



Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

April 21, 2009

Via email: moore.j@parl.gc.ca

The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage, Status of Women and Official Languages
Les Terrasses de la Chaudière
15, Eddy Street, 12th Floor
Gatineau, QC K1A 0M5

Re: Canada Media Fund

Dear Minister:

The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.

On March 9, 2009, the Government of Canada announced the creation of the Canada Media Fund (CMF), combining the current Canadian Television Fund (CTF) and the Canada New Media Fund (CNMF), and adding \$20.4 million annually for the next two years to support the creation and multi-platform availability of quality Canadian content. The CAB applauds this initiative and is pleased with the Government's recognition of the structural changes facing broadcasting and the need for an ongoing investment in the sector. One of the strengths of the CTF has been the close involvement of the broadcasting, production and distribution sectors, as well as the Government, in the design of the Fund and its policies. We are encouraged by the Government's continued interest in consulting with the industry on the CMF. To this end, the CAB is pleased to provide some constructive suggestions regarding one of the aspects of the CMF that is most pressing to the Government at this time: the governance and accountability model. We would also like to take this opportunity to provide the Government with some observations on policy issues of key concern to our members.

Independence of CMF Directors

In announcing the CMF, the Government indicated that the new organization would be governed by a smaller, fully independent Board. The CAB supports this direction and believes that such a governance structure would respond to concerns raised by the Auditor General of Canada in her 2005 audit of support to cultural industries.

In its desire to “get governance and accountability right” for the CMF, however, the Government must achieve a delicate balance. On the one hand, directors on the CMF Board should be fully independent of the industry; on the other hand, the CMF would still benefit from industry guidance on the important policy and guideline issues that directly affect broadcasters and producers. The CAB recommends that the new CMF include two new structures: the smaller, fully independent Board that the Government has announced, and a permanent consultative mechanism.

With regard to Board independence, the CAB suggests the following:

The current CTF Test of Independence and its related Criteria Used to Assess Independence form a strong base on which to define the independence of future CMF Board members. Independence of CMF management, independence of judgment, and independence from financial interests, as they are currently interpreted by the CTF Board, reflect governance guidelines used by for-profit corporations as well as best practices taught in leading management schools for not-for-profit corporations. There is a critical gap in the application of the CTF Policy on Independence of Directors, in that only the independence of management criteria must be satisfied by CTF directors. Directors that do not meet the criteria concerning independence of judgment and independence from financial interests may still serve on the CTF Board. The CAB urges the Government to close this gap, to ensure that directors are independent of management, of judgment and of financial interests (that is, no individual who represents 10% or more voting interest in an entity that is or could be a beneficiary).

CAB understands that the Government wishes to implement “best in class” independence criteria for the CMF Board, a principle which the CAB supports wholeheartedly. As such, the current CTF Test of Independence could be further strengthened with additional criteria relating, for example, to former employees of the CMF or CTF, specific lists of entities with which directors must not have material contractual relationships, and real or perceived vested interests. We have provided as an appendix to this letter a set of additional independence criteria which the Government could consider in developing the CMF’s Independence Test.

Industry Consultation Mechanisms

Among the advantages of the current CTF Board composition are the experience and knowledge of respected television and production industry professionals who can provide meaningful input to CTF staff on the development of policies and guidelines. In turn, these Board members bring the industry’s support to the CTF and the Government with regard to these policies and guidelines.

We are encouraged that the Government’s announcement of the creation of the CMF stated clearly that “broadcasters, producers and creators will be consulted through a mechanism to be established by the Board.” To support the Government in its review of potential consultative mechanisms, the CAB provides below some principles and approaches that would capture the best features of the current CTF Board structure, while recognizing that the CMF Board will be fully independent.

The current CTF Board provides a depth and breadth of industry expertise that will not be duplicated by the future CMF Board and could be lost to CMF staff. Consequently, it would be useful both to the industry and the CMF to have a permanent consultative body, which could be modelled on existing consultative bodies in the cultural and other sectors. Further, it could be useful to have separate advisory bodies for the English- and French-language markets, given the current asymmetry in CTF policies with regard to language markets.

