

**STRUCTURING AN INTERNATIONAL TREATY
CO-PRODUCTION OR A CRTC CO-VENTURE:**

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INTRODUCTION

This paper outlines the key factors to be considered by a Canadian producer in deciding whether or not to structure a film or television co-production with a non-Canadian producer as (a) an international treaty co-production certified by Telefilm Canada, or (b) a “co-venture” certified by the Canadian Radio-television and Telecommunications Commission (“CRTC”) in accordance with the rules and requirements set out in Appendix 1 to Public Notice CRTC 2000-42 (the “CRTC Public Notice”). It is hoped that the paper will provide some guidance for Canadian producers and their advisors in determining which structure is the right choice for any particular production. The discussion begins with a brief description of the international treaty co-production structure and the related role of Telefilm Canada in administering co-productions. This is followed by a discussion of the role of the CRTC and Canadian broadcast quotas in the CRTC co-venture structure, the definition of a “Canadian program” for CRTC purposes and the basic requirements for certification of a CRTC co-venture. In each case, I cover the respective advantages and disadvantages of choosing a particular structure, the availability of Canadian film and television tax credits in respect of each structure, and provide some practical suggestions regarding the selection of the optimal structure for a particular production.

INTERNATIONAL TREATY CO-PRODUCTIONS

A. The Role of Telefilm Canada

Telefilm Canada is a federal Canadian cultural agency which develops and promotes Canada’s audio-visual industry. It administers Canada’s official co-production treaties on behalf of the Minister of Canadian Heritage. The Minister is responsible for negotiating the treaties and Telefilm Canada is the administrative authority which acts on behalf of the Minister in assessing applications for co-production certification.

The international co-production department of Telefilm Canada is based in Montreal:

Telefilm Canada
360 St. Jacques Street
Suite 700
Montréal, Québec
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It recommends the certification of international co-production status for productions which comply with the policies and requirements established by Telefilm Canada and the applicable foreign competent authority as well as the terms of the applicable co-production treaty. The certification process involves two stages:

- Preliminary recommendation (aka advance ruling); and
- Final recommendation (aka final approval).

Applications for certification are submitted to both Telefilm Canada by the Canadian co-producer and to the applicable foreign competent authority by the non-Canadian co-producer (the

majority co-producer will submit the application first to its respective competent authority). The decision to grant or refuse certification of a project is jointly made by Telefilm and the foreign competent authority.

Applications to Telefilm for the preliminary recommendation of live action productions must normally be submitted at least 30 days prior to the commencement of principal photography and, for animation productions, at the time of key animation or, for an animated series, on production of the video master of the first episode.

To provide further guidance on its administrative policies, Telefilm Canada publishes guidelines on the certification of international co-productions. These guidelines were last updated on November 29, 2010 and are available, together with the applicable preliminary and final recommendation application forms, on the website of Telefilm Canada which is www.telefilm.ca.

B. Canada's Bilateral Co-Production Treaties

Canada is a party to approximately 56 film and/or television co-production treaties in effect in 53 countries including France, the United Kingdom, Ireland, Germany, Spain, Italy, Belgium, Bosnia-Herzegovina, the Netherlands, Sweden, Switzerland, Venezuela, Algeria, Argentina, Australia, Austria, Brazil, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Finland, Greece, Hong Kong, Hungary, Iceland, Israel, Japan, South Korea, Latvia, Luxembourg, Macedonia, Malta, Mexico, Morocco, New Zealand, Norway, Poland, Romania, the Russian Federation, the Republic of the Philippines, Senegal, Singapore, Slovak Republic, Slovenia, South Africa, Yugoslavia, Bulgaria, Colombia, Estonia and Uruguay. Notably, the United States is not party to a co-production treaty with Canada. Co-production treaties assist Canadian producers and their foreign counterparts in collaborating and pooling financial and creative resources on a given production. According to Telefilm Canada, for the past several years, the volume of Canadian co-production activity has been approximately \$500 million per year.

European countries tend to comprise the vast majority of Canada's co-production activity. However, co-productions are increasingly being forged by Canadian producers with producers from non-European countries such as Australia, Cuba, Morocco, South Africa, and the Philippines.

