, regional economic development commissions, sports groups and communication and marketing businesses. Also omitted from the majority decision were interventions filed by two expert interveners that are well known to the Commission: the Commissioner of Official Languages and PIAC.

17. The interventions filed by individuals came from people from all walks of life. A quick and non-exhaustive survey includes, in no particular order, farm operators, retirees, salaried employees, teachers at all levels (including French as a second language and French immersion), college and secondary students, self-employed workers, stay-at-home parents, lawyers, nurses, retired firefighters, financial advisers, doctors, amateur athletes and emergency service workers.

18. Of the interventions filed by four radio stations, three were in support of the Fund and CHCH-TV,[6] and the fourth came from a radio operator that also supported the Fund but made no reference to CHCH-TV.[7]

19. Of the 1,352[8] interventions filed and accepted by the Commission, 1,275 were letters[9] and 77 were briefs,[10] and they came from all provinces and territories except one.[11]

20. Simply counting interventions and dividing them into intervener categories and types of documents is not sufficient to fully understand the issue. We need to take a closer look at how the interventions differ from one another on certain points that would normally influence a decision in light of the objectives of the Act, including the linguistic identity of interveners, whether or not interventions come from OLMCs, the position of interveners with regard to the LPIF rate, the CBC's eligibility for the Fund and whether or not the intervener supports maintaining the Fund.

21. Some preliminary clarification is required with regard to interventions filed by individuals and interveners linked with the business world. Channel Zero, owner of Hamilton television station CHCH-TV, is the all-around leader in terms of support

[6] Interventions filed by Durham Radio (intervention #1307), Astral Radio (intervention #1288), CJ Radio (intervention #7).
[7] Intervention filed by Newcap (intervention #5).
[8] The 1,352 interventions taken into account in this analysis are separate, including those supporting CHCH. There was a form letter for a certain number of interventions in support of RNC, but they were all filed individually by each intervener.
[9] Submissions made by e-mail through the Commission's website are considered letters for the purposes of this calculation.
[10] I have arbitrarily defined a brief as any document more than two pages long.
[11] In my review of the interventions, I did not find any from Nunavut (allowing for error).

received in this proceeding. A total of 689 interventions were filed by individuals (672 interventions) and SMEs (17 interventions) in support of CHCH-TV, none of which explicitly stated a position on the relevance of the LPIF. I think that the simple fact that these interventions were filed in support of CHCH can be considered as support for the Fund. However, I will refrain from combining this implicit support with explicit support or opposition. I have made this clarification to emphasize the contribution of these interventions, not to disqualify them. It is important to be aware of the scope of the action that CHCH-TV incited to be able to objectively consider the weight to be given to the interventions received.

22. Given that the issue of support for keeping the Fund in place is central, it will be dealt with as part of each of the following analysis sections before being dealt with on its own at the end.

23. There were also 32 interventions that did not deal with the issues discussed in the proceeding clearly enough to be able to be categorized in this detailed analysis. Though these 32 interventions were not counted in the following analysis, which considers 1,320 categorized interventions, I did consider the general comments contained therein in my thought process that led to this opinion.

Linguistic identity of interveners

24. Of the interventions received, 1,004 were filed in English, 312 in French and 4 in both languages.[12]

25. Of the 1,004 interventions filed in English, 276 interveners wanted the Fund to be kept in place, 26 wanted it to be discontinued, 689 supported CHCH-TV without stating an opinion on the continuation of the Fund, 4 did the same for CHEK-TV in Victoria and 9 did not state any explicit opinion.

26. As for those interventions filed in French, 308 interveners wanted the LPIF to be kept in place, one intervener wanted it to be discontinued,[13] two supported CHCH without stating an explicit opinion on the Fund and one did not state an explicit opinion at all.

27. All interveners that filed interventions in both official languages supported the continuation of the LPIF.

[12] The bilingual interventions were filed by the Commissioner of Official Languages (intervention #1220), the CBC (intervention #1323), On Screen Manitoba (intervention #1340) and Tyrone Benskin, Member of Parliament in the Jeanne-Le Ber riding (intervention #1359).

[13] This intervention was filed by a vertically integrated company, i.e. Quebecor Media Inc. (intervention #1312). Cogeco Cable filed an intervention in English and this intervention is therefore considered in this section as an English-language intervention despite Cogeco's significant presence in both Quebec and Ontario. Note that Cogeco Cable shares the opinion of Quebecor Media Inc. regarding the discontinuation of the LPIF.

Origin of interventions and the OLMCs

28. Of the interventions received, 4 were filed by individuals or organizations from English-language OLMCs and 78 from French-language OLMCs. **All of these interventions, without exception, support the continuation of the LPIF.**

29. Moreover, three of the four interventions made in both languages called for the continuation of the LPIF to support local programming within OLMCs, namely the Commissioner of Official Languages, On Screen Manitoba and the CBC. The fourth intervener did not express a particular opinion on the subject. In addition, four interveners not from OLMCs made a specific comment to emphasize the importance they placed on LPIF support for OLMCs.

Position of parties on the LPIF rate

30. Few interveners dealt directly with the "tariff" component of the LPIF. It was initially set at 1% of BDU gross revenues[14] and was increased to 1.5% in 2009.[15] But what did the interveners think?

31. Of the interventions received, 27 asked that the Fund be discontinued. Some discussed a method to phase it out and others took an alternative position, such as maintaining the Fund with a lower tariff and more restricted eligibility. In any case, I think we can reasonably conclude that all of these 27 interveners would like a rate of 0%.

32. Another 29 interveners expressed explicit support for the LPIF rate and continuation of the Fund. Of these, 28 were in favour of keeping the Fund in place with the same objectives; the 29th was in favour of maintaining the Fund with adjustments to the eligibility rules. Of the 29 interveners, 2 proposed that the rate be increased to 2.5%,[16] 25 proposed that it be maintained at 1.5%, one stated that he would pay to keep CHCH, but did not state how much and the last, an individual, stated that an increase in his monthly payment to BDUs of $1, $2 or $3 would be acceptable in exchange for quality local programming.

33. Overall, 1,294 interveners, or over 95%, did not deem it necessary to give an opinion on the matter. However, one of these interveners must be mentioned, because to simply count it among those who did not explicitly take a position on the LPIF rate does not do it justice. This intervener is the Public Interest Advocacy Center (PIAC).[17]

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[14] See paragraph 355 of *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008.
[15] See paragraph 25 of *Policy determinations resulting from the 27 April 2009 public hearing*, Broadcasting Regulatory Policy CRTC 2009-406, 6 July 2009.
[16] See the interventions filed by the Fédération nationale des communications (intervention #1330) and the Bloc Québecois (intervention #1378).
[17] See intervention #1315.

34. PIAC's intervention is particularly interesting because the organization has never been shy to bring consumer interests to the forefront, and in this case, it did not propose a specific rate. In the context of this hearing, PIAC emphasized the importance of local programming and the Fund to the achievement of the Act's objectives, as well as consumer interest in local programming.

35. At the hearing, the organization stated the following:

> *Turning now to the fund's performance, it appears based on the public record of this proceeding, the fund is achieving its overall objectives, namely, to ensure that viewers in smaller Canadian markets continue to receive a diversity of local programming, particularly local news programming, and to improve the quality and diversity of local programming broadcast in these markets; and to ensure that viewers in French language markets are not disadvantaged by the smaller size of those markets.*[18]
>
> ***It is our view that these objectives are supported by most consumers and that local programming is considered an important component of television service.***[19] [my emphasis]

36. PIAC did, however, take the opportunity to protest the way in which several BDUs had directly billed their clients for the contribution to the Fund, contrary to the Commission's conclusions and expectations in 2008. PIAC also noted that the Fund should not be used solely to maintain the status quo for local programming, but rather to improve it, and that the Commission should implement the mechanisms necessary to verify that this was the case.

37. In its final analysis, PIAC concluded that the Fund serves the objectives of the Act, but asked that the Commission ensure that its funding come from the profit margins of BDUs rather than be billed directly to clients.

38. In my view, what the evidence on the LPIF rate says is simple. For those who support the Fund, who wish that it be kept in place and who support and value the local programming offered in their region, as well as for those who do not have an opinion on the relevance of the LPIF, the rate issue is not of interest. However, as PIAC pointed out, the fact that several BDUs have passed the bill on directly to the consumer, contrary to the expectations expressed by the Commission in 2008, is irritating at the very least, in particular since, according to PIAC, the financial and organizational situation of these BDUs justified the Commission's expectations to the contrary.

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[18] Transcript of proceeding relating to *Review of the Local Programming Improvement Fund,* Broadcasting Notices of Consultation CRTC 2011-788, 2011-788-1 and 2011-788-2, volume 5 - Public hearing held in Gatineau, Quebec - 20 April 2012, paragraph 9726.

[19] Ibid., paragraph 9727.

CBC eligibility for the LPIF

39. Excluding the CBC, which obviously was itself arguing to maintain its eligibility for the Fund, I note that 154 interveners stated explicit opinions on the issue. Of these interveners, 16 asked that the Fund, if it were continued, no longer be available to the CBC, while 138 interveners asked that the CBC continue to be eligible for the Fund.

40. Those who wish to deny the CBC access to the Fund are very different from those who wish to allow it access.

41. The opponents are mainly English-language interveners (14 out of 16) and companies, BDUs and broadcasters (11 out of 16), rather than individuals or their representatives (5 out of 16). None of the opponents are from or associated with an OLMC.

42. Those supporting the CBC's LPIF eligibility are mostly French-language interveners (111 French-language interveners, 25 English-language interveners and 2 bilingual) and are made up of a wider variety of interveners than the opponents. These interveners are linked in one way or another to the world of business or to the cultural community, community associations and regional development; they include production industry representatives, individuals, elected representatives, college and university community members, one vertically integrated companies (i.e. BCE), and not surprisingly, the Commissioner of Official Languages. In addition, 41 interveners (37 French-language, 3 English-language and one bilingual) of the 138 who supported the CBC's LPIF eligibility come from or support OLMCs.

43. In conclusion, for both English- and French-language interveners, there are more supporters than opponents of the CBC's LPIF eligibility (25 for and 16 against on the English-language side and 111 for and 14 against on the French-language side).

