



CFTPA
*Representing television, film
and interactive production in Canada*

ACPFT
*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

May 31, 2002

Canadian Content Review
c/o Director, Film and Video
Department of Canadian Heritage
15 Eddy Street, 6th Floor
Hull, Quebec
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The Canadian Film and Television Production Association (CFTPA) is pleased to participate in the Department of Canadian Heritage's review of its Canadian Content definition, and respond to the questions posed by the Department in its consultation paper. We consider this a worthwhile and useful exercise and look forward to participating on an ongoing basis.

The CFTPA represents the interests of almost four hundred companies engaged in the production and distribution of English language programs, feature films, and interactive media products in all regions of the country. Our members create high quality innovative television production that are broadcast on Canadian television, pay and specialty channels and enjoyed by audiences around the world. The Association is a major employer of Canadian creative and technical talent, and has an important responsibility to the creative guilds by making appropriate compensation to the creative talent employed in the making of our productions.

Some of our members' recent production credits include: Cold Squad (Keatley Film Limited/Alliance Atlantis Communications Inc.), Little Miracles (Breakthrough Films & Television Inc.), DaVinci's Inquest (Haddock Entertainment Inc.), This Hour Has 22 Minutes (Salter Street Films Limited), Royal Canadian Air Farce (Air Farce Productions Inc.), Designer Guys (WestWind Pictures Ltd.), F/X: The Series (Fireworks Entertainment Inc.), The Toy Castle (Sound Venture Productions Ottawa Limited), Viking Saga (Galafilm Productions Inc.) and Rolie Polie Olie (Nelvana Limited).

Overview

Having reviewed the Department's consultation paper carefully and consulted extensively with our members, we would offer the following general observations. The minimum Canadian Content definition, now used by CAVCO and the CRTC, has been in use for almost 30 years. In conjunction with the Canadian Content broadcast quotas for conventional and specialty broadcasters, that definition has helped build the Canadian production sector from virtual non-existence to one of the fastest growing and successful industries in Canada. The definition has helped nurture a growing production sector, writers, directors, actors, photographers, composers, editors and art directors, as well as build a solid infrastructure of highly skilled technical and creative talent capable of production on a par with any industry in the world. It has helped to encourage the creation of a critical mass of Canadian production activity that has enabled Canadian production companies to grow.

It is also important to underline that the CAVCO/CRTC definition has become a base mark for other definitions of Canadian Content used in Feature Film and the Canadian Television Fund. These Funds have been given strong cultural mandates by the government to build audiences for Canadian film and television programming in Canada and tell Canadian stories, and maximize the levels of Canadian creative and thematic content. In our view, this has provided a good balance to policy direction. The basic CAVCO/CRTC definition - 6-10 key creative point minimum, minimum 75% costs by Canadians, produced and controlled by Canadian companies – has become a critical building block of the Canadian industry, and the foundation upon which the financial reality of producing Canadian Content is based.

CAVCO Definition: Helping Create a Strong Body of Canadian Content

Direct public investment has played a key role in ensuring a high level of CAVCO/CRTC certified Canadian Content production. The Feature Film and Canadian Television Funds have been directed at achieving key policy goals related to building audiences for distinctively Canadian stories and reflecting Canada to Canadians. The CAVCO definition for eligibility to the Canadian Film or Video Production Tax Credit (CPTC) program has provided an excellent minimum definition to encourage both economic and cultural objectives.

The CFTPA is currently finalizing a new study it had commissioned from PricewaterhouseCoopers (PWC) on Canadian Content production not using the CTF program (Non-CTF). The study, which the Association will make available and public as soon as possible, outlines the economic and cultural importance of non-CTF production funded through the CPTC program. Non-CTF production reached \$1.6 billion in 2000/01, while CTF production amounted to \$683 million. Consistent with the important cultural objectives of the CTF mandate, CTF funded production levels have remained relatively stable over the past five years, while non-CTF content production has grown steadily over the past five years to make up almost 70% of Canadian Content production. Non-CTF production clearly forms an important base for the Canadian production industry.

The PWC Study also underlines the important relationship between lower point standards and increased foreign pre-sales. Not surprisingly, productions with the highest foreign pre-sales were the projects that achieved the lowest number of points. The simple fact here is that pre-sales, essential requirements for non-CTF financing, are often linked to requirements for foreign creative elements. An actor, a director, a writer – is required for that foreign sale. This represents an important area of industry growth and essential to industry growth and stability. The economics of the Canadian film and television market make it difficult to recover cost of production in Canada only. Sales to foreign markets are essential to maintain real growth, and foreign elements are often needed in those projects to ensure distributor and broadcaster pre-sale commitments.

