
**ACTRA SUBMISSION
TO GLOBAL AFFAIRS CANADA ON THE
CANADA-PACIFIC TRADE CONSULTATIONS
(FORMERLY TRANS-PACIFIC PARTNERSHIP)**

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**HOW TO PROTECT CANADA’S RIGHT TO SUPPORT OUR STORYTELLERS:
IN THE PROPOSED DISCUSSIONS AMONG THE REMAINING MEMBERS OF THE
TRANS-PACIFIC PARTNERSHIP**

This is the submission of ACTRA (Alliance of Canadian Cinema Television and Radio Artists) in response to Global Affairs Canada’s consultations on discussions with the remaining members of what was previously the Trans-Pacific Partnership (TPP).

Who we are

ACTRA brings to this process the perspective of 23,000 professional performers working in the English-language recorded media sector in Canada. For close to 75 years, we have represented performers living and working in every corner of the country who are pivotal in bringing Canadian stories to life in film, television, sound recording, radio and digital media. The ACTRA Performers’ Rights Society (PRS) secures and disburses use fees, royalties, residuals and other forms of performers’ compensation. The ACTRA Recording Artists’ Collecting Society (RACS) administers the royalty and private copying levy due to performers in sound recordings.

If the government takes steps to conclude an agreement among the 11 countries that remain in what was the Trans-Pacific Partnership, ACTRA submits the provisions of the TPP Agreement signed on February 4, 2016, must be renegotiated significantly to include a broad cultural exemption and a contemporary definition of the cultural sector.

ACTRA submits, if the 2016 TPP Agreement were to come into force, Canada’s right to implement the full range of cultural policies Canadians need in the digital era would be severely and unacceptably restricted.

Canada’s cultural policies have created successful cultural industries

Since the early 1950s, Canadians and their governments of all political stripes have embraced the premise that if Canada is to have a vibrant arts and culture sector, Canadian governments have an essential role to play. Over the decades, Canada has developed one of the most comprehensive cultural policies in the world.

The objective of our cultural policymaking is to support Canadian artists and cultural producers in their mission to tell our stories and bring our perspectives to audiences. It has never been exclusionary; Canada remains one of the most open markets in the world for the cultural productions of others. Our cultural policymaking is about ensuring our storytellers have the capacity and opportunity to bring high-quality works to the market; and ensuring that audiences, in Canada and abroad, have access to these works.

Even with the challenges of the digital world, our policies remain effective, and Canada’s film and television industry is thriving. There is a healthy mix of service and domestic production. People are

working. According to Profile 2016,¹ total film and television production in Canada was \$6.8 billion in the reported year (mix of data from 2016 and 2015), which represented 140,600 full-time equivalent jobs. While production volume declined by three per cent from the previous year, it remained close to 25 per cent higher than in 2011. Canadian content production, including that produced in-house by broadcasters, accounted for \$4.1 billion of the total.

Canadian television programs are increasingly popular in Canada. *Murdoch Mysteries*, *Motive*, *Saving Hope* and *Rookie Blue* have each regularly drawn more than 1.4 million viewers. The mini-series *Anne* drew 2.1 million people during its premiere episode. *Rick Mercer Report*, *Heartland*, *Schitt's Creek* and many others are well-established within the Canadian landscape.

Many of our television programs also have audiences around the world. While our English-language programs have always found markets in other countries, we've seen growing interest in the United States. From *Degrassi*, *Due South*, *Flashpoint*, *Rookie Blue*, and *Killjoys* to *Wynonna Earp*, Canadian shows receive significant exposure south of the border. We recently celebrated ACTRA member Tatiana Maslany's Emmy Award win for her stunning performances in *Orphan Black*. International successes in children's and youth programming include the *Degrassi* series, *The Next Step* and *Odd Squad*.

According to Film L.A.'s annual study, 13 of the top 100 highest-grossing feature films released in 2016 were shot primarily in Canada.² While our filmmakers regularly receive international acclaim and major awards for their works, audiences are somewhat harder to find for Canadian movies, particularly in theatres.

