
**ACTRA SUBMISSION
TO GLOBAL AFFAIRS CANADA CONCERNING
A POTENTIAL FREE TRADE AGREEMENT
WITH CHINA**

June 1, 2017



CANADA-CHINA FREE TRADE AGREEMENT: AN OPPORTUNITY FOR CANADIAN CULTURE

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ACTRA recommends that, if Canada and China agree to a Free Trade Agreement, the cultural provisions be based on our mutual support for the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* (Convention).

Key elements of this approach would be:

1. Confirm that, under the Convention's Article 6 and others, Canada and China each have the absolute right to support their own artists and cultural producers.
2. Develop more robust forms of cultural cooperation in every medium, including touring by artists and performing arts companies. ACTRA urges the government to convene a high-level panel of experts from our cultural sector, including from associations of artists, to develop appropriate initiatives.
3. Specifically in the film industry, provide that China will import four feature films from Canada each year and return to the Canadian producer/distributor a share of the relevant box office revenues on a most-favoured-nation basis.
4. Consider the potential for collaboration under other relevant provisions of the Convention.

Who we are

This is the submission of ACTRA (Alliance of Canadian Cinema Television and Radio Artists) in response to the public consultations concerning the possible negotiation of a Free Trade Agreement with China.

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 the 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.

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) and this 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 2011-12. 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 each regularly have drawn more than 1.4 million viewers. The mini-series Anne drew 2.1 million people during its recent premiere episode. The Rick Mercer Report, Heartland, Schitt's Creek and many others are well-established in the Canadian landscape.

Many of our television programs 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, Killjoys to Wynonna Earp, Canadian shows receive significant exposure in the United States. We recently celebrated ACTRA Member Tatiana Maslany for the Emmy Award she received 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 FilmL.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 help level the playing field for Canadian producers against foreign competitors who have a tremendous competitive advantage.

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;

Producers in the U.S., Britain, India and other countries can recoup their investment in their home market; Canadian producers cannot.

- Public institutions. 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 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 financial contributions to Canadian content production.
- Investment rules that protect Canadian firms.
- Preferential copyright rules.

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 (this created the World Trade Organization). GATT covers trade in goods and, when it was signed in 1947, cinema screen quotas were explicitly exempted from the agreement. But, concerns about the effects of "free trade" on cultural policymaking began to arise more seriously in 1986 as 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 goods, 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 public service institutions can do.

There is no doubt that many of Canada's cultural policies violate basic principles of global trade agreements. For example, measures that give 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, co-production 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 World Trade Organization (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 (the magazine) and the services it contains (the writing, advertising, design, etc.) are therefore covered by the trade rules. Since the ruling, Canada has been forced to limit magazine support measures primarily to financial subsidies for domestic magazines, since subsidizing domestic producers is permitted by the 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 (and 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 help our own artists and cultural industries to thrive and succeed in the globalized and digital world.

Over the past 30 years, we have been reasonably 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. It is generally the case that these exemptions are found alongside other significant public policy issues where states maintain flexibility to act, such as national 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 confront that challenge seriously. One limitation arises from the fact we have defined cultural industries as those that existed in 1986 and this may not adequately protect newer media forms. The second set of limitations arises from specific provisions, such as NAFTA's Notwithstanding Clause, which 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 running the risk of triggering the Notwithstanding Clause and thus narrow their policy options.

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*. Distinguished Canadian actor R.H. Thomson represented ACTRA at important international meetings in 2001-02 when the Convention concept was developed. The Convention seeks to confirm the right of governments to implement cultural policy measures and to promote international cultural cooperation. Since it was adopted in 2005, 144 states as well as the European Union, have ratified the Convention, which is both extensive and occurred remarkably quickly for what was initially a controversial proposal.

In recent submissions to the Canadian government concerning the proposed Trans-Pacific Partnership Agreement (TPP) and the potential renegotiation of the North American Free Trade Agreement (NAFTA), ACTRA has pointed out that the Convention is not an antidote to trade liberalization and its provisions do not override trade agreements. Importantly, since the United States is not a signatory to the Convention, it can have no impact on our relationship with our major trading partner. Thus, ACTRA submits it is vital to have a comprehensive general exemption in the TPP and, at a minimum, to retain the existing cultural exemption in NAFTA.

CANADA-CHINA FREE TRADE AGREEMENT

Considerations and background

ACTRA is a trade union and a proud affiliate of the Canadian Labour Congress (CLC). The CLC is currently considering various issues in regards to a potential Free Trade Agreement (FTA) between Canada and China. The CLC's reflection may cause ACTRA to take a broader position on the efficacy of a potential FTA. Certainly, there is concern about the need for China to begin to respect the rights of workers to form an independent union and to bargain collectively with their employer as provided in international law.