C. Benefits of Certification as a Co-Production

A production which is made in accordance with a co-production treaty and which is certified by Telefilm Canada and by the applicable foreign competent authority attains "official treaty co-production" status. As an official treaty co-production, the production is treated as a "national production" of each co-producing country and, as such, normally becomes eligible for the government incentives and tax benefits in each of the co-producer's respective countries which are available to domestic productions.

In Canada, qualifying co-productions are entitled to the full enjoyment of all of the Canadian federal and provincial government incentives and other benefits that are accorded to domestic Canadian-controlled productions. These incentives and benefits include eligibility for virtually all available Canadian federal and provincial film and television tax credits including both the

“higher” Canadian film or video production tax credit set out in Section 125.4 of the *Income Tax Act* and counterpart provincial “Canadian content” government incentives such as the provincial Ontario film and television tax credit and the Film Incentive BC. In addition, international treaty co-productions which meet prescribed requirements are also eligible for discretionary funding programs such as the Canada Media Fund (“CMF”) and the Canada Feature Film Fund (“CFFF”). Finally, international treaty co-productions will normally also qualify as “Canadian programs” as certified by the CRTC (ie. like domestic Canadian productions and CRTC co-ventures).

In foreign jurisdictions, the benefits of certification as an official treaty co-production will vary depending upon the particular country that is a party to the co-production treaty. Many foreign countries, like Canada, offer incentives and benefits for eligible domestic productions and a qualifying co-production will often be eligible to access this foreign source funding in addition to Canadian benefits. For example, an official Canada-U.K. feature film co-production, if properly structured, can access both Canadian film tax incentives and U.K. tax relief (but note that television co-productions, unlike feature films, are not eligible for U.K. tax relief). Similarly, an official Canada-Irish film or TV co-production can access domestic benefits in both Canada and Ireland (recent examples include “The Tudors” and “Camelot”). Certain treaty countries, such as France, have quota requirements for domestic television (i.e. like Canada) and a co-production will sometimes qualify under the relevant quota.

D. Examples of Recent Co-Productions

In addition to “The Tudors” and “Camelot”, other recent official treaty co-productions include: “Being Julia”, a Canadian-Hungarian-UK co-production produced by Toronto’s Serendipity Point Films, Francois Girard’s “The Red Violin” and Alexander Petrov’s “The Old Man and the Sea”, each of which won Oscars, “Hotel Rwanda”, “Eastern Promises”, “Fugitive Pieces”, “Amal” and more recently, the Academy award nominated “Barney’s Version” and “Incendies”.

E. European Content

The co-production treaties between Canada and various European countries are bilateral agreements and their effect must be considered in light of the formation of the European Community (EC) and its Directive on Broadcasting. The EC Broadcasting Directive was first created in 1989 and it has been incorporated into the domestic law of most EC member states, including France and the United Kingdom. Article VI of the Broadcasting Directive provides that member states are to ensure that broadcasters reserve a majority proportion of their transmission time to European works. In order for a Canadian/European treaty co-production to qualify as a “European work”, the work must originate in Europe, be “mainly made by authors and workers residing in Europe”, and have a European entity as a majority co-producer. If all of these conditions are met, the co-production will qualify as 100 % European content. Works that do not meet this definition are foreign works subject to the quota limits, but works that are mainly made by European residents are exempted from the quota to that degree of contribution. For example, if the European financial participation in a two-hour co-production amounts to one third of the total, 40 minutes of the co-production will qualify as European content.

F. Restrictions on Eligibility

While the co-production treaties provide several benefits as described above, they also impose a series of conditions upon the co-producers which sometimes limits their flexibility. For example, each co-production treaty sets minimum standards for financial participation (the minority co-producer must normally contribute at least 20% of the financing), creative participation and the extent to which “third party” countries can be involved in the production. The treaties are also quite specific in outlining the minimum creative and technical contributions which must be made by citizens or nationals of the country of the minority co-producer. For example, co-production agreements may specify minimum numbers of writers, technicians, leading and supporting role performers, and producers who must be citizens of the minority co-producer’s country.

In addition to the foregoing, Telefilm Canada has developed a Creative Evaluation Grid to enhance the transparency and consistency of its co-production assessment process. This Creative Evaluation Grid is available in the *Useful Tools* section of Telefilm Canada’s website. Telefilm Canada uses it to evaluate the creative and technical contributions of Canadians in a manner similar to the “points test” which is utilized by the Canadian Audio-Visual Certification Office (“CAVCO”) for domestic Canadian-controlled productions.