Whether or not to maintain the LPIF

44. Finally, what is the general profile of the interveners who prefer to eliminate the Fund and of those who wish to maintain it?

45. The 27 interveners who wish to see the LPIF discontinued are, with one exception, English-language interveners;[20] they represent all the BDUs that intervened except one, as well as three out of the four vertically integrated entities, and include 15 individuals (55%) and one business representative not related to the broadcasting sector. None are OLMC representatives, elected officials or academics.

46. Of the 586 interveners who explicitly requested that the LPIF be continued, 30% are English-language interveners and 70% are French-language.[21] Further, these interveners comprise individuals (42%), as well as a diverse range of representatives

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[20] See footnote 12.

[21] Bilingual interventions were divided equally among both official languages for calculation purposes.

from the business and cultural communities. All elected officials and all provincial and federal representatives of government institutions who filed interventions did so in support of the LPIF, as did representatives of the academic and production sectors and broadcasting employee unions. Broadcasters currently benefiting from the Fund, including the CBC, were in favour of continuing it, except for three that are, incidentally, components of vertically integrated companies. Independent and community broadcasters that are not currently benefiting from the LPIF were also in favour of its continuation, but proposed different eligibility conditions. BCE, which is also a recipient of the Fund as a vertically integrated company, was the only BDU who intervened in favour of maintaining the LPIF. Finally, all OLMC representatives who intervened did so in support of maintaining the Fund.

General conclusion regarding the analysis of the interventions

47. Support can be found for every possible position in the evidence since they are all represented. However, as a regulatory agency, we do not have the flexibility to make a restrictive selection. We must identify trends and retain the most important ones that have the effect, in a given context and under given circumstances, of achieving in the best manner possible the objectives of the broadcasting policy for Canada. To do so, the thought processes required to weigh the evidence and lead to a decision are key.

Weighing the evidence

48. In my opinion, we must first carefully consider certain statements made by Issalys and Lemieux in their study on government action.[22] They provide a caution that I consider relevant to the decision-making process of a regulatory body such as the CRTC.

49. They argue that the need to include experts in the makeup of regulatory organizations has its advantages and disadvantages. The authors claim that “[TRANSLATION] difficulties arise however to the extent that these experts come from the very sectors of activity that require supervision,”[23] which carries a risk of bias. According to the authors, “[TRANSLATION] there is in fact a persistent risk that the regulatory body becomes completely imbued with the values, mentalities, interests and perspectives of **the sector it is responsible for supervising on the basis of the public interest** [my emphasis].”[24]

50. What is of interest to me in this excerpt is not so much the concept of the organization’s makeup but rather the conclusion the authors draw from this concept, namely the risk of the organization’s being wholly “[TRANSLATION] imbued with the values, mentalities and interests of the sector”[25] which we are responsible for supervising in the public interest. As a holder of a public duty within a regulatory

[22] Pierre Issalys and Denis Lemieux. *L’action gouvernementale : Précis de droit des institutions administratives* (Cowansville: Yvon Blais), 3rd ed., 1566 pp.
[23] Ibid., p. 457.
[24] Ibid.
[25] Ibid.

agency and coming from the very sector I am charged with supervising, **I read this conclusion as a reminder of my duty to the public interest and a caution against the temptation to quickly conclude that the public interest is necessarily directly served by the interest of the sector**. Not that those interests necessarily differ, in which case the mandate of supervising the sector would be simply impossible. However, the interest of the sector, while forming a part of the public interest, is not its only component. Thus, **the weighing of all the interests of the participants in the public process must be established by the regulatory agency and justified in a manner that preserves, protects and ensures the public interest.**

51. Therein lies the reason for the absolute necessity of considering all interests represented and submitted as evidence, which, I respectfully submit, was not done in the majority decision.

52. On the other hand, I do agree that the decision-making process of a regulatory agency is different from that of a court of law or even an administrative tribunal, which is why particular attention must be paid to it. In accordance with the functions it fulfills, the Commission, which is primarily an administrative tribunal, sometimes acts in its capacity as a regulatory agency. This is the case in the present situation, and it is in this context that I fully support the words of authors Issalys and Lemieux:

> [TRANSLATION] Moreover, the decision-making process of regulatory bodies is generally more complex than that of administrative tribunals. It involves economic situations **that bring into play a variety of conflicting interests:** competitors, suppliers, clients, consumers, territorial communities, special-interest or groups or groups of different beliefs (ecological associations, cultural groups, vulnerable group rights groups, unions, professional associations, etc.).[26] [my emphasis]
>
> […]
>
> In this regard, the regulatory agency's situation is very different from that of a tribunal of law or most administrative tribunals. **It is not dependent solely upon the "evidence" adduced before it by the governed.** It can call upon not only the specialized skills of its members, but also on the often substantial human and material resources placed at its disposal for the execution of its regulatory mission.[27] [my emphasis]

53. Our present situation corresponds to the textbook example described by the authors. The documents and evidence at our disposal to make the decision—including the interventions filed, the qualitative reports of broadcasters for 2010 and 2011, the LPIF

[26] Ibid., p. 461.
[27] Ibid., p. 462.

financial statements, the financial statements of some interveners and the final observations and commitments filed by the parties to the hearing—amounted to approximately **4,359 pages**, while the hearing phase of the public proceeding represents **1,647 pages** of transcript.

54. While it is true that we are not dependent merely on the evidence adduced before us by the governed, we cannot disregard it. It must be one of the elements considered. The specialized skills of the members that make up the hearing panel are not in and of themselves sufficient to justify a decision. And yet the summary of all this evidence is detailed in the Commission's majority decision in only 14 paragraphs, which make up a total of three pages. It must be concluded that to be rendered in such an extraordinarily concise manner, the evidence cannot have been properly analyzed.

55. In my opinion, in order to successfully fulfill its mandate, the Commission must first consider the public interest and then reconcile the interest of the regulated sector with the public interest. How could the public interest have been upheld and enhanced in the current context?

- First, by emphatically building on the broadcasting policy for Canada, since it codifies the public interest as it is defined by the legislator;
- Second, by considering the evidence presented;
- Third, by considering how the regulated sector intends to respond to the public's demands and ensure that the public interest is served; and
- Last, by reconciling all these elements.

56. However, the majority decision took into consideration only the third point, without reconciling it with the important aspects of the first two points, which must be the very foundation of all Commission decisions. The positions of the regulated sector, which incidentally were polarized, are the only ones to have been retained in the decision. I reach this conclusion based on the lack of reference to the *Broadcasting Act* in the Commission's analysis and determination, on the very limited observations regarding the interventions—**from which were excluded individuals**, i.e. the public, who individually contributed to the process—and on the gaps in the description of the evidence provided in the majority decision, which I have tried to fill in above.

57. In this case, the interests of the regulated sector were clearly and predictably polarized between those who benefited from the Fund and those who served to provide its contributions. The majority decision chose one of those poles, without regard for the positions expressed by and for those who are not governed by the Act but are its designated beneficiaries, namely men, women and children of all ages, interests and tastes to whom the broadcasting system should provide balanced programming that informs, enlightens and entertains.[28] In light of contradictory

[28] Section 3(1)*(i)*(i)of the *Broadcasting Act*.

evidence, a choice must be made between two positions. **But this was not a contradictory debate. This was a public policy debate at the end of which we were to draw out from the evidence and our specialized knowledge the best possible outcome in the public interest.** The majority decision failed in this task because it took into account only part of the information and evidence with which it was presented. This is all the more incomprehensible as a large part of what was ignored is the very element essential to the fulfillment of our mission: the public interest.

58. The majority decision's conclusions that the LPIF can and must be discontinued are not based on the full evidence, nor on the application of the guiding principles that should direct and govern its thinking. With respect to this last point, the evidence is clear. Indeed, there is no mention anywhere in the majority decision of the effect of this decision on the implementation of the broadcasting policy for Canada, nor of the Commission's obligations under the *Official Languages Act.*

59. The Fund's initial objectives and the means which might have allowed the Fund to achieve them were also not considered. One example in this regard is the absence of any mention or analysis of the large number of interventions filed by individuals. Although section 380 of Broadcasting Public Notice 2008-100 states that the Fund's success will be evaluated on, among other criteria, "quantifiable evidence of audience satisfaction, such as public opinion polling," the majority decision did not take into account any of the 972 interventions filed by individuals, whether in terms of their number or content. This is not an opinion poll, of course, but the polling of opinions was just one possible form of evidence among several. The personal comments provide details that a poll could never provide and constitute, in my opinion, "quantifiable [and I would add qualifiable] evidence of audience satisfaction." The number of local news stories broadcast and how many more were added are also to be taken into account. But there are no references to the qualitative reports filed by broadcasters that benefited from the Fund, nor to the comments made by the broadcasters and unions during the hearing regarding the balance sought between the objective quantity of news stories and their subjective quality.

60. With regard to the gaps in the evaluation of the evidence in the search for a conclusion, I would point out the incongruity of two statements set out in the text of the majority decision.

61. First, in the first sentence of paragraph 15 of the majority decision, "the Commission considers that the [LPIF's] success described above has ultimately been achieved primarily at a cost to Canadians who pay the subscriber fees from which the LPIF is derived." In this context, this statement is used to justify discontinuing the LPIF. However, the opinions of Canadians themselves on the subject and that of one of their representatives, the PIAC, are not provided.

62. Second, and despite the fact that the public record on the subject is quite substantive, the majority decision disposes in paragraph 17 of the programming provided to OLMCs and of the LPIF's effect on that programming by referring everyone to a

subsequent hearing, that of the CBC's licence renewal. In doing so, several errors are made.

63. The first error consists in rejecting, after at least recognizing their existence in paragraph 13, all of the interventions from OLMCs. The second consists in not mentioning or considering the comments of the Commissioner of Official Languages. In this context, I do not see how it is possible to disregard, without even mentioning them, the comments of the federal institution responsible for recognizing and promoting Canada's two official languages.[29]

64. The third error lies in not raising the problem identified by English-language OLMCs. Yet we received three interventions on this topic, in addition to that of the Commissioner of Official Languages. Two groups appeared at the hearing to discuss it, and yet not a single sentence can be found in the majority decision to address it. Whether or not we agree with the positions of the interveners is not the point. The point is that before being able to decide whether or not to agree with the positions presented, we must at least take those positions into consideration.