Canadian Production Financing Realities: Diverse Approaches Necessary in Uncertain Times

A fundamental fact of the Canadian production industry is that it is virtually impossible to maintain any form of ongoing corporate viability on the strength of CTF or Feature Film funded projects alone. Many companies will undertake a range of production, often financed in different ways, to ensure continuing production activity, project development and revenue flow. This production activity will enable companies to diversify and expand, encouraging greater technical and creative employment while attracting private sector investment opportunities in the sector. CAVCO certified production is at the core of most Canadian-controlled production companies and central to this growth. Within the body of CAVCO, there is a steady range of production activity between 6-10 points. While overall levels have grown in the last few years, these basic percentages have remained relatively constant.

Production financing is a shifting equation of public and private investments, tax incentives, domestic and international broadcaster commitments and foreign distribution revenues and producer equity. As outlined on page 5 of the Department's consultation paper, the Government of Canada "...has tried to find the optimal balance between the cultural goals of creating Canadian film and television productions that reflect Canadian subjects and perspectives with the commercial trend to work with foreign co-producers and to engage foreign performers." This model has also helped provide Canadian broadcasters with a critical mass of high quality Canadian Content for cost-effective licence fees that normally represent only a portion of the total budget. While the growth of the industry has been impressive over the last decade in particular, the basic reality and the ongoing challenges of the Canadian funding equation have not changed. It remains virtually impossible to finance Canadian production exclusively within the Canadian marketplace. Direct public investment or international pre-sales and distribution advances are essential to the completion of financing.

For cultural policy reasons, direct public investment has increasingly been made available only to projects with a very high level of technical and creative content. But, as the recent CTF oversubscription crisis has underscored, there is a limit to public funding available. International pre-sales then become an obvious alternative to complete production financing. However, these pre-sale arrangements will often come with demands for foreign creative elements; a recognizable international star, a screenwriter or a director.

The CAVCO minimum definition allows producers some flexibility in making some concession to these demands, while still maintaining a high level of domestic content. And while there has been a steady growth trend in Non-CTF certified production over the past years, recent data indicates a general leveling of this type of production activity. The industry is clearly moving into a very uncertain period. Increased concentration and integration of foreign media interests have resulted in significant changes to the international market and a shrinking demand for Canadian productions, particularly in the higher budget dramatic genre area. This has resulted in major pressure on Canadian producers of higher budget programming to seek other markets and other modes of international participation. Simply put, financing of Canadian Content production has become harder in recent years, not easier, and productions companies need a range of financing mechanisms to ensure a critical mass of production activity.

A review of CAVCO certified production levels over the past year reveals a relatively stable split of production by creative points. When considering total production budgets, production in the 8-10 range makes up approximately 70% of overall production, while production in the 6-7 range has remained steady at approximately 30%. This is a healthy balance beneficial not just for producers, but also for the creative and technical talent that are employed on these productions. Given the limitations of the Canadian market alone to underwrite production costs, and the uncertain international market, any move towards eliminating lower point production from CAVCO eligibility would mean a loss of production activity and loss of creative and technical jobs. Higher points requirements will result in productions not happening in Canada and a major net loss to the Canadian industry as a whole: fewer jobs, rather than more.

CAVCO's Corporate and Cultural Development Mandate

In our view, the combination of key creative requirements with Canadian ownership, copyright, producer control requirements and 75% cost minimums has resulted in one of the most effective definitions of domestic content in the world. One of the more important aspects of the CAVCO minimum definition that does not receive sufficient mention in the discussion document came in 1995 with the move from a tax shelter incentive mechanism to a corporate tax credit mechanism. While the points system and Canadian cost requirements survived largely unchanged, major new Canadian corporate ownership, copyright, distribution/broadcasting and producer control requirements were introduced in 1995 with the advent of the CPTC program. It is worth mentioning that extensive consultation was undertaken at that time on the definitional requirements. Following extensive review, the government underlined the importance of the traditional points and cost requirements and allowed for their reinforcement in the new definition.