The issue of the origin of the project is often sensitive. Specifically, co-productions which are created “for the screen” by third party non-treaty personnel (e.g. U.S. writers or showrunners) and then entrusted to the co-producers for financing and filming are *not* eligible for certification as official treaty co-productions. This is a key distinction from CRTC co-ventures where the foreign co-venturer may be a U.S. controlled company and the chain of title may originate in the U.S. Notwithstanding this, under Telefilm’s guidelines, a project previously conceived from a third party country may be eligible if the co-producers can demonstrate that since they acquired the underlying property, they have “meaningfully developed and scripted the project”. The involvement of third party non-treaty country production elements is also sensitive. While Telefilm’s guidelines do contemplate the participation of a prescribed number of third party country actors (e.g. Americans) in particular circumstances, in general, all key credited production personnel must be from the co-producers’ respective territories or from the European Union (“EU”), in the case of co-productions with an EU member country. Therefore, for example, a credited U.S. writer or U.S. director would not be permitted to participate in an official treaty co-production (again, unlike the case of a CRTC co-venture or even a domestic Canadian production where such participation would be permitted subject to complying with the minimum 6 out of 10 CRTC or CAVCO “points” test, as applicable).

G. No Canada-U.S. Co-Productions

There does not exist a co-production treaty between Canada and the United States and no such treaty is anticipated. Furthermore, a U.S. controlled entity will not qualify as “Canadian” for purposes of the co-production treaties. In certain cases, however, U.S. companies may take indirect advantage of international co-production treaties through their non-Canadian subsidiaries or affiliates incorporated and carrying on business in non-Canadian jurisdictions which are parties to a co-production treaty with Canada (i.e. provided such non-Canadian subsidiaries or affiliates meet the relevant qualification criteria under the applicable co-production treaty).

Another key distinction between official treaty co-productions and CRTC co-ventures is that the latter includes any co-production between a Canadian producer and a non-Canadian producer which is *not* undertaken under an official co-production treaty. Therefore, for example, a CRTC co-venture can include a co-production between a Canadian co-producer and a U.S. co-producer. In contrast, in the case of an official treaty co-production, while a U.S. company may be involved as a distributor, broadcaster and/or financier, it cannot be a “co-producer” of the production *per se*. And its executives can only receive certain prescribed screen credits, such as Executive Producer credits, provided that Telefilm’s criteria are met, affidavits in prescribed form are executed and filed with Telefilm, and the screen credits are ultimately approved by Telefilm.

H. Key Criteria for Certification

To be certified as an official treaty co-production, the production must comply with the applicable bilateral co-production agreement as well as Telefilm Canada’s official treaty guidelines which are posted on Telefilm Canada’s website. Among the key requirements for certification are the following:

- The Canadian co-producer must be controlled both in law and in fact by Canadians in accordance with the *Investment Canada Act*;
- Co-productions must be with foreign producers from countries that have signed a co-production agreement with Canada or, in the case of multipartite co-productions, with one of the other co-producing countries;
- Creative and technical participation, as well as spending, copyright ownership and profit sharing must be proportionate to the financial contribution of each co-producer;
- If the Canadian co-producer is affiliated or associated with the foreign co-producer, it may be ineligible;
- The co-producers must control the development process (i.e. sufficiently to the satisfaction of Telefilm) and at least one of the co-producers must own or control the underlying rights necessary for the co-production;
- The Canadian financing must cover the cost of the Canadian elements, which can never be lower in the aggregate than the minimum applicable treaty requirements. The minimum financial participation of each co-producer varies depending on the treaty from 15% to 30%, with 20% being the most common;
- The producer, the crew and the key personnel exercising control over the creative, financial and technical aspects of the Canadian portion of the production must be Canadian citizens or permanent residents;
- For co-productions with an EU member country, the director(s) and scriptwriter(s) must be citizens or permanent residents of Canada or an EU member country; and
- All exploitation rights for the Canadian market must be under the effective control of Canadians.

For more detailed information, visit Telefilm’s website at www.telefilm.ca.