The mandate of the consultative body should be to provide input and guidance on CMF policies and guidelines, rather than providing a sounding board for staff, or simply a monitoring and environmental scanning function. Decisions or recommendations of the consultative body should have a meaningful impact on the policies of the CMF.

In order to ensure accountability both to the industry and to the public, the decisions and recommendations of the consultative body should be provided to the CMF Board and made available to the industry and to the public. Moreover, again to ensure accountability, the CMF Board should be responsible for providing formal responses to the recommendations made by the consultative body. The Board's responses should also be made available to the industry and to the public.

The consultative body should have regular input into CMF policy-setting. This could involve scheduled meetings/conference calls, periodic circulation of discussion papers or policy guidelines for comment, the creation of task or working groups to address narrow policy issues, etc. Ideally, the CMF would produce an annual consultation plan detailing the consultations to be held, the method of consultation, and the subjects to be considered.

Members of the consultative body should be drawn from the industry and nominated by industry groups, as is currently the case with the CTF with regard to private broadcasters, producers and distributors.

CMF Policy Matters

While the CAB understands that, in the next few weeks, the Department will focus its efforts on the CMF governance model, we wish to signal a number of CMF policy matters which we encourage the CMF and its consultative body to review in the months prior to the publication of CMF guidelines. These matters concern principles that the CMF "require innovation" and that its investments focus "on what Canadians want."

(a) Innovation

The CAB appreciates that interactive digital media are a necessary adjunct to conventional broadcasting content and represent an essential means to reach large numbers of Canadians. Indeed, Canada's private broadcasters today provide some of Canada's most popular video and audio content via the Internet and wireless platforms. It is their experience that the most successful multiplatform programming involves long-running television series, where audiences are engaged with the program and want to build on that engagement. Moreover, with long-running series, the high costs of development of the interactive platform can be spread across a large number of episodes. Much of the programming supported by the CTF today, however, consists of limited episode series or one-offs, for which the development of interactive content is not economical or effective. As private broadcasters have observed, new media can be extremely effective to extend viewer engagement with television series, but not all television productions of the type supported by the CTF today are suitable for digital multiplatform delivery. We encourage the Government to use a broad definition of "multiplatform" so as not to inadvertently exclude from funding productions which further the Government's cultural policy objectives. We further encourage the Government to consult with the industry on this matter prior to finalizing the Contribution Agreement with the CMF.

(b) Content Canadians Want

The Government's March 9 Backgrounder on the CMF states that the CMF will "ensure that ... [CMF-supported] ... programming is available not only on TV in prime time, but also on the Internet and mobile devices." The CAB supports the Government's objective of ensuring that Canadian content is available where and when Canadians want to watch it. This includes making content available on multiple platforms, as well as in multiple windows and broadcasts. For this reason, we strongly recommend that CMF funding favour programs that reach the largest number of Canadian viewers, irrespective of the broadcast window. It is our understanding that the CMF could favour original, first run programming aired in prime time. The CAB maintains that limiting support in this way would be contrary to the Government's key principle of focussing investments on what Canadians want. Similarly, limiting support in the documentary, variety and performing arts genres could imperil programs for which Canadians have a clear affinity and interest. We urge the Government to work through a CMF consultative body to address these matters in the coming months.

The CAB appreciates the opportunity to provide you with the foregoing suggestions that will encourage the achievement of the Government's key principles for the CMF. As you aptly noted in your announcement, "the most important thing the Government can do is ensure that the policies in place are not impediments to the changes required in the media industry. That is where this partnership becomes more important." Canada's private broadcasters wish, like you, to continue this effective partnership with a Fund that builds on the successes of the CTF while recognizing the current realities of Canadian television.