The tax credit regime introduced a new industrial development objective in its December 1995 announcement that had never been stated in the previous capital cost allowance regime. The primary objectives of the program are “the encouragement of Canadian programming and an active domestic independent sector.” The document outlined that the credit administered by CAVCO is designed to encourage a more stable financing environment and longer-term corporate development for production companies. It also established Canadian ownership and control requirements in order to ensure that the incentive is available only to de facto Canadian-controlled companies, while also providing sufficient flexibility to encourage foreign investment.

These were important new developments from a tax shelter regime that had similar creative requirements but did little to encourage Canadian companies or even require Canadian ownership. These requirements have allowed Canadian companies to retain rights and control the exploitation of their production, adding to company value and enabling them to bargain from a position of strength with international distributors and broadcasters. In conjunction with the minimum points and cost requirements, the result is a strong combination of creative and commercial incentive.

It is timely to re-emphasize the corporate development objectives of the tax credit and to ensure they are not forgotten in the context of this review. The major delays that have been experienced by producers in the certification of their projects and receipt of tax credit refunds have not only frustrated producers, but also placed major financial burdens on them as well. The significant interim financing costs that have been generated by delays in tax credit receipt, coupled with financing policies of the public agencies forcing tax credits into the financial structure at inequitable recoupment positions, have all resulted in a tax credit system that is still not fully accomplishing its corporate development objectives. While these issues are currently being addressed by government, progress has been slow and the burden of delay borne by producers. It is appropriate that this review is keenly aware of this reality as it considers its submissions.

The consultation document points out that the “CanCon” definition has not changed significantly over time. In our view, that is because it has provided a practical and workable definition of appropriate levels of minimum Canadian creative and technical content to enable the industry to develop within a balanced framework of cultural and economic objectives. From the beginning, Canadian creative and economic objectives were based on recognition that Canadian film and television content require viable Canadian companies to create it, and international sales or investment to help finance it. As we have stated already, it is virtually impossible to raise the cost of production from the Canadian market alone – public funds are limited, and foreign pre-sales normally come with foreign creative elements attached.

Conclusion

In summary, CFTPA maintains that the current CAVCO/CRTC Canadian Content definition is still very relevant to the future development of the Canadian production industry. It provides an excellent minimum standard upon which other direct investment programs are built to address more explicit audience objectives for Canadian themes and stories. The definition provides an effective balance of economic and creative elements, guaranteeing very high levels of costs incurred by Canadians in Canada and with very high levels. The points requirements ensure a very high level of key creative positions staffed by Canadians, while maintaining some essential flexibility for foreign creators and investment. This flexibility is essential to maintain production activity in an increasingly uncertain and competitive international market. Production activity within the various points categories has remained relatively stable over time, with lower point production clearly representing a smaller percentage of high overall activity.

The certified tax credit system is relatively new and many administrative and design issues are still being discussed with both the Departments of Heritage and Finance. The corporate development objectives of the system have not yet been properly addressed by the current system design and need to be within the context of the tax credit simplification process. We would maintain the corporate ownership and control requirements are important to industry development and need to remain in place if a Canadian controlled industry is to be allowed to develop. While the review of Canadian Content is always an interesting debate, we would not want the exercise to deter the Department from its commitment to simplify the design and operation of the credit administration system.

Issues and Questions

1) How should a revised Canadian Content system establish an appropriate balance between different perspectives?

We see no pressing need to revise the system to achieve these objectives. In our view there has been a natural coherence to the development of government's policy in the film and television production incentive system. CAVCO's system sets out a minimum standard by which a significant level of Canadian creative and technical participation, and strengthened producer control and ownership, is encouraged. The CTF has set a higher bar to encourage the production of distinctively Canadian themes and stories for Canadian audiences. The Feature Film Fund has also established another standard to encourage high level of Canadian Content, while allowing some flexibility for the use of non-Canadian creative elements. Our international co-production agreements provide a flexible but balanced framework to fulfill national cultural and commercial objectives. From a general policy approach, we see a coherence and balance between the various definitions used.

On a more specific administrative level, there is a need for greater simplicity and clarity in the rules and criteria for all direct funds and tax incentives. The application burden has become excessive. Respecting the mandates of the various public and private funds, there is a need to reduce duplication of efforts and standardize applications as much as possible. CAVCO, in turn, needs to establish a much simpler and clearer application process that keeps administrative discretion to a minimum in decision-making and improve application-processing time. Producer control requirements need to be much simpler and clearer, in order to reduce uncertainty and expedite more timely production financing. This should be accompanied by a clear standard of service commitment to its clients, consistent with the approach taken by the Canada Customs and Revenue Agency. We appreciate that many of these issues are being addressed in the context of tax credit simplification but wish to underline their importance to the effective functioning of the current system.

