



Submission by the
Canadian Media Production Association (CMPA)
to the
Department of Canadian Heritage

With respect to the
**Consultation on the implementation of
*Canada's Policy on Audiovisual Treaty Coproduction***

March 24, 2011

Executive Summary

The Canadian Media Production Association (the CMPA) welcomes the opportunity to provide comments in the context of the Department of Canadian Heritage's consultation on the implementation of *Canada's Policy on Audiovisual Treaty Coproduction*.

Addressing the decline in treaty co-production activity has long been a priority for the CMPA. We believe that a new, more flexible co-production policy ultimately will help reverse the considerable decline in activity and result in thousands of new employment opportunities for Canadians working in the creative community.

We support the guiding principles that are incorporated into *Canada's Policy on Audiovisual Treaty Coproduction*, and more particularly, those that seek to enhance the flexibility afforded to producers to structure a co-production in such a way as to optimize the potential for attracting financing and achieving commercial success.

We also endorse renegotiating existing treaties and pursuing the negotiation of new treaties.

Lastly, we support the alignment of promotional activities related to co-productions and the simplification of the administrative certification process.

However, to supplement the proposed supportive regulatory and policy environment, a dedicated international co-production fund and an export development program must be created and implemented to help develop, finance, promote and market the Canadian film, television and interactive media industry internationally, and across multiple distribution platforms.

Introduction

The Canadian Media Production Association (the CMPA) welcomes the opportunity to provide comments in the context of the Department of Canadian Heritage's consultation on the implementation of *Canada's Policy on Audiovisual Treaty Coproduction*.

The CMPA represents the interests of independent companies engaged in screen-based content production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. Our some 400 members are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

Canadian independent producers play a crucial role in ensuring diversity in the film, television and interactive media sectors and in helping to build a more cohesive and creative Canada in an ever growing media world of choice. They are dynamic trade and cultural ambassadors who develop and produce programming that is seen by millions of viewers around the world, employ more than 120,000 local artists, technicians, and other cultural workers, and generate billions of dollars in economic activity.

International co-production has historically been an important cultural and economic contributor to the Canadian film and television industry. It is a mechanism through which Canadian and foreign producers are permitted to combine their creative, technical and financial resources with a common goal of creating high quality productions that reach audiences at home and abroad.

However, as highlighted in the backgrounder, treaty co-production activity has experienced a 46% decline over the last decade. It has decreased from a high of \$859 million in 2000 to just \$460 million in 2009. The drop of \$400 million in co-production activity directly translates into a loss of about 5,000 high-quality, full-time jobs within Canada's creative community.

There are several factors underpinning this decline. The most significant is that Canada has lost its competitive edge with respect to its traditional co-producing partners, particularly in Europe. With the introduction of multilateral cultural trade agreements among EU countries, it is now often much more advantageous for a European producer to co-produce with a producer from another EU country than it is to carry out such works with a Canadian producer. The multilateral cultural trade agreements not only benefit EU producers by broadening their access to private financial resources and government incentives that exist in other EU countries, they also provide for more flexibility with regard to both the key creative elements of a production and the administrative process for certification.

Addressing the decline in treaty co-production activity has long been a priority for the CMPA. We therefore congratulate the Government of Canada, and more particularly the Minister of Canadian Heritage, the Honourable James Moore, for having developed *Canada's Policy on Audiovisual Treaty Coproduction* and for now seeking input on this new framework.

We believe that a new, more flexible co-production policy ultimately will help to turn around the considerable decline we have experienced in this sector and will result in thousands of new employment opportunities for Canadians working in the creative community. We would ask the Government to hold firm in its objective to position Canada as an audiovisual co-production partner of choice, and to not be deterred by those who believe that a new, more flexible approach to co-production will somehow result in fewer working opportunities in the creative community. Those who may champion this notion are simply not considering the significant challenges that exist for producers in the current environment.

As such, we fully support the guiding principles that are incorporated into *Canada's Policy on Audiovisual Treaty Coproduction*, and more particularly those that seek to enhance the flexibility afforded to producers in how they package a co-production in order to optimize the potential for attracting financing and achieving commercial success. We also endorse the notion of renegotiating existing treaties and/or pursuing the negotiation of new treaties. And, lastly, we support the alignment of promotional activities related to co-productions and the simplification of the administrative certification process.

However, updating Canada's co-production policy framework, while exceptionally important, will address only one element in the broader challenge of re-igniting co-production activity and stimulating greater exports more generally. The creation and implementation of a dedicated international co-production fund and an export development program would inject much needed investment into Canadian productions and help Canadian producers secure increased foreign financing. A new fund and program would help develop, finance, promote and market the Canadian film, television and interactive media industry internationally, and across multiple distribution platforms. Ultimately, these mechanisms, coupled with a supportive regulatory and policy environment, would serve to build strong relationships with our foreign partners, and would better position our industry to make a more significant contribution to our economy and to Canada's cultural diversity.

Outlined below are our specific comments on the consultation document's five key themes.