Sincerely,

Original signed by:

Charlotte Bell, Chair

c.c.: Paul Gratton, Chair, Canadian Television Fund

Jean-Pierre Blais, Assistant Deputy Minister, Cultural Affairs, Department of Canadian Heritage

Amanda Cliff, Director General, Broadcasting and Digital Communications Branch,
Department of Canadian Heritage

APPENDIX

CMF Governance – Independence Criteria

The following is a list of potential independence criteria for consideration. It is based on a review of the existing Canadian Television Fund (CTF) independence policy, as well as a brief review of the requirements for private corporations and the applicability of those requirements to the public sector.

1. Existing CTF Criteria

- **Independent of management** – a director must not be an employee of the Corporation or otherwise make decisions about the allocation of the Corporation’s program resources, either directly or indirectly
- **Independent of financial interests**
 - must not be a substantial shareholder (10% or more voting interest) in an entity that is or could be a beneficiary of the Corporation’s program resources;
 - must also not be a director, officer, employee, principal, partner or managing director of or material supplier to such an entity;
 - must not have any material contractual relationship with the Corporation, other than as a director or officer;
 - must not receive any professional, consulting or advisory fees or payments from the Corporation, other than compensation for Board services (this applies to related entities of the director – an entity is related if the director is a director, officer, employee, principal, partner, managing director, or substantial shareholder); and
 - must not have any other material relationship.
- **Independent judgment** – a director must have no vested interest in the Program Guidelines, and be independent in character and judgment.

Note: under the CTF only independence from management is mandatory; Directors may be deemed independent even if they fail to meet the other criteria.

2. Potential Additions to the CTF Criteria

- Make all the CTF criteria mandatory;
- Add a cooling off period of three (3) years for former employees and associates of the Corporation, and for material relationships;
- To the list of material relationships, add shareholder of material supplier or service provider;
- Include directors and officers on the list of entities with which the Director must not have a material contractual relationship;
- Enhance the judgment criteria to include both real and perceived vested interest.

Note: some of the above-noted criteria are potentially quite subjective. To ensure that criteria are met it is important to consider how their application will be enforced and whether a complaints mechanism should be incorporated into any independence policy adopted by the CMF.

3. Other Additional Criteria for Consideration¹

- smaller amount to represent substantial shareholder (e.g. 5%);
- specific time frame for which a director cannot have been an employee;
- specific amounts which a director cannot have received from the Company;
- the director or an immediate family member of the director who is a partner, affiliate or employee of any firm that currently is an independent auditor of the Company or any of its consolidated affiliates or of any firm that within the last three years was an independent auditor of the Company or any of its consolidated affiliates or the director or an immediate family member, within the last three years, was, but is no longer, a partner, affiliate or employee of any such firm and personally worked on the audit of the Company or any of its consolidated affiliates; or
- an executive officer of the Company serves or within the past three years has served on the compensation committee of the board of directors of another company that, at the same time, employs or employed either the director or an immediate family member of the director as an executive officer; or
- the director is an executive officer or employee of or an immediate family member of the director is an executive officer of another company and the annual payments made by such other company to, or received by such other company from, the Company for property and services exceeded in any single fiscal year the greater of \$X or X% of such other company's consolidated gross annual revenues;
- if he or she or an immediate family member who is employed as an executive officer received more than \$X in direct compensation from the issuer (other than for service as a director or part-time chair or vice-chair and not including fixed amounts received under a retirement or deferred compensation plan that are not contingent on continued service) during any twelve month period within the last three years;
- that the Director does not have any other interest, relationship or association which could be perceived to materially interfere with the Director's objective, unfettered or independent judgment or ability to act in the best interest of the Company.

Note: In January 2009, the Canadian Securities Administrators (CSA) released a new proposal to the public for review. The period for comments closes on April 20, 2009.

While it is important to note that securities laws are applicable to for-profit corporations and will not necessarily bind the governance framework of the CMF, the principles of good governance and independence of directors are significant for not-for-profit entities as well.

¹ See: <http://www.domtar.com/en/corporate/directors/3881.asp>;
http://www.macleoddixon.com/images/New_Corporate_Governance_Regime_Proposals.PDF;
http://www.riotinto.com/documents/Directors_Test_of_Independence.pdf.