Our film and television production industry is underpinned by a balanced range of government policy measures at the national, provincial and local levels:

- Canadian content rules, which require those providing viewers with audiovisual content to ensure Canadian works are included in the mix;
- Direct and indirect funding support, which helps to level the playing field for Canadian producers against foreign competitors who have a tremendous competitive advantage. Producers in the U.S., Britain, India and other countries are able to recoup their investment in their home market but Canadian producers cannot;
- Public institutions including the Canadian Broadcasting Corporation, Telefilm Canada and the National Film Board, the public-private Canadian Media Fund and others;
- Support for training and professional development, including of the artists and technicians whose skills are essential to the industry;
- Requirements for our highly-successful media companies, which have grown under the protection of various preferential measures, to make reasonable contributions to Canadian content production;
- Investment rules that protect Canadian firms; and
- Preferential copyright rules.

¹ [Profile 2016](#), CMPA in association with the Department of Canadian Heritage, Telefilm Canada and AQPM, prepared by Nordicity Canada;

² *13% of top grossing films shot in Canada*, Jordan Pinto, Playback, May 25, 2017;

Similar measures have been implemented in other cultural industries, including writing and publishing, music, crafts and design, as well as for the visual and performing arts.

Cultural policies come into conflict with trade agreements

ACTRA's involvement in trade issue stretches back to 1986 when Canada launched free trade negotiations with the United States, and the General Agreement on Tariffs and Trade (GATT) launched its eighth round of multilateral trade talks in Uruguay (the latter created the World Trade Organization (WTO)). GATT covers trade in goods and, when it was signed in 1947, cinema screen quotas were explicitly exempted from the agreement. Concerns about the effects of "free trade" on cultural policymaking began to seriously arise in 1986 because the negotiations launched that year included issues related to trade in services and trade-related investment measures.

Trade agreements concluded since 1986 typically establish rules not only for the physical good, including the book, CD, magazine or film, but also for the services contained in that good, whether they are provided by a writer, musician, dancer, performer or director. These agreements also protect foreign investors and some limit what state-owned enterprises can do.

There is no doubt many of Canada's cultural policies theoretically violate principles of global trade agreements. For example, measures giving preferential treatment to Canadian artists, producers and investors are non-compliant with national treatment obligations. Some broadcasting regulations may be contrary to market access rules. By their very nature, coproduction treaties violate most-favoured-nation provisions.

In the leading international case on cultural policies, Canada's magazine support measures were found in 1997 to be in violation of various WTO provisions. The WTO ruled that Canadian and U.S. magazines were "like goods" despite the fundamental differences in editorial content, and that both the good (i.e. the magazine) and the services it contains (i.e. the writing, advertising, design, etc.) were covered by the trade rules. Since the ruling, Canada has been forced to limit magazine support measures primarily to direct financial subsidies for domestic magazines, since subsidizing domestic producers is generally permitted by WTO and other trade agreements.

Protecting cultural policymaking space

Faced with these challenges, Canada's arts and culture community, together with successive Canadian governments (both Liberal and Conservative with support from other parties in Parliament) have been at the forefront of efforts to exempt culture from the provisions of trade agreements both bilaterally and multilaterally. This is essential to ensuring we have the ability to maintain, adapt and implement new cultural policies as required, from content rules to investment measures to funding programs, to ensure our own artists and cultural industries can thrive and succeed in the globalized world.

Over the past 30 years, we have been somewhat successful in this effort. Canada has negotiated cultural exceptions or exemptions that, while far from perfect, are generally robust and protect the full range of existing measures. Exemptions exist in the Canada-United States Free Trade Agreement, the

North American Free Trade Agreement and the plethora of bilateral agreements Canada has concluded in the last three decades.

While it is beyond the scope of this submission to provide a detailed analysis of each of the exemptions Canada has negotiated since 1986, it is generally the case that they are found alongside other significant policy issues where states maintain flexibility to act, such as security, public health and environmental protection.

While some of the exemptions may limit our flexibility to develop new measures in response to changing circumstances, we have not yet had to seriously confront that challenge.

