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## **Implementing Canada's Policy on Audiovisual Treaty Coproduction**

### **Response to Department of Canadian Heritage Consultation Submitted by OMDC**

#### **Summary**

OMDC is an Agency of the Government of Ontario with a mandate to build the capacity and competitiveness of Ontario's cultural media industries. Our goal in participating in this consultation is to ensure that Canadian producers continue to be successful in international coproductions and bring benefits to the Canadian economy through increased production activity, economic growth and job creation.

We therefore support the Policy's goal of positioning Canada as an audiovisual coproduction partner of choice. In order for the Policy to achieve this goal over the long term, OMDC feels that it must address the changing technological and financial environment through: a model treaty that provides broad definitions to allow for financial, creative and technological flexibility; the negotiation and renegotiation of treaties with countries who will be good business partners with Canadian producers; promotional activities that emphasize the value of doing business with Canada; a streamlined and transparent administrative process; and effective and flexible performance measures that are reported on regularly.

OMDC believes that the coproduction policy is just one of the many tools available to support and promote Canada's audiovisual sector and it cannot be looked at in isolation. Decisions in this consultation will affect, and are affected by, all federal and provincial programs that support the industry. In preparing this submission we have assumed that the federal government will continue to support the audiovisual sector through the existing funding programs and tax credits as the policy without corresponding funding will be ineffective.

In this submission, we have concentrated on the following provisions in the model treaty: maintaining flexibility when calculating proportionality, eliminating the distinction between high-budget and low-budget productions as they relate to key positions, a broad definition of eligible categories for location and technical services, distribution requirements and the need for alternative distribution arrangements, and promoting the principle that administrative bodies not impose additional conditions or restrictions on producers beyond the terms of the treaty.

OMDC suggests Canada should consider prioritizing the negotiation and renegotiation of coproduction treaties by taking into account: current production activity and financing, emerging economies, commonly shared cultural values, traditions and interests, geographic representation and a jurisdiction's readiness to enter into or renegotiate a treaty with Canada.

Coordination of promotional activities between different government partners should be pursued to leverage the impact of the Policy, but it should also be recognized that individual parties often have unique coproduction opportunities that are best pursued unilaterally.

We encourage DCH to consider only what documentation is necessary to certify eligibility of a

coproduction in the administration of the treaty system. And just as DCH should require only what is minimally necessary to ensure due diligence, so should producers work with administrators to ensure they are filing the appropriate documentation.

OMDC believes that effective monitoring is fundamental to the success of the Policy, and encourages DCH to publish its results on an annual basis. Performance measures should be flexible and adaptable in order to keep pace with the rapidly changing business and technological environment.

## **Introduction**

Ontario Media Development Corporation (OMDC) is an Agency of the Government of Ontario with a mandate to build the capacity and competitiveness of Ontario's cultural media industries. Through tax credits, programs and services for the film and television, book and magazine publishing, music and interactive digital media industries, OMDC maximizes opportunities for growth and innovation in Ontario and abroad.

OMDC provides direct support to Canadian screen-based content producers in Ontario through a variety of programs. The government of Ontario's media tax credits, administered by OMDC, are an important source of financing for audiovisual content creation. In fiscal 2009-10, OMDC issued over 600 tax certificates valued at \$263 million to Ontario's screen-based industries for projects with budgets of over \$2.6 billion. OMDC also invests directly in screen-based domestic content through the OMDC Film and Interactive Digital Media Funds. In 2009-10 the two programs supported 112 projects with production and development funds of more than \$7.5 million for projects with total budgets of \$109 million.

In addition to content creation OMDC supports screen-based marketing and development activities through its Export Fund, and through special initiatives such as the International Financing Forum at the Toronto International Film Festival. In fiscal 2009-10, the Export Fund supported 96 film, television and interactive digital media companies with nearly \$1 million in funds to attend almost 100 international markets. This activity generated over \$165 million in sales for Ontario companies.

In preparing this submission, OMDC consulted with its Screen-based Industry Advisory Committee, which has the role of providing input and advice to the Agency on important industry issues, as well as with other stakeholders with an interest in international coproduction. OMDC does not purport to speak on behalf of these stakeholders, rather, our intent is to highlight some of the issues they have raised and explore some possible solutions.

Given our role as supporters of cultural media content in Ontario, OMDC is pleased to have this opportunity to comment on the Department of Canadian Heritage's (DCH) implementation of *Canada's Policy on Audiovisual Treaty Coproduction* ("the Policy"). Ontario producers have a history of success in producing award-winning content with international partners: in 2009-10 they created 41 projects with budgets of over \$400 million and partners in 16 countries, contributing almost \$150 million in production activity to the provincial economy.<sup>1</sup> Our goal is to ensure that Canadian producers continue to be successful in international coproductions and bring benefits to the Canadian economy through increased production activity, economic growth and job creation.