2) Should the general approach of the current system be retained or should a new approach to assess Canadian Content be developed?

As we have indicated, the general approach that has evolved has proven effective. The CAVCO/CRTC definition provides an effective minimum for defining Canadian Content and

provides an effective balance of cultural and commercial objectives. It has served also as the foundation upon which direct funding initiatives like Telefilm and the CTF have been based. Administrative deficiencies and duplication are significant, however, and undermine the effectiveness of the current system.

a) Should the requirement that ownership of intellectual property rights and distribution of a production be controlled by Canadian interests?

The retention of intellectual property rights by Canadians is a fundamental feature of the CAVCO definition system and central to Canadian industry development. This requirement was only just implemented in 1996 and must be given additional time for its impact to be gauged. The business of building viable companies is about encouraging the creation of copyright material, the retention and exploitation of distribution rights and the building of company value. This is the intention of the corporate development objectives of the tax credit program. Initial control of rights by Canadians creates more powerful production companies and enables Canadian producers to deal with foreign broadcasters and distributors from a position of strength, while allowing flexibility for how those rights are exploited. It is also a fundamental aspect of producer control upon which CAVCO's system of requirements and indicators is based. We would see no reason to alter the copyright requirement at this time.

The essential requirements for Canadian distribution should be the initial control by Canadian producers. Ownership and control of Canadian copyright for 25 years is helpful for corporate development and the commercial exploitation requirements of the regulations encourage Canadian producers to control the exploitation of their projects in Canada and abroad. The Canadian-owned distribution sector needs every encouragement, but it is also important that Canadian producers have access to as many distribution avenues as possible, and ensure the environment is competitive. There needs to be greater attention to the value foreign-based distributors may bring to the Canadian market and it is important to encourage greater competition and investment in this area.

b) Are all key creative positions of the current Canadian content point system still sufficient, appropriate and relevant, and are the proper weights being allotted to each position?

The points categories and weightings are still relevant and well thought out. The minimum six points is still a good minimum – not often used but providing important flexibility - and well balanced by the mandatory first or second highest paid performer, and the director or screenwriter position. The key creative categories remain relevant. Given the importance of the director and writer functions to the creative realization of the project, the double point requirement is appropriate. The highest or second highest leading performer category requirement also reflects the importance of encouraging Canadians in the highest level performing positions. In these positions, however, it is also necessary to have some flexibility to use foreign talent, and the current definition provides that.

The CAVCO writer definition needs to make some accommodation for projects written by Canadians, but based on projects, novels, ideas developed by non-Canadians. CFTPA supports encouraging greater writing activity by Canadians, but we would question the overall effectiveness of current requirements. Some flexibility in this area would likely result in more projects produced in Canada as Canadian Content, and additional work for Canadian writers.

c) Should the minimum point system requirements be increased?

An increase in the points requirement would be counterproductive to the interests of the entire industry. The current minimum provides a strong incentive for Canadian creative elements while allowing for appropriate levels of international talent. These elements are often necessary for the production to happen; reducing or eliminating them will likely simply eliminate this production in Canada. Productions that no longer qualify for the CPTC program may or may not continue to be produced in Canada. Other options become available and producing outside the content system comes with fewer, if any, Canadian production requirements. Production outside the content system may become production lost to Canada with a corresponding lost benefit to its creators and technicians. We see an increase in the points requirements being counterproductive.

d) Is it necessary to require Canadian residency or is Canadian citizenship sufficient for key creative positions?

Canadian citizenship should be fundamental to the determination of program eligibility. The industry is increasingly international and Canadians will ultimately need to locate wherever it makes sense. Many highly skilled creative and technical talents are not living in Canada. Canadians residing in other countries are still Canadians and should be eligible for key creative positions.

e) Should the system be redesigned to adapt to the differences among the various production genres? Should the Canadian content system be limited to only certain genres?

The points system adapts reasonably well to different genres, which is another reason it has remained relevant to the industry. Genres such as “documentary” and “variety” may need be reassessed, clarified and harmonized with the definitions used by various private and public funding agencies. As new types of programming evolve and media changes to meet different tastes and audience demographics, and production technology evolves with it, it will become increasingly important to keep the definitions current.