65. The fourth and last error rests in limiting the debate on the local programming provided to OLMCs solely to the programming of the CBC. While there is no denying the CBC's vital importance in this regard,[30] the fact remains that private conventional broadcasters also actively participate in the provision of local programming for OLMCs. In English-language OLMCs, BCE (CTV, CFCF-DT) and Shaw (Global, CKMI-DT) are indeed present and have responsibilities in this respect because they are required by condition of licence[31] to provide local programming in Montréal. In French-speaking OLMCs, the contributions of Télé Inter-Rives, whose service coverage extends to New Brunswick, need no introduction and are emphasized by the interveners.[32] To ensure the application of the broadcasting policy for Canada and to fulfill our obligations under the *Official Languages Act*, these *de facto* situations must be recognized and encouraged by the Commission rather than be ignored.

Conclusion

66. In light of all of the above, I believe that the majority decision has not taken into account the evidence presented therein, as is its inescapable duty in accordance with the obligations and powers of the Commission, and that the decision was made without regard for the Commission's obligations under the *Official Languages Act* or the objectives of the broadcasting policy for Canada. I therefore cannot bring myself to support it.

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[29] Section 56 of the *Official Languages Act*.
[30] The importance of the CBC in this respect is underscored by the 41 interventions in support of the CBC filed by interveners from OLMCs or that support those OLMCs.
[31] Condition of licence 11 set out in the appendix to *Standard conditions of licence, expectations and encouragements for conventional television stations*, Broadcasting Regulatory Policy CRTC 2011-442, 27 July 2011: "If the licensee operates in a metropolitan television market, the licensee shall broadcast no less than 14 hours of Canadian local programming in each broadcast week."
[32] See, for example, intervention #1244 filed by the Town of Grand Falls, New Brunswick.

Dissenting opinion of Commissioner Louise Poirier

With the greatest respect for the reasoning of the majority of my fellow Commissioners, I must dissent[33] from this decision because I would have maintained the Local Programming Improvement Fund (LPIF) for the next three years while improving it and reducing[34] the broadcasting distribution undertaking (BDU) contribution rate from 1.5% to 1% effective 1 January 2013. A review of the LPIF could have been undertaken in 2016. In my humble opinion, my position is more consistent with the implementation of the objectives of the *Broadcasting Act* (the Act), the evidence before the Commission in this proceeding and the interests of all Canadians.

A reminder of the objectives and steps in the creation of the LPIF

The LPIF was introduced in Broadcasting Public Notice 2008-100 because the Commission recognized that the business case for local conventional television had changed significantly over the past decade with the proliferation of Canadian and non-Canadian viewing choices offered by direct-to-home (DTH) satellite undertakings, digital terrestrial BDUs and other digital media. This situation contributed to the fragmentation of viewing audiences, particularly those in non-metropolitan markets. The three initial objectives of the LPIF can be summed up as follows:

1. to ensure that viewers in smaller Canadian markets (populations of fewer than one million) continue to receive a diversity of local programming, particularly local news programming;

2. to improve the quality and diversity of local programming broadcast in these markets; and

3. to ensure that viewers in French-language markets are not disadvantaged by the smaller size of those markets.

At the time, it was noted that in markets with a population of fewer than one million, local programming spending had declined by 15.6% since 1998, a situation that was even more problematic in French-language markets because of their smaller size. The Commission decided to increase the required BDU contribution rate to Canadian programming from 5% to 6% of gross revenues from broadcasting activities, of which 1% was earmarked for the LPIF. In light of the performance of the BDU sector and the benefits accruing to BDUs as a result of other changes being made to their regulatory

[33] Allow me to emphasize that I appreciate the fact that the majority decision mitigates the negative impact of discontinuing this source of funding for local stations by phasing it out over two years, although I would have preferred a three-year phasing out as suggested by Rogers. The phasing out at least ensures a certain degree of predictability and the maintenance of all existing conditions by amending only one item of the conditions in effect, namely the amount collected from BDUs (reduced to 1% in 2012 and 0.5% in 2013).

[34] The economic data and public record of this proceeding show that the financial situation of conventional stations has improved since the end of the recent economic crisis and that current economic conditions no longer justify the rate increase for the LPIF to 1.5%. In this respect, I agree with the Commission's decision to reduce the BDU contribution rate from 1.5% to 1%.

framework, the Commission expected that BDUs would absorb this increase. However, as evidenced by the public file for this proceeding, many BDUs decided to recover this amount from their subscribers.

Further, as a result of the global economic crisis, the Commission announced in Broadcasting Regulatory Policy 2009-406 that it would be appropriate to increase the BDU LPIF contribution rate from 1% to 1.5% of gross revenues beginning in the 2009-2010 broadcast year, while eliminating the requirement that these amounts be incremental to the local stations' expenses. The Commission also expressed its intention to conduct a complete review of the LPIF after three years of operation and to maintain it in its original form, change it or discontinue it.

Contrary to what was continuously and incorrectly repeated in this proceeding, the LPIF was not established to mitigate the effects of the economic crisis and its impact on local programming in small markets. It was established to respond to the structural changes that had developed over the preceding decade (1998-2008). The original reasons for introducing the LPIF in 2008 remain relevant to this day, as many interveners reminded us. I would like to point out that of the several thousand interventions received, only about 30 opposed the LPIF, and all consumers who appeared at the hearing were in support of it. No evidence was provided to demonstrate that the LPIF was no longer necessary to guarantee that consumers in small markets would have access to local programming and news of equivalent quality to that found in large markets.

The *Broadcasting Act* and the continuation of the LPIF

I believe that discontinuing the LPIF will adversely impact the entire broadcasting system and that the majority decision does not achieve the policy objectives set out in the Act, including in particular the following: section 3(1)(*i*)(ii), which stipulates that the programming provided by the Canadian broadcasting system should be "drawn from local, regional, national and international sources"; sections 3(1)(*d*)(ii) and (iii) of the Act, which refer to the objectives applicable to local programming; and section 3(1)(*e*), which states that "each element of the broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming."

I also believe that it is in the public interest that the Canadian broadcasting system consist of healthy local stations that have the capability to enrich the diversity of news and editorial points of view. In particular, it is in the public interest that viewers in French-language markets are not disadvantaged by the smaller size of those markets. It also seems that local stations in all the smaller markets do not have the means to invest in local programming. Discontinuing the LPIF could potentially diminish the quantity and quality of local programming of some LPIF-eligible local stations and even lead to some stations being shut down. Consequently, does discontinuing the LPIF not risk in turn undermining the implementation of another Commission objective, namely diversity of voices?

Why maintain the LPIF?

A mere 18 months following its implementation, the LPIF has started to bear fruit, as borne out by the financial data gathered during the hearing. There has been an increase in spending on local programming (SLP). In 2011, aggregate SLP for LPIF-eligible stations showed impressive growth for the first time since 2003. In total, it reached $246M in 2011, thereby recovering almost all of the ground lost since 2007.

While LPIF-eligible stations reported an aggregate negative profit before interest and taxes margin of -18.2% in 2009, this margin finally became positive in 2010 at 2% and then increased to 5.2% in 2011 (including the LPIF). The profitability of these stations has therefore improved.

Far from increasing as suggested by the majority decision of the Commission, revenues from local advertising sales by LPIF-eligible stations remained at $149M in 2011, well below the 2007 revenues of $168M and 2003 revenues of $153M. As for national sales, they continued to decrease (by approximately $87M) between 2003 and 2011. Meanwhile, large-market, non-LPIF-eligible stations experienced record advertising revenues, revenues derived mostly from national advertising.

This financial data leads me to wonder how we can expect LPIF-eligible stations to continue to maintain in the future the same level of LPS when advertising revenues are at best flat and the LPIF funding is not forthcoming. The Commission's decision to abolish the LPIF will most likely result in a greater decline in local programming of small-market stations than was witnessed before 2008. I do not understand why we would want to discontinue a fund that we all agree was a success. We could simply have improved it, and later in this dissenting opinion, I will propose a few avenues that could have been explored.

Linguistic minority communities and the LPIF

Another of my major concerns in light of the discontinuation of LPIF involves official language minority communities (OLMCs), which I believe stand to lose even more. I note that local programming is an essential tool for the development and growth of these communities. Moreover, I note that the Commission has within the limits of its mandate the obligation to implement the commitment to enhance the vitality of OLMCs, support their development and foster the full recognition and use of both English and French in Canadian society. The risk of a decrease in local programming and even the shutting down of some stations that provide local programming in these communities may have a negative impact on them.

According to Statistics Canada data from 2006, the total population with a knowledge of French in OLMCs that are served by the CBC and Télé Inter-Rives is approximately 1,443,890. I note that, as the public record shows, with the exception of New Brunswick where programming is produced by Télé Inter-Rives stations, the CBC is currently the only broadcaster that serves French-language OLMCs. I also note the concern expressed by the Fédération des communautés francophones et acadiennes du Canada regarding the increased dependence of the CBC on the LPIF with respect to investments in local programming. In light of recent cuts, how can we expect the CBC to deal with the loss of revenue from the LPIF and still maintain its production of local news in all its stations located in small markets and, more importantly, in markets serving OLMCs?

In my opinion, the CBC's statement[35] to the effect that if the Commission decided to discontinue the LPIF, the CBC would continue to meet its objectives under the Act "subject to the availability of resources," does not sufficiently guarantee the protection of the availability of programming to OLMCs. Accordingly, I would have clearly maintained the LPIF as I consider it an essential tool for the growth and development of OLMCs. Moreover, the Commissioner of Official Languages was in favour of the LPIF, stating that it contributed to the development of francophone communities outside Quebec. He opposed all changes that would result in eliminating the access of regional CBC stations to the LPIF as they are often the only stations to provide the service to these communities.

Consumer concerns

As the evidence filed in this proceeding would seem to indicate, some BDUs have billed the LPIF contribution directly to consumers instead of absorbing it. I sincerely hope that the Commission's direction in the majority decision[36] that all BDUs report on measures taken or planned to reduce the bills of their subscribers sends them a clear message regarding the need and the importance of following suit. However, I have my doubts, although I hope I'm wrong, as that would only be fair.