We therefore support the Policy's general goal of positioning Canada as an audiovisual coproduction partner of choice through the guiding principles of flexibility, openness to renegotiation and negotiation of treaties, alignment of coproduction promotional activities and simplification of administrative procedures.

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<sup>1</sup> OMDC internal statistics.

In order for the Policy to remain successful over the long term, OMDC feels that it must address the changing technological and financial production environment through:

- a model treaty that provides broad definitions to allow for financial, creative and technological flexibility;
- the negotiation and renegotiation of treaties with countries who will be good business partners with Canadian producers;
- promotional activities that emphasize the value of doing business with Canada;
- a streamlined and transparent administrative process; and
- effective and flexible performance measures that are reported on regularly.

### **A Supportive Regulatory and Policy Environment**

Before we turn to the questions posed by DCH in the consultation paper, we would like to comment on the overall importance of supporting Canadian content creators. The coproduction policy is just one of the many tools available to support and promote Canada's audiovisual sector and it cannot be looked at in isolation. Therefore we have assumed, in preparing this submission, that the federal government will continue to support this sector through the existing funding programs and tax credits. Such support is essential in making sure that Canadian producers have the necessary resources to be effective partners in the international marketplace.

The Government of Ontario has demonstrated its commitment to the screen-based industries in a variety of ways. In February 2009, it announced the removal of sunset dates for the enhanced rates for the film and television industries, providing some stability for those industries. In the March 2009 Provincial Budget it announced a pilot initiative to support development in the screen-based industries through the Intellectual Property Development Fund. Also announced in the 2009 Budget were rate increases to the Ontario Interactive Digital Media Tax Credit (OIDMTC) to support Ontario's growing interactive digital media industry. Finally, in June 2010 the Government enhanced OMDC's base funding, providing us with the ability to provide long-term support to the screen-based industries. These initiatives complement and build on the federal government's activities in this area.

It is our belief that an integrated federal regulatory and policy environment that works with all orders of government and industry partners will have the greatest impact on growing the audiovisual sector. Therefore we urge the Department to be mindful of the impact that increased flexibility in the certification of treaty coproductions will have on producers' ability to access other sources of federal and provincial support. The ability of producers to access this support and bring a significant financial contribution to a project is an important selling point for Canadian producers. It is therefore our hope that all funders will continue to review their funding programs whenever changes are made with an eye to ensuring that all programs work together to provide effective support to producers. This will put them in the best position to leverage those public investments in order to grow their businesses and create content that will appeal to a worldwide audience. We look forward to working with all our partners to support this goal.

We also believe the funding currently available is the minimum required to support and grow the audiovisual industry. We encourage the federal government to continue to explore the development of innovative financing mechanisms to support the entire industry. This could include expanding tax credits to digital products, slate-based investments in companies rather than project-based support, and/or other investments that take into account the technological and financing challenges of all screen-based content creators. Investing in these sectors is a proven method of supporting economic growth and job creation in Canada.

## **Model Treaty**

We believe that for the Policy to succeed the model treaty will need to provide content producers with enough flexibility to accommodate the specific financial and creative requirements of each individual project. No two projects are the same and this flexibility will both protect the viability of individual projects and maintain the integrity of the overall Canadian cultural system. It is our understanding that the material changes made to the treaty are meant to provide increased flexibility for content producers, but OMDC is hopeful that reasonable opportunities for exceptions will also still be contemplated by the administrators of the treaty.

We have reviewed the proposed changes to the model treaty, and would like to make the following suggestions:

### *i/ Proportionality*

Though the proposed model treaty defines clearly the minimum amounts a Canadian coproducer must make towards *Canadian elements*, it does not make clear if there will continue to be administrative flexibility in this area. OMDC supports the principle that spending in Canada or on Canadians should be proportional to the Canadian financial contribution to the project in order to ensure there are economic benefits to the domestic industry. However, it is our understanding that treaty administrators currently allow for a degree of flexibility in defining proportionality, and we believe that this flexibility should be maintained on a case-by-case basis to address unique creative considerations. We therefore suggest that the language of the treaty be modified to give content producers some assurance that each project will be evaluated on its own merits when determining if a production has met the proportionality requirement.

### *ii/ Key Positions*

OMDC supports the added flexibility in the model treaty on how key positions are assigned within a project. However, we urge DCH to extend the flexibility to have up to two key positions filled by a third or non-party national to all productions, not just high-budget ones. It is often the low-budget productions that need the most flexibility when putting together the financial and creative package that will let them move forward on a production. It is our recommendation that all coproductions be given this flexibility related to key positions, regardless of budget.