Canadians were also at the forefront of the campaign to develop the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* (Convention). Some conceived this Convention as a way to carve out the arts and cultural industries from the trade agreements. While it confirms the right of governments to implement cultural policies, it does not override obligations made in trade and investment agreements. Since it was adopted in 2005, 144 states as well as the European Union, have ratified the Convention. In addition to Canada, six other remaining members of what was the Trans-Pacific Partnership are Parties. The Convention provides a foundation for a relationship based on mutual respect and a shared desire to ensure citizens in these countries have access to a richer diversity of cultural expressions.

Most Recent Trade Agreements and Ongoing Negotiations

In the past two years, Canada has engaged in a number of trade negotiations. Canada and the European Union have concluded and provisionally implemented the Comprehensive Economic and Trade Agreement (CETA). Canada has entered into negotiations with the United States and Mexico to “update and modernize” the North American Free Trade Agreement. Twelve countries, including Canada, signed the Trans-Pacific Partnership Agreement. To fully understand ACTRA’s position in the current consultation on proceeding with an agreement to cover the 11 remaining members of the Trans-Pacific Partnership (after the United States notified signatories it did not intend to become a party to the Agreement), it is necessary to review our concerns about the TPP in-depth, and to touch on our analysis of CETA and NAFTA.

TRANS-PACIFIC PARTNERSHIP AGREEMENT

The Trans-Pacific Partnership Agreement involved 12 countries of which seven are also parties to the Convention. It is thus disappointing to see the TPP fails to acknowledge the Convention and fails to adequately protect cultural policy space.

If implemented, the TPP would put pressure on long-standing cultural policies and restrict Canada’s options in developing future policy measures. This is the case since the only substantive Canadian rights arise from country-specific reservations Canada has taken against specific TPP chapters, and these reservations are not underpinned by strong general language recognizing the legitimacy of policies that support cultural industries and cultural diversity.

TPP Preamble

Parties acknowledge the importance of cultural diversity in the preamble but they do so with a significant corollary:

“Recognise the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad;”

The assertion that trade and investment “can expand opportunities” is, on the whole, simply incorrect. When it is left unregulated, history shows trade and investment bring cultural homogenization, where the few dominant cultures overwhelm smaller cultures, not cultural diversity. The Canadian feature film industry is the case study for this failure. Despite our world-class talent pool with Canadian performers, writers, directors and others achieving global success in Hollywood, and the tremendous international acclaim of our filmmakers, Canadian English-language movies struggle to achieve even a two per cent market share in Canadian cinemas. This is because Canada does not have content quotas in our movie theatres, and our film distribution and exhibition sectors are largely unregulated. Meanwhile, this same talent pool creates popular television programs that draw large audiences at home and abroad, and bring in millions of dollars annually from foreign sales, because they have been able to grow and develop with the support of funding, robust Canadian content rules and other broadcasting regulations.

Compare the modest and misleading TPP language with language in four recent agreements Canada has concluded (Peru, Jordan, Panama and Honduras). Similar language is found in most other Canadian agreements:³

“Recognizing that states must maintain the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity, given the essential role that cultural goods and services play in the identity and diversity of societies and the lives of individuals.”

Also in the TPP Preamble, there is a paragraph in which Parties recognize “their inherent right to regulate,” including “... to preserve the flexibility... to set legislative and regulatory priorities... and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system, and public morals.”

Culture and cultural diversity are striking in their absence.

This TPP language is completely different from what is found in many other trade agreements to which Canada is a party. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union recognizes, “... the right of the Parties to regulate ... to achieve legitimate public policy objectives, such as public health, safety, environment, public morals, and the

³ Maltais, Alexandre L., *The TPP and Cultural Diversity*, CCPA, Ottawa, March 2016, pg. 11;

promotion and protection of cultural diversity.” This provision is strengthened by the very next clause that reaffirms the commitment of the Parties to the UNESCO Convention.

TPP General Exceptions

In this section, TPP Parties agree to broad general exceptions for measures related to Security, Taxation and Tobacco Control. There is also a provision that states, “... nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.”

There is no reference to culture or cultural diversity in the General Exceptions.

TPP General Provisions

The only other reference to culture and cultural diversity found in the TPP’s preamble, exceptions or general provisions is in the General Provisions section:

“Subject to each Party’s international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.”