Since Canadians will lose a significant portion of their local programming and there is no real guarantee that they will see a decrease in their bills, and given that the profitability level of BDUs will continue to rise,[37] will Canadian consumers and the broadcasting system really come out the winners?

Impact on the local economy

Finally, I note that the LPIF has stimulated the local economy in the markets in question. Many stated that jobs were created, with all the positive economic spinoffs that this brings to a region. Many independent producers based in the regions were able to develop projects that had the great advantage of not only reflecting their communities but also stimulating their local economies. Stations have purchased and installed new equipment, opened new offices and even new stations. Without the LPIF, it is clear that this local economic stimulus would not have had the same scope or indeed may not have occurred at all.

I also think of the journalists, actors, singers, comedians, cameramen, editors and other qualified employees who are necessary both for the production of local news and local

[35] Statement made at the public hearing and contained in paragraph 12 of the Commission's majority decision.
[36] Paragraph 21.
[37] An increase in profitability of 21% between 2008 and 2011.

programs and who will lose their jobs or experience a decrease in income. Given that it is increasingly difficult to counter migration to urban centres, such cuts will have a negative effect on the local economy.

Improving the Fund instead of discontinuing it

In the context of this proceeding, the Commission had broad flexibility to change the eligibility requirements for the LPIF. Because I advocate the approach that there is always room for improvement, I have listed below some ideas, among others, that deserved to be studied for the sole purpose of improving the LPIF.

By reducing the BDU contribution rate from 1.5% to 1%, it would have been possible to review the LPIF allocation model. Several groups made suggestions to change this model. Such a review would have allowed us to better define the LPIF.

1. In support of Bell's argument that LPIF eligibility for vertically integrated companies should depend on the characteristics of a community and not those of the broadcaster that serves it, I think it would have been appropriate to establish some rules that would have fostered greater equity. Would it have been a good idea to set a cap based on the consumer price index for certain markets or ownership groups? Would we have had to exempt other BDUs?

2. In support of the Commissioner of Official Languages and numerous interveners in this proceeding, would it not have been better to agree to make certain English-language conventional television undertakings in Quebec eligible by redefining the concept of metropolitan market? This would have allowed English-language OLMCs in Quebec to benefit from local programming that reflects their community. Indeed, although the English-language OLMCs can readily have access to English-language programming, this programming does not necessarily reflect their own community.

3. To achieve the basic objectives of the LPIF with reduced funding, would it have been desirable to eliminate the eligibility of certain types of production? Would it have been a good idea to include a requirement to broadcast local productions on the Web or to foster the creation of Internet applications to encourage the shift to new platforms?

4. Should we have included other types of broadcasters which, while not producing local news as defined by the CRTC, contribute in other ways to the reflection of local communities?

5. Finally, in addition to eliminating certain criteria for gauging success,[38] should we not have added others, including that established by the majority of the Commission to publish each year the amounts allocated to stations funded by the LPIF? Transparency clearly emerged in this proceeding as an essential criterion.

[38] Paragraph 377 of Public Notice 2008-100.

Conclusion

Since this hearing enabled us to bring to the fore on an industry-wide basis the fact that the business model for traditional television is still precarious and that it will remain so in the short and medium term, I would have advocated maintaining the LPIF with a decrease in contributions from 1.5% to 1% effective 1 January 2013.

I would have also made significant changes, including changes to better target recipients and to ensure that the funds be directed to local programming and that more transparency be required from recipient stations. These improvements would have enabled all Canadians, regardless of where they live and the stations that serve them, and in particular OLMCs, to receive adequate local programming. This approach could have been reviewed after three years.

Lastly, I strongly hope that consumers will be the big winners, that is to say that the level of local programming will not decline either in quality or quantity and that they see a real decrease in their bills from BDUs. However, I doubt this will be the case.

I remain concerned because the evidence submitted in this proceeding has no direct link with the majority decision to discontinue the LPIF.

Concurring opinion of Commissioner Michel Morin

Introduction

Since the Local Programming Improvement Fund (LPIF, or the Fund) was created three years ago, over 11.3 million Canadian cable and satellite subscribers have paid, directly or indirectly, more than $300 million to 80 local television stations in Canada. Although the nature of the Fund was and still is a world first for private broadcasting undertakings, no national print company–all media combined–has, to my knowledge, considered it worthy of reporting on. Are we to believe that over $300 million in contributions by Canadian consumers and their distributors flew under the radar, and that the benefits of real on-air content were not clear to anyone? Unfortunately, I believe that such is the case, and is no less what I predicted in my dissenting opinion concerning the creation of the fund by the CRTC in 2008.

Like it or not, close to 36 months after the Fund's implementation and without any of the specific criteria I proposed in 2008, no one can say today with certainty that this generous $300 million envelope has significantly increased the overall production of local news in these 80 markets (50 English-language and 30 French-language) with populations of less than one million, across Canada.

Failing a possible healthy change in direction, which I unsuccessfully attempted to propose during the April hearings (that is, greater accountability for producing what the Fund was intended to produce, primarily local news), I am solidly behind the Commission's majority decision to abolish the LPIF. In my opinion, the least one can ask of a regulator is to ensure that the contributions that consumers and distributors are required to pay are actually directed to the specific purposes for which they are intended, that is to say, in this instance, that the monies be primarily allocated to the production of local news in markets with a population of less than one million.

However, during the week of hearings held in April, very few people, if any, seemed prepared to require or to themselves propose a condition as essential and fundamental as a minimum level of local news to be produced in each of these markets. I faced a veritable gauntlet, questioning many broadcasters, independent broadcasters in particular. I thought it was important to get back on track and remedy the situation by proposing greater accountability for the content being broadcast. Only a minimum level of "local" news or "local segments" to be produced for cultural, sporting, scientific, economic or political events, imposed as a condition of eligibility for the LPIF, could have, in my opinion, justified continuing Fund activities.

In my opinion, when the Fund was launched in 2009, the Commission should have better targeted its approach, given the deficiencies of the generic term "local programming," which can include just about anything, as I will show below. In other words, the Commission should have ensured at the outset that the LPIF envelopes would be primarily, and indeed exclusively, earmarked for the production of Category 1 local news, to use CRTC terminology.

The Commission imposed regulatory fees in 2008, and today is congratulating itself for its actions, while refraining from assessing whether this content is now more local than it was three years ago. This can hardly be called accountability. Both the Commission and the dissidents to this decision are completely in the dark. Hundreds of millions of dollars have been spent (that is certain!) without being able to measure with relative accuracy over a three-year period, the true scope of the Fund in terms of local coverage, particularly for privately owned broadcasting undertakings. Everything happened as if, on stage right, we were talking “local programming,” while, on stage left, we were uncertain with respect to “truly local content” of local programming.

However, to understand what led the Commission to make such a decision, I would be remiss if I did not address, in more detail, the circumstances that contributed to the Fund’s implementation and the conditions that could have been proposed if the Commission found it necessary to turn to the *Broadcasting Act* (the Act) in order to improve local programming. Lastly, I will repeat the arguments I raised in 2008 concerning the role and mandate of the Canadian Broadcasting Corporation. I believe that the public broadcaster deserves better than one-time funding that was at risk from the moment it was created.

A Fund launched in haste

First, it should be noted that this Fund, referred to as the local programming fund, was created without any public notice of its possible creation and thus with no real evidence of local programming needs placed on the public file.

I won’t divulge the amounts discussed at the Commission, but they would be quite revealing. In the end, the Fund was announced with a $60 million envelope (based on a contribution of 1% of broadcasting distribution undertakings’ (BDUs) gross revenues) to more than $100 million (that is, 1.5% of the average customer’s bill.) All this within one year! If the Commission had had more assurance as to the target objectives sought, it would not have hesitated to open an actual public file, rather than rushing the disorganized creation of the Fund based on otherwise laudable objectives.

I believe that this clearly shows that the Commission had obvious difficulties establishing the scope of the problems in question, both in markets with populations of less than one million and in regions identified as linguistic minority communities, such as French-language communities outside Quebec. The very purpose of increasing local programming by establishing an “incremental expenditures” criterion–which dominated the announcement of the Fund’s creation in 2008–was completely abandoned a few months later, whereas the Commission increased the regulatory envelope from $60 million to $100 million. Below is a list of the Commission’s actions on this matter since 2008:

- Broadcasting Public Notice 2008-100 introduced the LPIF.

- Broadcasting Notices of Consultation 2009-70 and 2009-70-1 questioned the appropriateness of revising the LPIF formula, given the severity of the economic downturn.

- Broadcasting Notice of Consultation 2009-113-1 invited comments on the CAB's proposed allocation formula (which resulted in Broadcasting Regulatory Policy 2009-406).

- Broadcasting Notice of Consultation 2009-176 invited comments on the proposed revisions to the *Broadcasting Distribution Regulations* that would govern LPIF contributions.

- Broadcasting Notice of Consultation 2009-411 invited comments on the appropriateness of reverting to the original LPIF criteria set out in Broadcasting Public Notice 2008-100 after one broadcast year (a topic revisited in Broadcasting Regulatory Policy 2010-167).

It should be remembered that with the expansion of specialty services systematically licensed by the CRTC, the inevitable happened. In 2008, local stations had already been experiencing a drop in national advertising revenues for three years. In other words, well before the problems of 2008 and especially the more economic challenges of 2009, there is no doubt that the CRTC was perfectly aware that over-the-air (OTA) television was no longer, nor had been for several years, the golden egg laying goose that was profitable during previous decades. The problem was structural before it was cyclical. Specialty services had simply taken over. The Commission was also well aware of the inevitable change in business models, but nevertheless opted, without notice and aided by market turmoil, to take strong action in favour of OTA stations in small markets on the simple pretext that the distribution sector was in better financial health than the production sector. To sum up, this was the first set of circumstances behind the Commission's actions in 2008.