In addition, it is OMDC's expectation that the improved flexibility in the model treaty will not eliminate the practice of allowing reasonable administrative exceptions to accommodate unique creative elements within a project. Such individual exceptions, made on a case-by-case basis, are crucial to providing content producers the needed flexibility to make coproductions viable. In cases where a producer makes a compelling argument for an exception, OMDC does not object to the concept of asking the producer to demonstrate that they are still providing benefit to the Canadian system. If for example a project requires an additional non-treaty key to be viable, has agreement between all coproduction partners, and otherwise lives up to the requirements of the treaty, it may be to Canada's benefit to allow the exemption if the Canadian producer can offer an alternative such as an apprentice position that provides a legitimate training opportunity for emerging Canadian talent. By providing for such reasonable administrative exceptions, OMDC believes the model treaty will fulfill the Policy's goal of increasing flexibility and making Canada a coproduction partner of choice.

### *iii/ Location and Technical Services*

We believe a cap of 25% is reasonable for expenditures on location and technical services in non-treaty countries. However, we encourage DCH to define these services as broadly as possible in order to present

Canadian producers with the greatest amount of flexibility when creating their budgets. One means of doing this is to provide examples of eligible categories that are illustrative but not exhaustive. By giving examples, the treaty is providing a level of predictability for content producers, and by leaving the list open-ended it is allowing for adaptation to individual technical, creative or financial circumstances.

#### *iv/ Distribution*

Introducing a distribution requirement in all territories involved in a coproduction is an important mechanism to ensure that productions reach the widest possible audience. OMDC also supports the concept, as outlined in Article 8 paragraph (2) of the Annex, that alternative distribution arrangements that do not depend on a traditional broadcast licence or distribution commitment may be considered eligible for the purposes of certifying a co-production. This ensures that the treaty will be adaptable to both changing consumption habits and future distribution technologies.

#### *v/ Additional Principles*

To be effective over the long term, we believe that the definitions in the model treaty need to be sufficiently broad to allow for the ongoing technological changes that are sweeping through the creative industries. A modern audiovisual treaty can no longer simply be a film and television treaty, but must include the possibility for alternate forms of distribution and interactive content and platforms. Digital media are emerging as an important economic component of creative production and consumption. Film and television content are increasingly being supplemented with convergent content such as webisodes, games, and websites that are all being consumed on a variety of platforms. Any coproduction policy that does not make room for technological innovation will not stand the test of time.

Finally we would like to see DCH include in the model treaty a statement of principle that administrative bodies will not impose additional conditions or restrictions on producers beyond the terms of the treaty. Unless a coproducer is asking for an exception, the terms of the treaty should remain the sole source of obligations for all producing partners. Canada's screen-based content producers and their international partners are best suited to determine the most appropriate business arrangements for their productions. Provided they are meeting the eligibility requirements, administrators should err on the side of what will benefit the producers when there is ambiguity in the terms of a specific treaty.

#### **Key countries to negotiate and renegotiate treaties**

OMDC suggests Canada should consider prioritizing the negotiation and renegotiation of coproduction treaties by taking into account the following:

- if there is already production activity and where financing exists (for example UK and France);
- if there are potential emerging economic interests (for example India and Turkey);
- if there are commonly shared cultural values, traditions and interests (for example Commonwealth nations, English/French speaking countries, regions with large communities in Canada and countries that respect fair labour practises and copyright);
- if all geographic areas are adequately represented (currently Canada only has one coproduction treaty partner in the Caribbean and none in the Middle East); and
- if a jurisdiction is ready to enter into or renegotiate a treaty with Canada,

In addition, the Department should consider whether a territory has sufficient infrastructure in place to ensure that the risks for Canadian producers are sufficiently mitigated so as not to put their financial investments in jeopardy. This includes both the administrative infrastructure to administer and uphold the provisions of any treaty in that territory as well as the production infrastructure to support content creation activity generated by the treaty.

We acknowledge that potentially all territories, and therefore all treaty coproduction negotiations, are important to content producers, but based on the principles above some of the highest priority treaty partners include: UK, France, Germany, India, China, Brazil, the Nordic countries (Denmark, Finland, Sweden, Iceland, and Norway), Ireland, Australia, New Zealand, South Africa, Caribbean nations, the Middle East, Singapore and Thailand. The timetable for negotiating and renegotiating treaties should be arranged accordingly.

In an effort to maintain timely information we suggest it might be useful for the Department to consult regularly with government partners and content producers to make sure the list of prioritized countries is current and reflects the changing business realities of the international marketplace. Sharing information regularly will mean that DCH can be proactive in reacting to changing and emerging markets.