CRTC CO-VENTURES

A. The Role of the CRTC and Canadian Broadcast Quotas

The CRTC, in its capacity as regulator and supervisor of all aspects of the Canadian broadcasting system, requires all Canadian television broadcasters, cable and specialty services and networks, as a condition of their respective broadcast licenses, to license and broadcast a minimum quota of “Canadian content” television programs. To this end, it has established criteria for what constitutes a “Canadian program” as set out in the CRTC Public Notice. When programs are certified as Canadian by the CRTC they are issued a “C” number in the case of domestic Canadian programs and an “SR” number in the case of co-ventures. If the co-venturers are able to deliver an “SR” number to a potential Canadian broadcaster, this will increase the value of the program to the broadcaster (i.e. as a “Canadian content” program that will assist the Canadian broadcaster in fulfilling its annual “Canadian content” program quota as mandated by the CRTC) and may induce the broadcaster to license the program and to pay a higher Canadian broadcast license fee for the program than would be the case if it was not certified by the CRTC.

B. The Definition of a “Canadian Program”

The CRTC Public Notice sets out the criteria for the certification of Canadian programs by the CRTC including several definitions of eligible “Canadian programs”. The basic definition of a “Canadian program” comprises the following elements:

- (a) The producer of the program must be a Canadian citizen or permanent resident of Canada;
- (b) A live action production (there are separate rules for animated productions) must earn a minimum of 6 out of 10 “points” based on the following key functions being performed by Canadians (the “**Points Test**”):

Director – 2 points

Screenwriter – 2 points

Lead Performer (or first voice) – 1 point

Second Lead Performer (or second voice) – 1 point

Production Designer – 1 point

Director of Photography – 1 point

Music Composer – 1 point

Picture Editor – 1 point

At least 1 of the director or screenwriter of each production (or episode, in the case of a series) and at least 1 of the 2 lead performers must be Canadian;

- (c) At least 75% of all production services costs (i.e. “below-the-line” costs with certain exceptions) must be paid to Canadians; and
- (d) At least 75% of all post production/laboratory costs must be paid for services provided in Canada by Canadians or Canadian controlled companies.

C. Requirements for Certification as a CRTC Co-Venture

In lieu of qualifying under the basic definition of a Canadian program described above, a production may be granted special recognition by the CRTC as a “Canadian program” if it qualifies as a CRTC co-venture in accordance with the CRTC Public Notice. “Co-ventures” are defined in the CRTC Public Notice as international co-productions between Canadian controlled companies and foreign controlled companies which are not included under the international co-production treaties administered by Telefilm Canada. As discussed above, the Canadian government has entered into international co-production agreements with over 50 countries around the world but there is no treaty between Canada and the United States. However, a co-venture between a Canadian co-producer and a United States co-producer is permitted by the CRTC and, in fact, is the most common form of co-venture.

The detailed criteria for qualification of a program as a CRTC co-venture are set out in the CRTC Public Notice. Generally speaking, a co-venture will qualify for special recognition and certification by the CRTC as a “Canadian program” if the co-venture agreement between the Canadian and foreign-controlled companies and other documentation substantiate to the CRTC’s satisfaction that the Canadian company:

- (i) has no less than an equal measure of decision-making responsibility with the foreign co-venture partner on all creative elements of the production; and
- (ii) is responsible for the administration of not less than the Canadian element of the production budget.

The decision-making responsibility for the production is considered by the CRTC to be in the hands of the Canadian company when that company:

- (i) has sole or co-signing authority on the production bank account. For co-ventures shot entirely in Canada, the production bank account must be in Canada; for those shot partially in Canada, a Canadian bank account is required for the portion of the production shot in Canada. In the case of co-ventures shot entirely outside Canada, a Canadian bank account must exist, for payment of the Canadian elements of the program;
- (ii) contributes at least 50% of the production financing and receives at least a 50% share of the “profits” from the exploitation of the co-venture production;
- (iii) is at financial risk and has budgetary responsibility in respect of the co-venture production; and
- (iv) has at least an equal measure of approval over all creative elements of the production with the foreign co-venture partner, regardless of the number of foreign persons fulfilling the functions of executive producer or producer.

In addition, in order to receive special recognition from the CRTC, the co-venture must meet the Canadian “Points” Test (i.e. at least 6 out of 10 “points” allocated to Canadians) and the 75% minimum Canadian expenditure tests described above. Note that while the Canadian co-venturer must receive at least 50% of the profits from the exploitation of the co-venture production, it is

not required under the CRTC rules to own any interest in the copyright of the co-venture production which may be owned 100% by the foreign co-venturer if the parties so desire.