A second set of circumstances in 2008 led the Commission to create the LPIF. This time, a leading Canadian OTA network, the TQS network from Quebec, declared bankruptcy and sought protection from its creditors under the *Companies' Creditors Arrangement Act*. Its shareholders had shown remarkable patience. After more than 20 years of almost uninterrupted losses of over $200 million, they finally decided to sell to new shareholders who were seen by many as being quite reckless and who, having acquired five regional stations in the Quebec market for less than $10 million, had decided to do without an OTA news service, with all of the staff and equipment required. It had become impossible for the new shareholders to maintain a news budget similar to the budgets of other Canadian stations while ensuring the company's lasting recovery. At the public hearings regarding the change of effective control of TQS inc., which lead to Broadcasting Decision 2008-129, Québec Mayor Régis Labeaume expressed outrage and told the Commission pointedly that without a real newsroom, he did not want this third OTA station in the Québec market. Even though the message was very clear, the Commission, contrary to policies followed to that point, created an exception unprecedented within the Canadian system, and in my view concurrently came up with the idea of supporting private broadcasters in their production of local news.

With contributions from consumers and their BDUs, the Commission decided on a new local programming support regime, essentially comprised of local news, even though the owners of TQS stations, which became V Interactions, had no interest because of the business models they wanted to implement for the company's recovery. This example alone should have elicited extreme prudence from the Commission in creating the LPIF.

There is a third backdrop to the Commission's decision: even outside Quebec, in three other Canadian provinces, the Chair felt that the traditional model was doomed. Furthermore, the creation of the LPIF in September 2009 did not prevent the closure of CTVglobemedia's Wingham and Wheatley stations in Ontario (CKNX-TV and CHWI-TV, August 2009), CKX-TV in Brandon, Manitoba (October 2009) or CanWest's station in Red Deer, Alberta (CHCA-TV, August 2009). Faced with the spectre of further station closures, the Commission set aside the requirement, initially introduced in 2008, of "additional spending" and increased the distribution system contributions paid to OTA broadcasters from 1% to 1.5%. As for the minimum condition, which, in my view, seemed to consist of ensuring, at the very least, that these subsidies would be used to produce Category 1 local news, this was not even among the Commission's concerns. Suddenly, everything became acceptable under the umbrella of local programming! From the Commission's perspective, the urgency of the situation trumped any other consideration.

Further station closures in English Canada had to be prevented and support had to be given to V Interactions in Quebec, even though its contribution to local programming had already been reduced, owing to its financial uncertainty, to two hours a week of Category 1 news in the large Montréal and Québec markets, and to one hour in the Trois-Rivières, Sherbrooke and Saguenay markets.

With the LPIF, V Interactions was to be propped up artificially, receiving the lion's share of its news budgets for fiscal 2009 and 2010 ($2.1 million and $2.6 million, respectively). V Interactions became profitable because of the LPIF, while at the same time producing the lowest levels of local content ever seen in the Canadian broadcasting system.

In short, local programming remained an OTA matter; despite subsidies of often over $1 million per station, everything depended on the broadcaster's willingness. This was made clear at the hearings in April 2012 when one broadcaster, to demonstrate the benefits of the LPIF, cited a concrete example of improvements to its local programming: the scaling of Mount Kilimanjaro in the heart of Africa by a citizen with a team from Rivière-du-Loup dispatched to the site. How many stations in markets with populations over one million would have made such a decision? With LPIF money, anything was now possible: it was local programming! Without a clearer definition, local programming could comprise international, federal or provincial news produced by networks, even if this news, by its very nature, was foreign news with truly local coverage. In other words, despite the distribution of $100 million annually to support local programming, the

Commission did not ensure that there was a minimum local content for newscasts, as incredible as that may seem.

It is always easy for some *to evoke the* Act *in general terms* to justify such an intrusive intervention *by the CRTC.* The Act may be blamed, but we are all non-*elected commissioners.* If the general legislation *provides direction*, it remains vague and unclear on bills *being* passed on to cable and satellite subscribers. But this “Canadian” bill, *unlike* that used in the U.S. subscriber system, is already non-transparent for *the* 11.3 million subscribers, who are unaware, for example, that they already contribute an average of up to 6.5*% of their bill for* Canadian content (LPIF, Community Television, Canada *M*edia Fund, private broadcasters’ fund*),* to which we must add GST in all provinces, not to mention provincial sales tax in Quebec of 9.5%*!* I have already issued a dissenting opinion on this lack of transparency *with regard to the bills of Canadian* subscribers. The creation of the *LPIF* has only exacerbated and *further highlighted this problem* that I describe as being fundamental for any Commission that would further the interests of consumers. How can consumers complain if they do not know what the system costs them?

Overall, this is not an easy task: we are talking about a bill for nearly half a billion dollars per year, courtesy of the CRTC, or the equivalent of about half of the budget earmarked to the CBC/SRC. And I repeat: all of this implemented by non-elected individuals! Some of my dissenting colleagues would like to further increase subscriber bills for the benefit of a public broadcaster, which already accounts for 40% of the LPIF, in addition to already receiving a budgetary allocation of $1 billion, without even ensuring, through the implementation of specific measures, that the Commission’s 2008 objective to increase Category 1 local news is truly met in all eligible markets.

In other words, merely evoking the Act does not excuse the regulator from doing its job and establishing parameters for its actions. How can we talk about thoroughness today if, owing to a lack of historical data, we do not know, for example, whether integrated companies like Rogers, Shaw, Quebecor or Bell produce more “local news,” more “local segments” today in small markets than they did three years ago?

And, if that were not enough, the implementation of the LPIF regime was disorganized. Some distribution undertakings, such as Rogers, Quebecor and Bell, officially passed the cost on to their customers, showing regulatory fees of 1.5% on customer bills. Others, like Manitoba’s MTS Inc., absorbed the fee, as was the Commission’s hope, without officially informing customers. As a result, for the first time in the Canadian broadcasting system, cable and satellite customers in similar markets were not treated equally after the introduction of a CRTC regulatory measure.

Furthermore, all of the interveners, and the public in general, will have been forced to wait almost three years to find out how much money was paid, station by station, to a minority of broadcasters, meaning the specific amounts for 26 stations owned by Quebecor, Rogers and CBC/SRC. For the 54 other stations, we will never know how the other $58 million, out of a total of $106 million per year, was distributed station by station. As for data by company, we know the overall amounts for Bell, the CBC/SRC, Quebecor, V Interactions, Rogers and Shaw, but one-quarter of the Fund ($23 million) is still completely unknown to the public, without really knowing from the public record how much Corus, Astral, Télé Inter-Rives, Pattison, Channel 0, CHEK-TV, Newcap, NL Broadcasting, TB Electronics and RNC MÉDIA received. In every case, the amounts were over $1 million. Never in the history of support for Canada's broadcasting industry has the implementation of a fund lacked such transparency. At my request, my questions to the Commission concerning this lack of transparency were included in the record.

It was in this climate that in 2008 I issued my sixth dissenting opinion with respect to the Commission's policies. In my opinion, given all the elements of the issue, it should have been an absolute precondition that funding coming from customer bills or from distributor revenues should have been directed to Category 1 news. However, this was not the case. For the first time, the Commission introduced a programming support regime without ensuring that it would, without a doubt, serve the purposes for which it was first intended, i.e., the production of local programming comprising primarily Category 1 local news. To my knowledge, never before had a fund been created without any specific conditions other than those to which the programming undertakings were already committed under conditions of licence. Far be it for me to criticize the industry. We set the rules. Since 2009, broadcasters have benefited from this unexpected fund. Why would they complain about it? They were given unconditional (i.e., on a silver platter) $100 million a year. Two Commissioners, Peter Menzies from Alberta and I, provided dissenting opinions.

Only a minimum level of local news to be produced could have justified continuing these subsidies to local television stations

Just over a month before the April 2012 hearings, CRTC staff, at the Commission's request, distributed a questionnaire to all of the 80 stations eligible for the LPIF, and to six ineligible stations in markets with populations over one million. For the first time in the CRTC's 44-year history, broadcasters were asked if their local programming still included local news! Until very recently, the Commission had always assumed that local programming was comprised primarily of local news. Nothing, however, could have been further from the truth.

Below is the table that was sent to each of the 80 local television stations.

Category 1 local news, known as "local segments," is highlighted in the table below. For example, in the Montréal market, a segment on the construction of an STM (Société des Transports de Montréal) centre or one regarding the Cosmodome are clearly "local segments" as opposed to segments on the Shafia trial in Kingston or on the federal NDP's position on the gun registry.

For this newscast, a total 5 minutes 42 seconds of "local segments," thus, of "local news" was calculated, out of a total newscast length of 23 minutes 55 seconds.

6:00 p.m. local news (rebroadcast) 29 November 2011

Section	Start of segment	Title of story or segment	Origin of segment	Length of segment
	00:00	Introduction		01:20
Headlines	01:20	Shafia trial	National	00:36
	01:56	Accident	Montréal	00:18
	02:14	Auditor’s report – Daycare centres	Provincial	00:18
	02:32	CAQ	Provincial	00:44
National news	03:16	Federal politics - Durban and Kyoto	National	02:03
	05:19	NDP gun registry	National	00:53
Vox Populi	06:12	Facebook question	National	01:26
Arts and shows	07:38	Rock et Belles oreilles	National	01:55
Sports	09:33	Canadiens - Pacioretty	National	00:15
	09:48	Hockey - Muller	International	00:12
	10:00	Hockey - Boudreau	International	00:15
	10:15	Hockey - Crosby	International	00:14
Weather	10:29	Weather	National	01:07
Misc.	11:36	Amusing news	International	00:26
Advertising	12:02			02:58
Misc.	15:00	Number of the day		00:28
Local news	15:28	Fight	Montréal	00:20
	15:48	STM centre construction	Montréal	00:16
	16:04	Switching on the Xmas lights at city hall	Montréal	00:16
	16:20	Laval Cosmodome	Montréal	00:21

In the regions	16:41	Hospital investment	Provincial	00:46
	17:27	Debt fund	Provincial	00:25
	17:52	Nancy Landry	Provincial	00:18
Report	18:10	Griffintown	Montréal	02:18
International	20:28	Durban Summit	International	00:34
	21:02	Egypt	International	00:26
	21:28	Syria	International	00:24
Report	21:52	Keelboat	National	01:00
Misc.	22:52	Number of the day	National	00:37
Arts and shows	23:29	Place Gilles-Carle	Montréal	01:06
	24:35	Urban tales	Montréal	00:47
Weather	25:22	Weather	National	01:11
	26:33	Contact us		00:20
Advertising	26:53			03:07
	30:00			
		Total length of newscast		23:55
		Total length of local content		05:42

I should note that some broadcasters, who shall remain nameless, had very flexible definitions of local content, or of “local segments,” to use this new expression. For example, in its response to the questionnaire, one OTA station claimed to have broadcast 12 hours, 33 minutes and 2 seconds of “local segments” each week. However, according to CRTC staff, it was 8 hours, 16 minutes and 14 seconds, that is, 34% less. Another broadcaster, no doubt alarmed by the lack of “local segments” per week (2 hours, 6 minutes and 32 seconds) had in fact doubled its actual content of 1 hour, 6 minutes and 20 seconds!