This is the only provision that approaches an exception or confirms a right to regulate, yet it is far too narrow to provide any protection for measures Parties may take to support their arts and cultural industries. Typically, “traditional knowledge” and “traditional cultural expressions” refer to those passed along from generation to generation within First Nations’ or Indigenous Peoples’ communities. The World Intellectual Property Organization notes such knowledge often forms part of the culture or spiritual identity of these communities.

While ACTRA fully supports and encourages a provision that gives Parties the right to enact measures to support First Nations and Indigenous Peoples, including in their cultural expressions, it should not be drafted as being conditional on “each Party’s international obligations.” The obligation exists at a national level even in the absence of an international obligation.

TPP Chapters

To discover how Canada has sought to protect its right to implement, maintain and adapt cultural policies, we need to look at each Chapter of the Trans-Pacific Partnership. CETA was the first agreement in which Canada took this approach, rather than seeking a general exemption.

Parties may list existing “non-conforming measures.” These may be continued or promptly renewed. They may be changed only if “... an amendment to (the) non-conforming measure... does not decrease the conformity of the measure.”

Canada has listed certain non-conforming measures and taken a reservation against various obligations in the Chapters on Investment, Trade in Services, State-Owned Enterprises and Government Procurement. This is the reservation Canada has taken in TPP Annex II against provisions in the Investment and Cross-Border Trade in Services Chapters:

“Canada reserves the right to adopt or maintain any measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content, except:

- a) discriminatory requirements on services suppliers or investors to make financial contributions for Canadian content development; and
- b) measures restricting the access to on-line foreign audiovisual content.”

There are also important considerations and some degree of cultural exception in the Chapter on Electronic Commerce. The key obligation is found in Article 14.1:

“No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.”

Later in the Article it is noted this obligation does not apply to “broadcasting” nor does it apply to subsidies or grants a Party may provide.

There is also a prohibition against imposition of customs duties on cross-border electronic transmissions, although a Party may impose “internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement”.

Intellectual Property

ACTRA believes Canada’s copyright provisions need to be strengthened. In this respect, we fully endorse the provisions in the Trans-Pacific Partnership Agreement’s Intellectual Property Chapter that requires each Party to set the minimum term of copyright protection to the life of the author plus 70 years after death, or 70 years after the date of publication/fixation in those cases where copyright term is not based on the life of a real person.

With regard to liability of Internet Service Providers (ISP), which facilitate the unauthorized use of copyright works, ACTRA supports stronger provisions that would require the ISP to take down the unauthorized material unless the subscriber can prove they have the necessary legal right to make it available. This is known as “notice-and-takedown.”

How TPP threatens Canada’s cultural policies

1. A Reservation is not an Exception

The mechanism used to remove Canadian cultural policies from various TPP obligations is to list existing non-conforming measures and to specifically reserve the right to implement policies related to cultural industries in various TPP Chapters.

This is, first of all, a one-way approach. There is no mutual or multilateral understanding that Canadian cultural policy measures are exempted, particularly in the absence of supportive acknowledgement of the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*.

A reservation does not provide protection nearly as strong as an exception/exemption. Assuming Canada has filed a comprehensive list of existing measures, these may only be “continued” or promptly “renewed.” If a measure is, for any reason, not achieving the policy objective, it cannot be strengthened because this would “decrease the conformity” of the measure and thus would be in violation of the TPP.

There is also a strong assumption in international trade law that all sectors should be liberalized and made to fully conform to the obligations. Where a reservation is taken, it is assumed “standstill and ratchet” provisions will apply.⁴ In other words, the Party will not take actions that would make the reserved sector less “trade compliant” and it is understood the sector will be gradually liberalized. Canada will thus be under constant pressure to restrict its measures implemented under the reservation and, ultimately, to remove its reservation. If it were ever to do so, the sector could never be re-protected. While the risk of such a decision at the moment is remote, the potential is there.

2. The CETA Exception is far more effective than the TPP Reservation

There is a major difference between the approach taken by Canada and the EU in CETA and the approach taken in the TPP. The chapter exceptions in CETA are underpinned by strong language in the Preamble confirming the right of the Parties to regulate, including for “the promotion and protection of cultural diversity.” Further, CETA Article 28.9 provides additional support: “Parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapters Seven (Subsidies), Eight (Investment), Nine (Cross-Border Trade in Services), Twelve (Domestic Regulation) and Nineteen (Government Procurement).” The Parties have also specifically acknowledged their commitment to the Convention.