Having tabled this caveat, the situation with China respecting culture is potentially significantly different from Canada's situation with the partner countries in either TPP or NAFTA. ACTRA believes the history of the Canadian-Chinese relationship, the existence of a huge Chinese diaspora in Canada, and our mutual support for the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*, provides a foundation for an expanded and more robust cultural relationship, one that is based on mutual respect and a shared desire to ensure that citizens in both countries have access to a richer diversity of cultural expressions.

Canada and China have historically enjoyed a positive relationship. The famous Canadian doctor, Norman Bethune, is a hero in China for his selfless work as a battlefield surgeon for Mao Zedong's Eighth Route Army. Mao's eulogy of Dr. Bethune, who died in the struggle, was for many years required reading for Chinese schoolchildren. In 1970, Canada became one of the first Western countries to recognize the government of the People's Republic of China, and Prime Minister Pierre Trudeau, who travelled there in 1973, was among the first major Western leader to visit.

Given this history, it was not surprising that Canada and China entered into a Film Co-production Treaty in 1987. One of the primary motivations for the Treaty was to facilitate the production of *Bethune: The making of the hero*, a feature film released in 1990 that was the most expensive Canadian movie ever made at that time and one of the first major Western movies to be shot in China. Unfortunately, overall there has been little production under the Treaty in its 30-year history. Since 2005, only six movies have been produced under its terms. Perhaps as a consequence, when Prime Minister Justin Trudeau visited China in 2016, the countries signed a refreshed Co-production Treaty that came into effect on May 1, 2017.

There is a large Chinese diaspora in Canada. According to the 2011 census, the Chinese Canadian population was 1.3 million people, or roughly four per cent of Canada's overall population. The numbers will continue to grow since China has supplied the largest number of immigrants to Canada since 2000, averaging 15 per cent of all immigrants each year. Statistics Canada projects that, by 2031, the Chinese Canadian population will reach between 2.4 and 3.0 million, constituting approximately six per cent of the Canadian population. This brings significant connections on many different levels between the two countries.

Canada and China were both active participants in the negotiation and development of the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* and were strongly supportive of its implementation. Canada was the first state to accept the Convention in November 2005, while China became the 44th when it ratified the Convention 14 months later.

Convention provisions can guide the cultural relationship between two member States

ACTRA believes a more robust cultural relationship is possible between China and Canada, and the UNESCO Convention provides the foundation for that relationship. The following are the key elements of this new relationship:

1. Confirm that Canada and China each have the absolute right to support their own artists and cultural producers.

One of the key objectives of the UNESCO Convention is “to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territories.” Article 6 outlines the range of measures a Party may take to achieve the objective, including:

- Regulatory measures;
- Measures that “provide opportunities for domestic cultural activities, goods and services” within the overall market, including “provisions related to the language used for such cultural activities, goods and services;”
- Public financial assistance;
- Public institutions;
- Measures aimed at supporting artists and others involved in the creative process;
- Measures aimed at enhancing diversity in the media, including through public service broadcasting;
- Measures aimed at ensuring access for domestic cultural industries;
- Measures that promote the “free exchange and circulation” of ideas and cultural expressions and that stimulate the “creative and entrepreneurial spirit.”

The scope of the Convention is broad, it “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.” It is importantly not limited exclusively to “cultural” policies. The Convention definitions reinforce the broad scope of cultural policymaking. Cultural activities, goods and services are defined as things that “embody or convey cultural expressions, irrespective of the commercial value they may have.” Cultural policies and measures refer to “those policies and measures relating to culture ... that are either focussed on culture as such, or are designed to have a direct effect on cultural expressions ... including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.”

There are some limits to what Parties may do in support of their domestic cultural sector. Importantly, Article 5.1, the general provision respecting the scope of governmental authority, confirms the need to respect human rights and fundamental freedoms. There is also a principle of “openness and balance” that may act as a limitation.

Overall, by confirming support for the Convention, Canada and China will acknowledge they each have the right to support their own artists and cultural producers in every sector and medium, and however the works may be distributed to consumers. This is a positive understanding of the broad scope of cultural policymaking and is not limited to current media. Thus, it provides far more protection for Canada than even the most comprehensive exemption Canada has negotiated in any other trade agreement.

2. Develop more bilateral cultural cooperation agreements in every medium

The Convention does more than just confirm the sovereignty of States to take actions within their own territories to promote cultural expressions. It also seeks to encourage cultural exchanges and international cooperation to promote cultural development based on mutual respect and with the goal of providing greater access to diverse cultural expressions in each of the partner countries. One of the objectives of the Convention is “to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges....” The Convention also establishes the “Principle of openness and balance,” which provides, “When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world...”

With this in mind, ACTRA recommends the government convene a high-level meeting of leaders of the Canadian cultural sector to consider how to expand our bilateral cultural relationships with China. It is essential that such a panel include representatives of the artists’ associations. Initiatives to consider would include:

- Expanding the existing Film Co-production Treaty as appropriate to include other media, particularly television and videogames;
- Creating more opportunities for Canadian musicians to tour China;
- Encouraging more opportunities for touring by other artists and performing arts companies with the goal of providing greater access to diverse cultural expressions in both of our countries.