THEME I. MODEL TREATY

The CMPA agrees with and supports the approach taken in structuring the Model Treaty. Specifically, we support the addition of an administrative annex which may be subject to ready change in the future. The ability to modify certain terms of a treaty without going through a formal amendment process is a significant improvement over the current administratively-laden mechanism.

Definitions (article 1)

We respectfully request that the Department clarify its intentions concerning the following two definitions:

- “audiovisual”: We are unclear as to whether the proposed definition includes new media works. Does the Department wish to bring new media works under the umbrella of the Model Treaty?
- “Canadian elements”: The wording of the proposed definition seems to suggest that any expenditure made in Canada would qualify as a “Canadian element.” This would include expenditures incurred by a Canadian producer to bring its co-production partner’s key creative personnel to Canada. Is this the correct interpretation of the definition?

Proportionality (article 4)

Allowing the concept of proportionality to include the broad definition of “Canadian elements” will likely increase co-production activity by lowering the financial hurdle that many producers face under the current requirements.

While we support the general move towards broadening the test for proportionality, we recommend that Canadian expenditures be in reasonable proportion to the Canadian financial contribution. This would allow for some flexibility for Canadian expenditures to exceed, or be less than, the Canadian financial contribution, depending on the needs of a particular work.

We’ve noted that this proposed article is unclear as to the competent authorities’ ability to continue to exercise administrative discretion when evaluating the allocation of Canadian financing on agreements co-signed by the producers of a work. We strongly recommend that the language of this article be modified to help preserve the current flexibility that exists with regard to administrative practices.

Creative control (article 7)

The CMPA appreciates the proposed latitude afforded to production partners in negotiating copyright and revenue shares.

We recommend the inclusion of language with respect to reasonable reciprocity between creative control, financial participation and copyright ownership. This would help Canadian producers – especially those in a minority partnership position – retain some leverage during negotiations with their production partners and financiers.

The above being said, we believe that as a basic principle, deals negotiated between co-production partners should take precedence over the notion of reasonable reciprocity.

Distribution (article 8)

In the current financing environment, it is difficult to envision a co-production which would not have distribution or broadcasting commitments in the territories of the co-producers. Key existing support programs already include distribution or broadcast requirements that the co-producers retain the distribution or broadcasting rights to their respective territories, or have distribution or broadcasting commitments in at least one, if not both, of the co-producer's territories. However, that environment could change. We should, therefore, strive to maintain flexibility in this regard. As such, we do not see the need to address this new requirement in the Model Treaty. Doing so would add another layer of administration to the certification process.

In addition, given recent technological advances, we believe traditional distribution models may face some pressure from alternate platforms: adding a distribution component to the treaty requirements will unduly complicate matters.

In light of the above, the CMPA strongly recommends the removal of article 8 from the Model Treaty.

Material changes (article 9)

Competent authorities already require co-production partners to report material changes. This new provision further complexifies the certification process. We recommend that the reporting of changes be included in a comprehensive consultation on administrative simplification (see Theme IV below) and that this article be removed in its entirety.

ANNEX

We agree with appending administration-related rules in annex. This allows the competent authorities of each partnering country to more easily update various administrative rules in accordance with the needs of an ever-changing international marketplace.

Financial contribution by producers & key positions (sections 1, 2 and 3)

We agree with lowering the minimum threshold for producers' financial contribution to 15% of the total production budget. Due to ongoing challenges Canadian producers face in raising financing, the proposed reduction should encourage an increase in the overall volume of co-productions and ultimately reinforce Canada's industrial and cultural mandate going forward. This increased activity should result in thousands of new employment opportunities for the creative community in Canada.

While we support the Department's intention to introduce flexibility in terms of the financial contribution and key positions, we note that the lower thresholds could lead to unintended consequences for some works. We therefore welcome further discussion with the Department to discuss these issues.

Per our comments on creative control on article 7 of the Model Treaty, we recommend that the Canadian financial contribution be in reasonable proportion - rather than in equal proportion - to Canadian expenditures, and that either co-production partner is able to bring in financing from their territory or any other territory, to be allocated to the production budget as the partners chose.

As well, we strongly recommend expanding the list of key creative positions in each of the genres to mirror those in Telefilm Canada's co-production guidelines of November 29, 2010. In these guidelines, Telefilm Canada lists no less than:

- eight key creative positions for live-action and documentary productions (including director of photography, production designer/art director, picture editor and music composer);
- eight positions for 2D animation (including storyboard supervisor, picture editor and music composer, design supervisor/art director); and,
- eleven positions for 3D animation (including storyboard supervisor, design supervisor/art director, character model supervisor, motion capture supervisor, animation director, picture editor and music composer).

The more restrictive definition proposed in the Model Treaty may have the unintended consequence of preventing producers – especially minority co-producers – from fulfilling the key position requirements and securing official co-production status, even though they may be able bring a broad range of key positions to the work.