In other words, under the umbrella of local programming, for which the number of hours is now harmonized at 7 hours per week in English-language markets and 5 hours in French-language markets, the truly local content can easily vary fivefold. As I have just shown, not all consumers receive a minimum level of local news, to say the least.

At the hearing last December (which led to Broadcasting Decision 2012-243) where the Commission reviewed certain conditions of licence of V Interactions inc. regarding the broadcast of local programming, and specifically local news, I asked representatives of Montréal's V Interactions to produce for the Commission the logger tapes of newscasts they had aired in various Quebec regions during the last broadcast week of November. I should note that with five stations in Quebec, V Interactions already enjoys an exception that is unprecedented in the Canadian broadcasting system: since the 2008 decision it has been required to produce only two hours of local programming per week in the Montréal and Québec markets and only one hour per week in the Saguenay, Sherbrooke and Trois-Rivières markets.

However, despite these apparently restrictive conditions for V Interactions, the analysis showed that the Category 1 "local" news was largely absent; the condition applied only to Category 1 news, regardless of origin. For example, for the first day of the week that was selected for analysis i.e., Monday, 28 November 2011, in the Québec market, viewers received only one minute and 48 seconds of Category 1 local news (sports, economic, environmental, cultural, political news, etc.)! Quite an offering, despite the Commission's extremely harsh conditions! In other words, less than two minutes of truly local segments in a program over 25 minutes in length. Unfortunately, this was not an exception. With a variation of only a few minutes, this was the situation every day of the week in the five markets. The analysis showed that on Friday, 2 December and Saturday, 3 December, there was not even 10 seconds of local news in the Saguenay and Sherbrooke markets, and on Sunday, 4 December, there was not one second of local news in the Québec market, the province's second largest market. In other words, for the Québec area, barely 15 minutes of "local segments" of news was produced for all seven days of the week.

This is this same undertaking that received more than $4.5 million over the past two years from the application of the LPIF!

The following is the table for V Interactions in the Québec market, which I have just alluded to, and which clearly identifies the 1 minute 48 seconds of "local segments" (highlighted in the table) of truly local news.

Québec **28 November 2011**

Section	Start of segment	Story or segment	Origin of segment	Length of segment
	00:00	Introduction		01:08
Headlines	01:08	Young lady set on fire	Saguenay	00:36
	01:44	Forcible confinement of an elderly person	Montréal	00:31
	02:15	Report on Daycare centres	National	00:25

	02:40	Divorce	National	00:31
National news	03:11	NDP	National	01:44
	04:55	Criminality	National	00:53
Vox Populi	05:48	Facebook question - Vox Pop		01:40
Arts and shows	07:28	Reviewed and corrected	Montréal	01:06
	08:34	Metro blues	Montréal	01:04
Sports	09:38	Canadiens	Montréal	00:19
	09:57	NFL football	International	00:12
	10:09	Formula 1	International	00:11
	10:20	Tennis	International	00:11
Weather	10:31	Weather	National	01:08
Misc.	11:39	Black Friday	International	00:23
Advertising	12:02	Advertising		03:00
Misc.	15:02	Intro Québec		00:28
Local news	15:30	Rouge et Or	Québec	00:14
	15:44	Journalists convention	Québec	00:25
	16:09	Wetlands	Québec	00:28
	16:37	Hockey centre	Québec	00:13
In the regions	16:50	Skating competition	Saguenay	00:41
	17:31	Hydro-Sherbrooke	Sherbrooke	00:37
Report	18:08	Wood stoves	National	02:40
International	20:48	Syria	International	00:38
	21:26	Egypt – violence	International	00:46
	22:12	Germany – nuclear waste	International	00:54

	23:06	Libya – Archeological discovery	International	01:09
	24:15	Number of the day - fir		01:02
	25:17	Weather	National	01:11
	26:28	Contact us		00:23
	26:51	Advertising		03:09
	30:00			
		Total length of newscast		23:51
		Total length of local content – Québec		01:48

It is ridiculous that there could have been no local news specifically covering these markets, and according to my reading of the broadcaster's conditions of license, the broadcaster would have been in full compliance with its conditions of license regarding the Category 1 "general" news, without any "truly" local content. The mayor of the second largest city in Quebec had good reason to be wary...

Aware of the exception it had granted in 2008 and its results that we now know, the Commission, in its decision issued in Spring 2012 (Broadcasting Decision 2012-243), noted the proposed commitments by V Interactions for 2012 to 2014 regarding the minimum amount of Category 1 "local" news or "local segments." This is precisely the objective I was looking for during the hearing last April on the LPIF. More specifically, the table published in Broadcasting Decision 2012-243 referred to a "minimum length of local segments" for V Interactions. The issue at hand was Category 1 news, reporting local stories in the fields of economics, politics, culture or sports. The goal was not to bypass the production of local news with the flagship production of international, federal or provincial news. In other words, for the first time, the Commission recognized the need to add to the definition of local programming not only Category 1 news, but also the concept of "local Category 1 news" or "local segments" to ensure that a local product would be aired.

With the new decision, at least, V Interactions committed to broadcast one hour of Category 1 local news in the Québec and Montréal markets, and 36 minutes per week in the Trois-Rivières, Sherbrooke and Saguenay markets (see table below). Even in the Montréal area, local content for the week of 28 November to 4 December 2011 that did not exceed six minutes of "truly local" news in a program less than 26 minutes long qualified as local programming for the region of Montréal. In fact, this local programming and Category 1 news was made up of international, federal and provincial news, as well as local news from other markets. This programming was not in any way related to local coverage in the specific markets of Montréal, Québec, Trois-Rivières, Saguenay and Sherbrooke.

Impact of the commitments

Station	**2008-2011**		**2012-2014 (proposed commitment)**	
	Quantity of newscast programming as required by condition of licence (per broadcast week)	Quantity of local news segments broadcast during the week of 28 November to 4 December 2011	Quantity of newscast programming to be required by condition of licence (per broadcast week)	Projected quantity of local news segments (per broadcast week)
CFJP-DT Montréal	2 hours	34 minutes	2.5 hours	1 hour
CFAP-DT Québec	2 hours	15 minutes	2.5 hours	1 hour
CFRS-DT Saguenay	1 hour	16 minutes	1.5 hours	36 minutes
CFKS-DT Sherbrooke	1 hour	17 minutes	1.5 hours	36 minutes
CFKM-DT Trois-Rivières	1 hour	16 minutes	1.5 hours	36 minutes

It was following this decision that the Commission decided to put the same question to broadcasters who had been receiving LPIF funding since 2009. The Commission wanted to know if they were talking about local news or international, federal or provincial news. To my mind, this meant first making it clear what type of news was being talked about, and then possibly establishing a minimum quantity of Category 1 “local” news or “local segments” in areas as diverse as culture, the environment, the economy or politics, on the basis of which a local broadcaster could profit from the LPIF. In my opinion, that was the real game plan, which did not materialize. The Commission cannot speak from both sides of its mouth: it cannot claim that it wants to improve local programming without imposing conditions of licence at the same time to ensure that the content is truly local.

Nevertheless, this was the Commission’s decision in 2008, and I expressed my dissent.

In 2008 I wrote that, “[...] having acknowledged that there is a deficit in the production of news programming in small markets (population under one million), the CRTC should have focused on a single objective: the production of news in small markets to offset the deficit that has worsened over the last 10 years.” And I added: “[the] locally-produced analysis, commentary and opinion programming that will be eligible for subsidies from the LPIF are rarely “exportable” to the large Toronto, Montréal, Vancouver, Calgary and Edmonton markets or to the English-language Ottawa-Gatineau market. The only news liable to be broadcast on the national networks and thus improve coverage across the country for all Canadians is pure news.”

I have not changed my opinion. I still believe today that achieving this objective should be the priority at this moment and that it can only be achieved by clearly establishing a minimum quantity of local news for each of the stations subsidized by the LPIF. To quote Peter Murdoch, Vice-President of Media for the Communications, Energy and Paperworkers Union (CEP) of Canada:

“[...] the conditions you did impose do not require specific hours of original local news–as CEP had urged repeatedly–but just general/local programming [...] you have good reason to be concerned about whether the LPIF is paying for new, original local news, or is padding recipients’ profits [...] This is why we have always recommended an incremental and accountable LPIF [...]”

Do the Canadian broadcasting system’s 11.3 million subscribers not agree with Mr. Murdoch?

In any event, I share the CEP’s views: one does not do just anything with subscribers’ money. As I have shown, local programming, even with Category 1 news, must be defined more thoroughly and must not become a catchall for any and all claims of “outside” coverage. Otherwise, let’s be honest, we are not talking about local programming, we are talking about programming in general.

Apparently, this is not the understanding of the Syndicat des Communications de Radio-Canada, of which I was a member for over 20 years and whose president, Alex Levasseur, stated on the last day of the hearings that he was against the imposition of local news quotas. In other words, open the door to international, federal and provincial news regardless of the Fund’s very mission, which had to be the production of local news. Even the unions are not on the same wavelength–some want stricter conditions while others want to keep the bar low, with no conditions.

In my opinion, given that the Fund’s resources have always been limited, the Commission should give absolute priority to the production of local news, not only because it is more easily measured than public affairs or cultural programming, but also because Category 1 local news, more than any other type of programming, is the core of coverage for the greatest number of political, cultural, economic and other news, in the more financially vulnerable small markets.

The results of the investigation mentioned above and initiated by CRTC staff with broadcasters are extremely interesting. For the first time we know what we were talking about. When we talked about local programming, we knew what percentage of this local programming actually comprised local news worthy of its name!