If Canada were confronted on the use of its cultural reservation in the TPP, it would not have any similar strong language to use as a defense for the cultural policy measure being challenged.

3. Limits on TPP Reservations

As we have seen, there are also explicit limits in various TPP provisions on Canada’s right to implement new policies.

In its own Reservation, Canada has preemptively excluded the possibility to implement “discriminatory requirements on services suppliers or investors to make financial contributions for Canadian content development; and measures restricting the access to on-line foreign audiovisual content.” In the Electronic Commerce Chapter, Parties have certain rights to impose requirements but these must not be more onerous for the works or goods from other TPP Parties. Thus, while the CRTC may be entirely free to impose requirements on Over-the-top (OTT) services under the Broadcasting Act, it could do so in conformity with the TPP only if it applies the same rules to both domestic and foreign OTT services.

⁴ Op. cit., Maltais, pg. 15 for additional analysis.

Yet, this may not be the most appropriate policy mechanism to address the particular challenge or need.

NORTH AMERICAN FREE TRADE AGREEMENT

In renegotiating NAFTA, ACTRA is urging the government to ensure:

- a) The broad general exemption for cultural industries, contained in the general exceptions article, be retained;
- b) The notwithstanding clause be eliminated. This is the clause that authorizes retaliation against measures “that would have been inconsistent” with the agreement were it not for the exemption. This has created a climate where our policymakers often look for ways to solve the problem without triggering retaliation. If culture is exempt, then future policy measures should be judged only for their efficacy and effectiveness, and not against trade liberalization commitments taken by the Parties; and
- c) The definition of what is covered by the cultural exemption be updated and written in a way that will ensure all current sectors and media as well as any future medium that is used for the production or distribution of artistic expressions are included.

A contemporary definition of culture

With respect to the definition, ACTRA believes a contemporary definition would put the artist and creative expression at its heart. The UNESCO Convention could be the guide:

- “Cultural expressions” are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content;
- “Cultural content” refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities;
- “Cultural goods and services” embody or convey cultural expressions, and may have both a cultural and commercial value. The precise form of their medium of production or dissemination is irrelevant to their existence as cultural expressions.

CONCLUSIONS

If Canada decides to proceed with an agreement among the remaining 11 Trans-Pacific Partnership countries, it is important to note Australia, Canada, Chile, Mexico, New Zealand, Peru and Vietnam are all signatory to the UNESCO Convention. These Parties should act on the commitment they have made under the Convention’s Article 21:

“Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.”

To fulfill this commitment, these Parties will have to work together to completely overhaul the cultural provisions of the Trans-Pacific Partnership Agreement before implementing a new trading relationship.

Any Agreement should include a cultural exemption and a contemporary definition of the cultural sector.

The biggest test for cultural diversity is just around the corner as all of us continue to confront the challenges of the Internet. The Internet, of course, is rapidly becoming THE source for cultural expressions of all kinds, from music to literature to movies to games. And there is no doubt artists from many regions have embraced the technology and have been able to gain some exposure. At the same time, even when diverse materials are available online, search engines are making them harder to find. Certainly, an individual who is motivated to search for new and diverse materials will be able to find a treasure trove of interesting cultural expressions from many cultures around the world. However, the algorithms and methods used by the dominant search engines are not conducive to providing a rich range of options, particularly those from outside dominant cultures.

In the face of these developments, our governments will inevitably need to intervene to ensure there is reasonable access for all artists and for the rich global diversity of cultural expressions, and to ensure citizens can find them. Many participants in the government's Canadian Content in a Digital World consultations made this point.

ACTRA believes the Trans-Pacific Partnership Agreement that Canada signed on February 4, 2016, would significantly impede our scope to maintain, adapt and implement the policies we need to ensure Canadian content can thrive in the digital era. Any future trade or investment agreement involving Canada must fully preserve Canada's unrestricted right to regulate for the protection and promotion of cultural industries and cultural diversity.

Mahatma Gandhi: "I do not want my house to be walled in on all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any."