Furthermore, we recommend providing the competent authorities with sufficient latitude to approve additional non-party or third party national participation on a case by case basis, as may be required to attract financing and/or talent to a given work.

Lastly, we recommend the removal in subsection 3 c) of the reference to “high budget film” so that any work may benefit from both the expanded definition of “key position” and the competent authorities' latitude with respect to third party and non-party nationals.

Dubbing (section 5)

This provision is problematic in that it represents an unnecessary additional cost when co-producers are unable to attract international buyers for dubbed versions of works created in their home territory. As a result, we recommend that the language be modified to allow producers to use best efforts to undertake dubbing in their home territory.

THEME II. Key countries to negotiate and renegotiate treaties

In choosing existing treaties to renegotiate, we suggest giving priority to those countries that have traditionally been the co-producing partners of choice for Canadian producers. Various other criteria may also be used to prioritize negotiations, including, but not limited to:

- the volume of co-production activity undertaken with co-production partners since the signing of the treaties
- willingness of current or future partner countries to renegotiate or negotiate a treaty with Canada
- common linguistic, cultural and industrial values with Canada's diverse cultural communities, such as the members of the Commonwealth
- countries with strong broadcast and theatrical sectors that have interest in treaty co-productions and may attract more investment to Canada
- countries with sufficient administrative and production infrastructure to administer treaty provisions
- countries with pro-active competent authorities

In light of the criteria outlined above, we recommend that Canada prioritize treaty negotiations with:

- UK
- Australia
- New Zealand
- India
- Ireland
- China (including the renegotiation of the television portion of the treaty)
- France
- Germany
- Brazil
- the Middle East (eg. Turkey, United Arab Emirates, Qatar)

We recommend that the Department of Canadian Heritage regularly consult with industry to update the list of prioritized countries given international market shifts which may occur during lengthy negotiations.

In addition, and as mentioned earlier, it is imperative to create and implement a dedicated co-production fund to encourage more co-production activity. Ideally, this fund should be sufficiently financed to allow support to non-English and non-French-language productions. Telefilm Canada now invests exclusively in English- and French-language production. Irrespective of any progress made on the negotiation front, funding support for non-English and non-French-language works would send a strong message to the international community that Canada is interested in enhancing production activity with all treaty partner countries.

THEME III. Alignment of coproduction promotional activities

The CMPA recognizes Telefilm Canada's efforts to promote Canada abroad. As a member of the International Business Development Group – a pan-Canadian industry group lead by Telefilm Canada – we are pleased to help support initiatives which promote treaty co-productions to potential foreign partners. These initiatives include targeted events at various international festivals and markets during which Canadian producers are able to meet with producers, international commission agents and distributors from all over the world.

That said, in order to ensure optimal distribution opportunities and encourage further partnerships, especially in emerging territories such as Eastern & Central Europe, and South America, it is imperative that the industry expand its partnership with the public sector to elevate Canada's presence abroad. The creation and implementation of an export development program would help stimulate business opportunities with Canada and put our country back on the co-production map.

THEME IV. Simplification of administrative procedures

The key to triggering interest in negotiating or renegotiating treaties with Canada is to reassure our foreign partners that Canada has a streamlined and simple certification process. It is often quicker to obtain both preliminary and final rulings from our treaty partner countries than it is in Canada. It is important that the competent authorities have the capacity to administer their respective co-production guidelines with flexibility, judgment and discernment.

A revitalized and healthy co-production environment is one in which the Department's stated objective and guiding principles can flourish without undue administrative restrictions placed on co-producing partners. Competent authorities can best support our industry by recognizing business arrangements that have been negotiated by production partners, and keeping broader industrial and cultural benefits to our industry in mind when certifying and funding treaty co-productions.

We strongly recommend that the Department of Canadian Heritage launch a separate industry consultation on Telefilm Canada's and CAVCO's administrative processes for co-production certification. Identifying baseline documents, reducing wait times for decisions, and sharing information between certification and funding agencies would send a strong message internationally about Canada's desire to overcome its reputation as an onerous country with which to do business.

THEME V. Policy monitoring

Canada's Policy on Audiovisual Treaty Coproduction could be monitored using a number of “hard” metrics, including:

- increased volume of international sales
- increased volume of international financing
- increased total budget levels
- increased Canadian portions of total budgets
- increased volume of foreign expenditures in Canada
- increased number of co-productions undertaken with both existing and emerging territories
- increased number of countries with which Canada has successfully negotiated or renegotiated treaties
- streamlined certification process

The CMPA recommends evaluating the effectiveness of the *Policy* over a longer period of time (eg. 5-10 years) in order to capture the most accurate data possible of its success or failings.

Additionally, it is important that the Department and industry jointly review the performance measures and the *Policy* on a regular basis to assess whether they continue to be effective in an international business landscape that constantly changes.

Conclusion

The CMPA applauds the Department of Canadian Heritage's timely launch of its consultation on *Canada's Policy on Audiovisual Treaty Coproduction*. We look forward to continuing to work with the Department in addressing the issues raised in this consultation.

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