The very professional report prepared by CRTC staff showed a great deal of contrast, which took me by surprise. Below is the table I presented at the start of the hearings on Monday, 16 April 2012.

The table summarizes information on local news filed with the Commission by television station licensees in response to the Commission's request in its letter dated 17 February 2012. The data in the table represent an average per station of local news broadcast by the stations that belong to the groups shown below during various newscasts that aired during the week of Sunday, 12 February to Saturday, 18 February 2012.

Average local news per station per week (Hr:Min:Sec)

	non-LPIF	**LPIF**	**Proposed min. threshold for LPIF stations**
CBC	5:41:08	6:17:51	
SRC	2:08:53	3:16:08	
VI English (Bell, Rogers, Shaw)	11:49:43	5:32:23	
VI French (QMI)	3:10:44	2:17:59	
Independent English (Astral, Channel 0, CHEK, Corus, Newcap, NTV, Pattison, Thunder Bay)	n/a	10:59:50	
Independent French (RNC, TIR, V)	n/a	1:33:36	
Average	**5:42:37**	**4:59:38**	

This time, we cannot be misled. First, in terms of local news, the English-language and French-language markets show very different numbers, with a huge deficit on the French-language side. This is the true account concerning what was broadcast.

Indeed, the Federal Communications Commission tried itself in July 2011 to report on local news in the United States in a document of over 500 pages. It had to conclude that during the last seven years, local news increased by 35%, a trend that in Canada seems to be very different from that south of the border. And like me, they focus first on "local news" that is aired.

In any event, the Commission had decided to grant a basic annual envelope of $400,000 to each station, regardless of ratings, local news content or station language (English or French). The French-language stations received 30% of the remaining envelope, even though they represent less than 25% of the Canadian population, have fewer stations and, most importantly, broadcast less local news!

For example, despite all of these favourable conditions, Quebecor, as a private integrated company like Bell, Rogers or Shaw, produced for the week in question just over two hours of "local" news per week in markets with populations of less than one million, compared with over five hours of local news broadcast by the three other private integrated companies in English-language markets with populations of less than one million. What is the reason for such a large gap (three hours per week) between Quebecor and its English-language market counterparts (Rogers, Shaw and Bell)? Among independent broadcasters, the difference is even greater, with 11 hours of local news per week on the English-language side and just over one and a half hours on the French-language side. And some of them want to continue receiving the same level of funding, using the same formulas, for such different and unconvincing results, particularly from the French-language side?

Finally, there are very sizeable differences between CBC and SRC services, depending on whether they target Francophones or Anglophones. The public broadcaster's French-language stations produce on average just over three hours of local news per week, compared with an average of six hours for CBC English-language stations, in markets with populations under one million. Why such a difference?

Do not give me the argument that the SRC is at a disadvantage in terms of budget envelopes for both networks combined. The opposite is true. Do we need to be reminded that overall, the SRC's French-language services received approximately 38% or $654 million of the public broadcaster's total $1.7 billion budget, which is paid by all Canadian taxpayers? How can these differences between the networks be explained if not by the decisions made by the Corporation itself?

Why should French-language stations in Canada, despite LPIF criteria that do not take into account the size of each station's audience, not be bound by the same results as the English-language stations, which are much more generous in terms of Category 1 local news programming? Under its constituting legislation, is the public broadcaster not required to primarily "inform," and subsequently "entertain"?

Second difference: the performance of private vertically integrated broadcasting undertakings and that of independent broadcasters in the English- and French-language markets.

In the English-language markets, it is the independent stations that are breaking all the records. They are the real champions of local information, and are completely different than vertically integrated companies or the CBC/SRC stations. For example, in their respective markets, Astral (Dawson Creek and Terrace), Corus (Kingston, Peterborough and Oshawa), Pattison (Medicine Hat, Kamloops and Prince George), CHCH (Hamilton), CHEK (Victoria) and Newcap (Lloydminster), to name but a few, devote twice as many hours per week to local news as stations belonging to the large integrated companies.

If the CRTC had decided to continue the Fund and impose minimum quotas, these independent English-language producers would have passed the test with flying colours and could have qualified for even higher subsidies on the basis of merit, because they already had a head start on all the other private or public broadcasters. Finally, even if the large integrated companies benefit from the inevitable synergies, they are beat out in the small markets by the public broadcaster's stations, which produce, on average, one hour more of local news each week. To be fair, however, the opposite is true in the large English-language markets with populations over one million: on average, in the large urban markets, Bell, Rogers and Shaw air twice as much local news (11 hours) than the CBC stations (5 hours).

What a contrast with independent producers in Quebec, who produce barely one hour of local news/"local segments" per week, roughly 8 times less than the English-language independent stations! By imposing minimum quotas for Category 1 local news, the Commission could have helped to gradually correct the situation in the French-language market across all categories: independent broadcasters, integrated broadcasters (TVA Group) and the public broadcaster (CBC/SRC).

As Yves Mayrand, Vice-President of Corporate Affairs at Cogeco stated in response to one of my questions, "[Translation] [...] it is very difficult for us [...] In any case, we were not able, based on the evidence on the public record, to establish that there is a clear, lucid and complete correlation between the allocation of LPIF funds and, as you say, the increase in programming, particularly in local news."

This lack of data has been noted by several parties, including the vice-president of the Alliance des producteurs francophones du Canada, Suzette Lagacé: "[Translation] It is difficult to accurately analyze the use of LPIF resources at regional stations. We would like to take this opportunity to reiterate our call for the publication of financial data, set out by group and program category, by the LPIF administrator. We also reaffirm the need for a public report detailing the use of the amounts received, as well as the names of local programs counted toward a minimum weekly amount of local programming for regional stations supported by the LPIF."

I could only agree to maintaining the Fund under these conditions. In my opinion, imposing on consumers another bill of over $300 million without ensuring that a minimum quantity of Category 1 local news is produced and aired in each of these markets makes no sense. To my mind, this was the one and only condition–decisive, easily measurable and accountable. Each subscriber would be able to check the quantity of local news, stopwatch in hand! This is the kind of transparency on which we could have based our decision. Any ordinary citizen could easily determine over the course of a week if they had received their "local content" over the airwaves (the minimum quantity of local news determined by the Commission) and lodge a complaint with the Commission in the event of non-compliance.

I believe that this is a direction that the CRTC can take in the future to make the broadcasting system more transparent. It would be in the Commission's interest to propose simpler and more accessible tools (such as measurable levels) that anyone could use, ones that would be more user-friendly and focused on the target objective. This is also a way to reduce regulation while being more transparent and predictable, and implementing measures that all subscribers, where possible, can master easily and quickly. After all, it is the subscribers who, directly or indirectly, pay the bill. Why not give them simple tools that they can use themselves to ensure that companies are complying with the applicable regulations, rather than leaving the task to insiders? Would this approach not help ensure system integrity?

For example, from a hodgepodge of regulations that are difficult to enforce and spread out over several pages, we did this with English-language musical montages in the French-language market (which make up not more than 10% of programming). We could have done the same with "local segments" in newscasts associated with local programming. Since it would have involved a shorter period of time, it would have been even easier for subscribers to the Canadian broadcasting system!

Lastly, I do not believe that the incremental expenditure criterion, as it was first established by the Commission in the initial implementation phase, was the right criterion. Verifying its integrity is a regulatory burden for stakeholders and Commission staff. Innovating does not necessarily mean spending more, and what matters in the final analysis, to my mind, is the news and, above all, the local content of the news. This does not mean micromanaging as some interveners claimed, but rather ensuring that the $300 million paid by consumers is used to reach an end (local coverage) and an objective (minimum quantity of Category 1 local news). As for calculating "local segments" in each newscast, with this practice put into place, any production assistant could have done it in less than a minute at the end of the local news report. It isn't rocket science, it's not complicated to ensure that there is something for every consumer at the end of each broadcast week.

This is the subject I would have liked to discuss, and one that few participants raised in their final arguments. To them, I simply say, a word to the wise is enough. You do not want any condition in terms of minimum quantities of Category 1 local news, so do not count on me to impose regulatory fees of 1.5% on the bills of 11.3 million Canadian cable and satellite subscribers or their distributors! As a member of a regulatory body, my focus is accountability and transparency. There is no way I am going to give you $300 million on a silver platter for another three years, with no condition requiring you to produce truly local news for the benefit of consumers in each of these markets. Because in most cases it is the consumers who paid this $300 million over three years, I simply wanted to ensure that the content they receive actually does include local news, in the strict sense of the term. Better luck next time, if the opportunity ever arises again.

The case of the CBC/SRC: Local programming is central to their mission

In 2008, I wrote a dissenting opinion against forcing Canadian subscribers to contribute, via regulatory fees, to local coverage by the CBC/SRC. I have not changed my mind in the intervening four years.

In my opinion, the funding and the mission of a public service should not be placed at risk by the imposition of circumstantial regulatory fees, the duration of which was uncertain from the outset.

It is worth remembering that in 2008, the Commission wrote that “the Commission will determine whether the LPIF should be maintained as originally defined, modified or discontinued.”

There were no guarantees beyond an initial three-year period. As for linguistic minorities, just like local coverage, they are an integral part of the public broadcaster’s mission. It is up to the Corporation to defend them and get the budgets required to perform its duty. In my opinion, it is not up to a regulatory organization–the Commission being composed of non-elected members–to be a substitute for public funding via various good causes. Why, for example, would the CBC/SRC not publicize a budget allocation dedicated specifically to minority markets, where audience ratings cannot be marketed due to a lack of audience? Would this approach not enhance the public service’s transparency and at the same time permit an appreciation of the impacts of their policy decisions? This, in my opinion, is the most effective way for public broadcasters to deal with government expectations and launch a better dialogue between the two parties with regard to the granting of specific budget allocations.

In other words, it is clear in my mind that if the government decides to cut the Corporation’s budgets, the CRTC does not have to pick up the slack and charge regulatory fees to subscribers to offset the loss of revenues resulting from a government decision. Ultimately, the elected government is responsible for funding the CBC/SRC as well as for budgetary decisions regarding the public broadcasting service.

This is a topic I reiterated in my 2008 dissenting opinion, by insisting on the objectives of the legislation governing the CBC/SRC, which states that local coverage is the public broadcaster’s second objective, right after Canadian content! Even from a strategic perspective at the time, local coverage was the Board of Director’s second priority.