### **Alignment of coproduction promotional activities**

Coordination of promotional activities between different government partners should be pursued to leverage the impact of the Policy, but it should also be recognized that individual parties often have unique coproduction opportunities or priorities that are best pursued unilaterally. The Canadian brand is an important element to market to the world, but so are local and regional brands. There could be occasions when a local immigrant community, geographical proximity, or cultural affinity that would make a local initiative very appealing to a potential foreign coproduction partner, but these things would not necessarily be reflected in a national coproduction promotion. Therefore we believe a balance is required between national and regional promotional activities.

We also believe that promotional opportunities should be carefully balanced to both maximize business opportunities in existing markets and generate new opportunities in emerging and niche markets. Maintaining Canada's presence in its existing markets is a key strategy towards making the Policy successful, but those existing mature markets are not likely to lead to long-term, dynamic growth. Therefore, an important element of coproduction promotional activities needs to focus on generating interest in Canadian coproductions in emerging markets. OMDC urges DCH to dedicate a portion of its resources specifically to both maintaining market share and to developing new markets.

One important method of raising the profile of Canadian coproductions is to reinforce the message abroad that Canadian producers have access to both financial and creative resources. Success is not only about emphasizing that Canada is open to partner, but also that Canadian producers bring a wealth of financial, creative, and technical skills to the table. It is our experience that the best selling feature is often the promotion of current coproduction projects because they demonstrate that coproduction deals get done, and done well, with Canada.

Once again we believe this is an opportunity for DCH to regularly communicate with government partners and content producers to share timely information on changing market conditions, so that marketing efforts can be deftly targeted.

### **Simplification of administrative procedures**

OMDC understands the complexity of coproduction treaty administration, and the need to ensure due diligence when certifying international treaty coproductions. At the same time, we understand that there is also a need for efficiency and transparency in the system. Streamlined and transparent administrative procedures give producers an advantage in the international marketplace when the predictability and stability of our system can be turned into a selling point for potential partners.

In order to balance accountability and efficiency, we suggest that the review process should only require

the submission of documentation that speaks directly to the eligibility of a coproduction. It is our feeling that the goal of those administering treaty coproductions should be to encourage coproductions and reduce administrative entanglements as much as possible. Producers and administrators need to work together to ensure the appropriate documentation is submitted to prove eligibility requirements are being met.

It is also true that applicants have a responsibility to provide complete and timely information to administrators. It is therefore our hope that DCH will work with content producers and (when appropriate) other government partners to develop a method of minimizing the necessary documentation required to administer the treaties and improve the overall process so that the administrative process itself does not become an obstacle to coproduction.

### **Policy monitoring**

OMDC believes that effective monitoring is fundamental to the success of the Policy, and supports the set of performance measurements outlined in the Policy statement. OMDC would also suggest additional measures be introduced to quantify the revenue and profitability of coproductions, so it can be determined which types of productions bring the greatest value to the Canadian cultural and economic environment.

In addition, we appreciate and applaud Telefilm's recent attempts to define audience reach as widely as possible. We encourage DCH to adopt the same broad and flexible approach to this definition when evaluating the audience reach of Canadian coproductions. A broad definition of audience will give a more accurate representation of the impact of Canadian coproductions, and will encourage new forms of distribution as technologies and tastes change.

We also believe regular publishing of measured results is essential to ensuring the ongoing effectiveness of the Policy and encourage DCH to publish its results on an annual basis. This will give both industry and government the important information needed to address challenges and take advantage of opportunities as they arise.

Finally, since the international business landscape is constantly evolving, it is important that performance measures be flexible and adaptable in order to keep up with this evolution. It will therefore be beneficial to review the key performance measures with industry and government partners regularly to ensure the Policy is continuing to meet its goals and their needs.

### **Conclusion**

OMDC supports DCH's goal of positioning Canada as an audiovisual coproduction partner of choice through the guiding principles of flexibility, openness to renegotiation and negotiation of treaties, alignment of coproduction promotional activities and simplification of administrative procedures. As one component of an overall system of support for the audiovisual industry, a flexible Coproduction Policy that puts producers' financial and creative needs first will bring added benefit to these important sectors and the Canadian economy as a whole.

A model treaty, as part of this Policy, with broad definitions and reasonable administrative exceptions will provide content producers with the necessary flexibility to attract foreign coproduction partners and will ensure the treaty is adaptable to technological and market changes. This in turn will ensure that the Policy will be effective in growing coproduction volume and will provide for increased opportunities to create Canadian content using Canadian talent.

Finally, all elements of the implementation of the Policy will be enhanced if sufficient opportunity is

made for ongoing consultation and collaboration with industry and government partners. Regular consultations will improve DCH's ability to prioritize countries with which to negotiate and renegotiate treaties, identify appropriate venues for promoting Canada as a coproduction partner in existing and emerging markets, target areas to streamline the administrative process and create effective performance measurement data and reports.

Thank you again for the opportunity to contribute to this consultation.

**Submitted by Ontario Media Development Corporation, March 23, 2011.**

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