CMF approach to projects governed by a Terms of Trade Agreement

In April, 2011, the Canadian Media Production Association (CMPA) and Astral Television Networks, Bell Media Inc. Rogers Broadcasting Limited, Shaw Media Inc., and Corus Entertainment Inc. concluded a Terms of Trade Agreement (the "Terms of Trade Agreement" or the "Agreement"). The Agreement governs a number of key aspects of projects produced by English-language Canadian independent television producers and licensed by these broadcasters.

In order to address the current inconsistencies or conflicts between the Terms of Trade Agreement and the CMF programs, the CMF is announcing the following changes to its Guidelines for all production programs[1] in the Convergent Stream, effective from the beginning of the CMF's 2011-2012 fiscal year, where there is a Terms of Trade Agreement in effect between the CMPA and a Canadian broadcaster which governs the Television Component of an Eligible Project applying to the CMF:

- The CMF will deem a fair market value licence fee under the Agreement to be an Eligible Licence Fee under the CMF Guidelines, notwithstanding anything to the contrary in section 3.2.TV.5 or any of its subsections, with the exception that section 3.2.TV.5(e)(i) will continue to apply to all CMF-funded Convergent production projects, including those subject to the Terms of Trade Agreement. The consequences of this approach include the following:
    - Broadcast licence agreements governed by the Terms of Trade Agreement will no longer need to comply with section 3.2.TV.5.3, which sets out rules related to the separate valuation of various "Other Rights" such as Internet, mobile, original digital content rights, and more "traditional" distribution rights. The treatment of these rights in CMF-funded projects will now generally be determined under the Terms of Trade Agreement. (But see below regarding the CMF's Standard Recoupment Policy.)
    - The CMF's Maximum Terms at section 3.2.TV.5.2 of the Guidelines will no longer apply to broadcast licence agreements governed by the Agreement. The licence term limits described in the Terms of Trade Agreement will now apply.
    - Section 3.2.TV.5(e)(i) will continue to apply to all CMF-funded projects, whether a Terms of Trade Agreement governs the project or not. Section 3.2.TV.5(e)(i) requires that the Television Component be broadcast closed captioned, in peak viewing hours, within 18 months of completion and delivery of the production and, in some CMF production programs, that it be broadcast in the specified language of production.

[1] I.e. the Performance Envelope Program, the Francophone Minority Program, the Aboriginal Program, the English POV Program, and the Diverse Languages Program.

- CMF Licence Fee Thresholds at section 2.4 of the Guidelines will continue to apply to all CMF-funded projects. Where a broadcaster has signed the Terms of Trade Agreement, the "fair market value licence fee" under the Agreement will be counted towards meeting the Licence Fee Threshold, rather than the CMF-defined "Eligible Licence Fee".

    - *Note that the CMF's primary goal regarding the changes described in this document is to facilitate the implementation of the Agreement, harmonizing to the greatest extent possible the Agreement and the CMF's programs. The Terms of Trade Agreement creates a bundle of rights at article 6(a) that a broadcaster can acquire for a single, undifferentiated fair market value licence fee. The CMF's deeming of this fair market value licence fee to be an Eligible Licence Fee should not be interpreted as a valuation of the rights in the "6.a) bundle", either in relation to the Licence Fee Threshold or otherwise. The CMF encourages broadcasters and producers to negotiate the fair market value of all rights.*

- The 10% minimum broadcaster financing requirement for the CMF to fund a Digital Media Component, as described at section 3.2.DM.4, will continue to apply as a separate and distinct requirement. Notwithstanding that the Terms of Trade Agreement bundles "program website" rights within the fair market value licence fee under clause 6.a), the same, undifferentiated fair market value licence fee amount cannot be used to meet both the CMF's Licence Fee Threshold and the 10% minimum financing requirement at the same time.

- Broadcast licence agreements with Canadian broadcasters who have not signed the Terms of Trade Agreement with the CMPA will continue to be subject to section 3.2.TV.5 and all its subsections.

- CRTC-licensed VOD can be used to meet the "2nd platform" requirement of 3.2(2) of the applicable CMF Guidelines. Section 3.2 describes the CMF's convergence requirements, and states in part: "Where fees for the Canadian VOD Right are included within the Eligible Licence Fee, the VOD exploitation associated with those fees is considered part of the Television Component under 1)b above, and therefore cannot be used to meet the requirements of 2) above." Under the Terms of Trade Agreement, certain VOD rights are included within the "fair market value licence fee". As such, where the Terms of Trade Agreement applies, the above-quoted passage from section 3.2 will not apply; VOD can be used to meet the "2nd platform" requirement described in 3.2(2) notwithstanding the fact that the fees associated with them are included within the "fair market value licence fee"/Eligible Licence Fee.

- The CMF's Treatment of Tax Credits Policy will not apply to projects governed by the Agreement. The primary consequence of this change is that for the CMF's selective programs in the Convergent Stream[2], projects need not include 90% of the estimated federal and provincial tax credits in their financial structures as is otherwise required by the Policy. However, the CMF will take into consideration the amount of tax credits included in financial structures when it calculates its contribution to a project.

- The section on "Reduction or Deferral of PFCO" in the CMF's Producer Fees and Corporate Overhead (PFCO) Policy will not apply.

[2] I.e. the Francophone Minority Program, the Aboriginal Program, the English POV Program, and the Diverse Languages Program

The approach described above will be implemented where the Terms of Trade Agreement applies to a project seeking funding from by CMF. While the CMF will effectively defer to the Agreement as described above, the CMF is not adopting the terms of the Agreement as its own Guidelines. As such, any dispute over the interpretation of, or compliance with, the Terms of Trade Agreement will be a matter for the parties to the Agreement, and not the CMF. The CMF will not enforce any of the terms of the Agreement, nor will it determine whether a broadcast licence agreement is in conformity with the Terms of Trade Agreement. The CMF notes that the Terms of Trade Agreement contains a "Dispute Resolution Provision" which parties may avail themselves of in the event of a disagreement.

Notwithstanding the Terms of Trade Agreement, the CMF's Standard Recoupment Policy will continue to apply to all CMF-funded projects receiving an equity investment from the CMF. The CMF has determined that the Standard Recoupment Policy remains important to implementing its mandate and must be maintained in its current form for all projects with a CMF equity investment. As a result, in the event that there is a conflict between the Agreement and the Standard Recoupment Policy, the CMF will require that applicants nevertheless conform with the Standard Recoupment Policy. This includes provisions regarding deduction of distributor fees and/or revenue sharing percentages; where there is a CMF equity investment the CMF will not accept revenue sharing arrangements that are less favourable to the CMF than a 50/50 gross revenue share between broadcaster and producer, unless otherwise specifically permitted by the Standard Recoupment Policy. In case of conflict, compliance may involve two separate recoupment structures for applicants to meet the terms of both the Terms of Trade Agreement and the CMF's policies.

The CMF's determinations in this document are based on the details of the specific Terms of Trade Agreement between the CMPA and the above-mentioned broadcasters. The CMF will continue to closely follow both the impact of the current changes to the program Guidelines and the terms of trade negotiations with other broadcasters. The CMF will determine its approach for the 2012-2013 programs depending on these outcomes.