We see no need to limit further beyond the current exclusions. With many new channels available, all competing for viewers, producers for those channels should have access to the same type of incentives. Direct funding incentives or policy direction from CRTC may better address need for increased availability of certain types of programming.

f) What changes, if any, need to be made to the point system for animation?

We believe the CAVCO/CRTC animation definition is out-of-date and has been overtaken by changes in production technology. How animation is created has evolved and diversified considerably over the past five years and the points categories as well as the cost requirements need to be reviewed in detail. We would recommend the creation of a specific technical force representing Canadian animation producers and creators to review the present level of relevancy of the current key creative and cost requirements.

g) Should the production and post-production expenditure requirements be amended?

The Expenditure requirements of the definition are very important and as relevant as ever. The 75% minimum ensures that a major amount of production budget is spent on Canadians in Canada. CAVCO indicates that the vast majority of certified productions are well in excess of the minimum. This ensures major value from the system for Canadian technicians, creators and goods and service providers as well. The requirement for post-production to be done in Canada has been fundamental to the creation of a post industry in Canada and should be maintained. Recognizing the overall policy value of these requirements, we would suggest that the dual calculation – production and post-production - could be reviewed by a technical task force of industry experts to consider ways of simplifying and streamlining the calculation.

h) What should be the basis of a new approach to define Canadian content, if deemed required?

Not needed, as outlined above

i) A new Canadian content system would conceivably require the design of vastly different program criteria and administrative processes. How should this new approach work?

Not needed, as outlined above.

j) What are the commercial and cultural consequences of the proposed system?

N/A

3) Should international treaty co-productions continue to qualify as 100% Canadian content?

Co-productions are essential part of system, and they must continue to be treated as domestic content for purposes of broadcasting and for the tax system. Loss of their status as domestic content would undermine the value of our agreements and jeopardize our international agreements. Co-production treaties are important vehicles for cultural exchange as well as one of the only ways available to producers to finance larger budget productions without having to seek U.S. financing. Our treaties are unique in the world and form an important part of Canadian cultural and industry development. Co-productions, ultimately complex projects that are hard to produce, merit continued government support.

4) Should NFB, CBC in-house and Canada Council supported productions continue to be automatically recognized as 100% Canadian content?

We would see much of this production through the NFB or the Council being done in conjunction with independent producers, and normally there would be an application process to CAVCO. Any production qualifying for tax credits should be subject to the same criteria and application process of any independent producer.

In-house production should continue to qualify but be subject to a verifiable application process at the CRTC, as independent producers would do seeking certification at the Commission. This would eliminate any suggestion of a double standard for certification as content for broadcast purposes. As the application process to the CRTC is simpler than CAVCO's, with less budget review, consistency with the Commission's certification role would be maintained, without the creation of an unnecessary burden.

5) Who should assess the Canadian content of a production and how should this be done? Should there be greater harmonization between the approaches taken by the federal departments and agencies involved in the determination of Canadian content? Should the assessment of Canadian content be centralized?

There is a need for greater harmonization among agencies and a simplification of administration process generally. We recognize the different mandates of funding agencies and regulatory bodies but something needs to be done to expedite the system. CRTC needs to continue to do its own certification, as it is less concerned with financial issues and budget review, and is able to provide a timelier certification. CAVCO provides industry standard but its application process has been plagued by backlog and delays. We would recommend a review of procedures in conjunction with the tax credit simplification agenda.

6) Should the administration body have the discretion to accommodate exceptional situations?

The current certification rules should be simpler, clearer and more straightforward. The CAVCO definition is an effective one, but increasingly complex and driven by rules that are not part of the regulations or legislation, and subject to considerable interpretation. Exceptional circumstances tend to raise the potential for increased managerial discretion on rulings, where there is a need for greater predictability and certainty up front. The review of Canadian costs should consider approaches to productions which may have difficulty achieving the cost thresholds, but which meet the points requirements and represent a significant overall benefit to Canadian creators and technicians.

7) Should there be a mechanism to appeal Canadian content decisions?

Simple, clear rules should reduce the need for appeals. The Department's ruling should be binding but there may be some need for a time-efficient mechanism that can provide a second opinion on the details of a project to the Department. An independent advisory panel to CAVCO made up of industry experts could provide expert advice on complex situations and reduce the need for formal appeals.

A handwritten signature in black ink, appearing to read "Elizabeth McDonald". The signature is written in a cursive style with a large, looping flourish at the end.

Elizabeth McDonald
President and CEO