Four years later, the Corporation produced a new strategic plan, with even more explicit priority given to local coverage. The public service’s viewers can be reassured on this point.

In the summary of the strategic plan published in September 2011, President Hubert Lacroix writes:

> Canadians have told us time and again that the regions rank among our foremost priorities in their minds, but that they don’t feel we live up to our potential. For different reasons, we haven’t always been everywhere we need to be, or able to do

> everything we need to do. We will reverse that trend and bridge that perception gap by strengthening our presence in the regions.
>
> [...] And we will pursue new partnerships to enhance both our reach and our impact. While execution will vary by market and between English and French Services, the strategy commits us to launching new stations (primarily radio) and expanding others. We will not exit locations but in some, we may change how we deliver our services. We will introduce new local and hyper-local websites and services, new formats on radio and extend regional news on television to seven days a week.

Seven days a week and not one word about the LPIF! As we can see, Mr. Lacroix makes no mention of the Fund in the development of the Corporation's strategy toward greater regional reflection in all markets.

This policy of the Corporation in favour of greater regional presence was recently confirmed in this end-of-mandate interview given to the *Globe and Mail*.

Furthermore, at the hearings, Louis Lalande, Vice-President, French Services, agreed with their opinion.

Unlike the Bell Media representatives, not once did he raise the possibility of specific local stations being closed. At the most, he very vaguely implied that there would no doubt be less regional production. And concerning official language minority communities (OLMCs), the issue was raised but without the spectre of closures or minimal coverage or substantial reductions if the LPIF was discontinued. We must remember, for the purposes of the record, that the issue of OLMCs was not included in 2008 in the public notice! Yes, Broadcasting Public Notice 2008-100, by creating the LPIF, alluded to this objective, but the Commission's priority was local programming and, very secondarily, linguistic minorities. Broadcasting Public Notice 2007-10-1, with its subsequent amendments leading to Broadcasting Public Notice 2007-10-7, never raised the question of local programming for OLMCs. Broadcasting Decision 2009-70 confirmed that in terms of the implementation of the LPIF, the CRTC abandoned the incremental expenditures criterion in both conventional markets and in linguistic minority community markets. No doubt the CBC/SRC licence renewal hearings will devote more time to this issue, since it involves the public service's very mandate.

Mr. Lalande also insisted that never before in the Corporation's history had local stations been closed. That surprising statement from a person formerly responsible for the regions of course contradicts the facts: no fewer than 11 stations were closed by both networks in the 1990s, but this could also be the result of the Corporation's enthusiasm, and indeed its determination, in accordance with its mandate, to keep stations open both in Quebec and outside Quebec.

Third, the SRC receives 38% of the public broadcaster's overall budget of over $1.7 billion, a percentage that far surpasses Francophone representation in the provinces. Lastly, not only does the SRC have very generous budgets compared with CBC services, it can also count on more journalists than the CBC to fulfil its mandate and ensure its presence in Canada's regions. Senator Pierre De Bané, member of the Senate Committee on Official Languages, recently published a strongly critical document of over 160 pages on the biased nature of Radio-Canada programming as a federal institution. Having obtained unpublished data on the number of journalists working at the CBC/SRC, he observed that in 2010, 1,246 journalists were employed by the public broadcaster: 596 by the CBC and 637 by the SRC. Not only does Quebec employ twice as many French-language journalists in the French network (406) as the CBC in Ontario (194)–which is where we find the capital of Canada–the same goes for other parts of Canada: the SRC employs 89 journalists in Ontario, 25 in Alberta, 23 in British Columbia, 25 in Manitoba and 32 in New Brunswick. In each of these provinces, the number of journalists working for the French-language network represents between 37 and 67% of the number of journalists working for the CBC, despite audience ratings so low that they cannot be measured correctly. Finally, in New Brunswick, where Francophones are a minority, there are more journalists working for the SRC (32) than those working for the CBC (22). These are the official numbers of the CBC/SRC! It is difficult to claim that Radio-Canada, in terms of information, has not allocated many resources to the French-speaking minority community.

If it's true that in 2009, as was the case for other private broadcasters, the advertising revenues of the CBC/SRC dropped from the previous year, from $365 to $296 million (on the Francophone side, approximately one-third of revenues), that drop represented only $8 million (from $112 to $104 million) for French services. In fact, since 2010, the SRC has completely regained the ground lost in 2009. Not only are both networks taking in the same advertising revenues as in 2008, but the Corporation predicts that it will go from $369 million in 2011 to $372 million in 2011-2012, and to $439 million in 2014-2015 – a $67-million increase by the end of the last year. In this context, it is important to understand that at no time during the proceedings did the Vice-President of French Services mention the possibility of local stations shutting down, including in minority communities, if the Fund were to be discontinued. Contrary to the policies followed in the late 1990s by the CBC/SRC board of directors, local coverage appears to be part of the public service's mission. In his recently published book, *The Tower of Babble: Sins, Secrets and Successes Inside the CBC*, former CBC president Richard Stursberg clearly mentions on page 303 the CBC's decision not to shut down local television stations. The Corporation appears to have understood that it must establish itself as a public service for the entire country and meet the challenges of the "Montréalization of the airwaves" and the "Toronto centric" programming of the traditional SRC and CBC, respectively. For Radio One, this movement toward more local programming is producing more decisive results in English-language markets. For example, Radio One, all stations combined, according to PPM recordings or the BBM statistics, now occupies the second spot in the Toronto market, the country's metropolis (10.4% - PPM), and first place, again with all music and talk stations combined, in the Calgary market (10.4% - PPM), the Vancouver market (10.0% - PPM), and the Ottawa-Gatineau market (21.9% - BBM). After the "national" stars, for which listenership shares were largely less, one had to believe it. The CBC believed and today harvests the fruit of its wager in favour of better local roots. This has never been seen before.

It follows that CBC/SRC will now have a vested interest in maintaining resources in its stations to provide local service to the population. Thus, the CBC, in its national coverage and French-language minorities, continues to enjoy the facilities of the CBC across Canada.

Conclusion

With this decision, broadcasters will have received, over five years, close to $400 million from the LPIF without any conditions other than those already in their conditions of licence.

Created without public notice during a period of financial difficulty, the LPIF was soon assimilated into an emergency fund for lack of advancement of local programming, as its name suggests. After three years, without objectives or measurable and historical criteria, no one can say how local programming, and in particular local news, which was its main objective, has improved as a result of the allocation of an overall envelope of over $300 million to 80 stations spread out among small markets with populations of less than one million.

That $300 million could have supported a real improvement in local programming. Truly an opportunity missed, but certainly a perfect example of a public policy doomed from the start due to its lack of transparency regarding sums paid to broadcasting undertakings—an example that, I hope, will not be repeated.

For all of these reasons, I therefore concur with the majority opinion, which has decided to discontinue the Fund, which, it must be recognized, had no other objective than to provide occasional help to private conventional, and secondarily public, stations in small markets with populations under one million.

On the eve of the end of my five-year mandate as a CRTC commissioner, I am leaving on a high note, so to say, by concurring with the majority opinion. This opinion adds to the 15 dissenting opinions I have already issued, the list of which can be found following this concurring opinion. But in this case as in the others, I have always been guided by the same principles.

In my opinion, demonstrating respect for the consumer's opinion through a transparent public record is at the very core of my obligation. In the case of the LPIF, those principles were not respected, as I hope to have demonstrated above. The Commission made a grave error in (1) launching a fund that could have been developed as part of its own public hearing; and (2) failing to be transparent in the distribution of envelopes, not only from one station to the next, but for ten or so beneficiaries, for which we will never know the total amounts received over the five years ending in 2014.

Established in the context of the forecasted death of local television, the LPIF was poorly targeted and non-transparent. It had all the characteristics of what a regulator should not do. The 11.3 million subscribers that contribute to the Canadian broadcasting system deserve better.

List of 15 Dissenting Opinions

- *Regulatory measure associated with the provision of detailed monthly billing,* Telecom Regulatory Policy CRTC 2011-569, 2 September 2011

- *Addition of FUEL TV to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Regulatory Policy CRTC 2011-289, 3 May 2011

- *Call for applications for licences to operate a French-language general interest pay television service,* Broadcasting Notice of Consultation CRTC 2010-860, 19 November 2010

- *Criteria for assessing applications for mandatory distribution on the digital basic service,* Broadcasting Regulatory Policy CRTC 2010-629, 27 August 2010

- *Community television policy,* Broadcasting Regulatory Policy CRTC 2010-622, 26 August 2010

- *AUX TV – Category 2 specialty service,* Broadcasting Decision CRTC 2010-223, 21 April 2010

- *The implications and advisability of implementing a compensation regime for the value of local television signals: A report prepared pursuant to section 15 of the Broadcasting Act*, 23 March 2010

- *Reconsideration of Broadcasting Decision 2008-222 pursuant to Orders in Council P.C. 2008-1769 and P.C. 2008-1770,* Broadcasting Decision CRTC 2009-481, 11 August 2009

- *Video-on-demand service*, Broadcasting Decision CRTC 2008-366, 23 December 2008

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services,* Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *Licensing of new radio stations to serve Ottawa and Gatineau, Broadcasting Decision CRTC 2008-222, 26 August 2008, as corrected by Licensing of new radio stations to service Ottawa and Gatineau - Correction,* Broadcasting Decision CRTC 2008-222-1, 28 August 2008

- *Change in the effective control of TQS inc. and licence renewals of the television programming undertakings CFJP-TV Montréal, CFJP-DT Montréal, CFAP-TV Québec, CFKM-TV Trois-Rivières, CFKS-TV Sherbrooke, CFRS-TV Saguenay and of the TQS network,* Broadcasting Decision CRTC 2008-129, 26 June 2008

- *CRTC Report to the Minister of Canadian Heritage on the Canadian Television Fund (Appendix 2) as announced in CRTC submits report on the Canadian Television Fund,* News release, 5 June 2008
- *Licensing of new radio stations to serve Kelowna, British Columbia,* Broadcasting Decision CRTC 2008-62, 14 March 2008
- *CIGR-FM Sherbrooke – Acquisition of assets,* Broadcasting Decision CRTC 2007-435, 24 December 2007