3. Agree that China will import four feature films from Canada each year and provide to the Canadian producer/distributor a share of the relevant box office revenues on a most-favoured-nation basis.

In 2007, the United States launched a WTO complaint against Chinese importation regulations that both limited how many foreign films and books could be imported into the country, and required that it be done in partnership with a Chinese co-distributor, effectively a state-owned enterprise. China cited the Convention in support of its measures, although the dispute panel

rejected this argument, inevitably since the U.S. is not a Party to it. In 2009, the WTO ruled in favour of key elements of the U.S. complaint. While China could continue to exercise censorship and control release dates, it was required to take steps to open its market.

After the WTO decision, China and the United States negotiated a five-year agreement that expired in February 2017. It is now being renegotiated. China agreed to import 34 feature films each year (14 in Imax or 3D format and 20 others) and also agreed to provide 25 per cent of the gross box office receipts from the exhibition of those movies to the U.S. partner. The percentage of revenues returned to the producer/distributor is very small by international standards.

According to press reports, U.S. President Donald Trump and Chinese Premier Xi Jinping have agreed to an increase in the number of Hollywood films that can be imported into China as part of a broader trade deal.³ The issue of revenue sharing remains to be negotiated.

The Chinese theatrical market has grown substantially in the recent past, from U.S. \$2 billion in 2011 to U.S. \$6.4 billion in 2015. Rapid growth continued in early 2016 but then slowed markedly after May 2016. Still, there was four per cent growth in box office receipts and continued expansion of the market with 10,000 new screens being opened in 2016.⁴ China's limitation on imports was designed to ensure roughly 60 per cent of box office receipts are earned by Chinese films (including co-productions). This target was not reached in 2016. Perhaps in an effort to kick-start the slumping market, China informally imported four additional Hollywood films in 2016.

As part of any Free Trade Agreement with China, ACTRA submits that Canada should negotiate an agreement for the Canadian film industry, similar to what China has agreed to with the United States. Such an agreement should require that four or more Canadian feature films be imported annually for theatrical release. Canada could either seek a higher percentage of the gross box office receipts received by these Canadian movies to be returned the producer/distributor, or propose a most-favoured-nation provision that would ensure that Canadian companies are treated the same way as Hollywood companies.

According to recent reports, China is looking to slow down the massive amounts of money that has been leaving the country in recent years in several sectors, including investments in the film industry.⁵ In January 2017, Paramount Pictures announced a deal to source U.S. \$1 billion to finance upcoming films from two Chinese firms, but this deal recently fell apart.

Given our long-standing and generally positive relationship with China, the excellence of our film industry and the fact that production budgets for Canadian movies are only a fraction of

³ China's Hollywood film quota to expand after Trump trade deal, *The Guardian*, April 12, 2017;

⁴ U.S. and China Struggle over Film Quotas, Patrick Frater, *Variety*, February 9, 2017;

⁵ Chinese attempts to curb capital spending abroad, Etan Vlessing, *Hollywood Reporter*, February 13, 2017.

those in Hollywood, all of this creates an opportunity for the Canadian film industry, which ACTRA urges the government to seize.

4. Consider the potential for collaboration under other relevant provisions of the Convention.

The Convention can provide other opportunities for collaboration if the Canadian government wishes to consider them. Examples include:

- Working with China to “promote the objectives and principles of this Convention in other international forums,” as provided in Article 21. This could include working together in the WTO to ensure future multilateral trade agreements fully respect the particular circumstances and requirements of cultural goods and services;
- Promoting collaboration between our respective “civil society, non-governmental organizations and the private sector,” as provided in Articles 11 and 12;
- While it would be extremely delicate, the government could propose collaboration to protect forms of cultural expression that “are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding,” as provided in Articles 8 and 17.

CONCLUSION

Since their election in 2015, the Prime Minister and several cabinet colleagues have talked a great deal about “gold-standard” and “progressive” trade agreements. Yet, each of the agreements currently being seriously considered, from the Comprehensive Economic and Trade Agreement with the Europe Union, the Trans-Pacific Partnership to the North American Free Trade Agreement, present challenges for the Canadian cultural sector. At best, the agreement cultural provisions adequately protect our cultural policymaking space in the analogue world of the last century, but risk seriously restricting our policy options in today’s digital economy. At worst (TPP), the agreement’s cultural provisions will seriously erode Canada’s capacity to support its own artists and cultural producers.

ACTRA proposes a new and progressive approach to the cultural trade issues, one that is based on the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*. This approach would confirm the absolute right of the partner countries to support their own artists and cultural producers, regardless of the medium or method of distribution. It would also encourage the partner countries to develop more robust forms of cooperation and cultural exchanges, based on mutual respect and with the goal of providing greater access to diverse cultural expressions in each of the partner countries.

Such an approach would bring a real gold-standard and progressive agreement for culture.