D. Reduced Requirements for Co-Ventures with Commonwealth, French-Speaking or Co-Production Treaty Countries

If the co-venture is between a Canadian entity and an entity from a Commonwealth or French-speaking country, or a country with which Canada has an international film or television co-production treaty (for list of current co-production treaties, consult the Telefilm Canada website at: www.telefilm.ca) the co-venture is eligible for special recognition by the CRTC with a reduced Canadian “Points” Test and reduced Canadian expenditure tests as follows:

- (i) the production attains a minimum of 5 points (i.e. rather than 6 points) out of 10;
- (ii) at least 50% (i.e. rather than 75%) of the costs for services are paid to Canadians; and
- (iii) at least 50% (i.e. rather than 75%) of the post-production and laboratory costs (except for picture editor) are paid for services provided in Canada by Canadians or by Canadian companies.

E. Advantages and Disadvantages of Using a CRTC Co-Venture Structure

The decision to use the CRTC co-venture structure, as opposed to the official treaty co-production structure, is driven by several different factors which are rooted in the different eligibility requirements for each structure. For example, if a non-treaty country screenwriter or director is attached to a production, an international treaty co-production will not be possible as discussed above. Similarly, if a production originates in the U.S. and a U.S. party desires to have production input a CRTC co-venture will often fit the bill whereas a treaty co-production would not be permitted. In yet other circumstances, a production which might otherwise be structured as a Canadian service production for a foreign copyright owner may be restructured as a CRTC co-venture so that the production qualifies as a “Canadian program” for the CRTC’s Canadian broadcast quota purposes.

The key advantage of the CRTC co-venture structure is that, notwithstanding the direct involvement of a non-Canadian producer in the co-venture and the potential ownership of the copyright in the production by a foreign-controlled company, the co-venture production will nevertheless qualify as a “Canadian program” for Canadian broadcast quota purposes as if it were a domestic Canadian program (generally resulting in an easier Canadian broadcast sale and a higher Canadian broadcast license fee). For example, a Canadian broadcaster, could agree to pay to the Canadian co-venturer a substantial license fee for the Canadian broadcast rights to a program, conditional on such program qualifying as a “Canadian program” for CRTC purposes and a CRTC co-venture would so qualify.

Other advantages to the CRTC co-venture structure include the fact that a production can originate with a non-Canadian co-producer, the chain of title can be controlled by a non-Canadian co-producer and copyright can be owned by a non-Canadian co-producer. As well, a

non-Canadian co-producer may be openly involved in the production process (unlike an official treaty co-production), may receive producer-related credits and may control distribution of the production outside of Canada (all of which would pose problems under either an official treaty co-production structure or a CAVCO certified “Canadian content” production). In addition, the conventional minimum 6 out of 10 Canadian “Points” Test and the 75% minimum Canadian expenditure tests are reduced in the case of co-ventures with Commonwealth and film or television treaty co-producers (which can be a particular advantage where a production would not otherwise qualify as “Canadian” for CRTC purposes).

Of course, whether or not a particular factor is considered an advantage or disadvantage will vary depending upon whether one is the Canadian or foreign co-venturer. For example, the fact that there are no restrictions over ownership of copyright by a non-Canadian may not be perceived as positive from the point of view of the Canadian co-venturer. Similarly, the foreign co-venturer may not wish to share decision-making responsibility with the Canadian co-venturer on an equal basis, nor wish to cede control to the Canadian co-venturer over the administration of the Canadian element of the production budget.

The most significant disadvantage of the co-venture structure, however, is that while the program will be considered “Canadian” for CRTC broadcast quota purposes, it will not qualify as a Canadian certified film or video production for purposes of the federal “Canadian content” tax credit program and other similar “Canadian content” provincial film tax credit programs. As discussed below, it will, however, qualify for the lesser production services film tax credits which are available from both the federal Canadian and most provincial governments. As well, unlike an official treaty co-production, a CRTC co-venture will also not be eligible to access either CMF or CFFF funding.

F. Canadian Co-Venturer: Tax Planning

Another issue for the Canadian co-venturer to carefully consider is its Canadian tax position in light of the CRTC co-venture structure. The CRTC co-venture production will not qualify as a “Canadian film or video production” under the *Income Tax Act* and, in addition, the Canadian co-venturer will often not own the copyright in the production and will have a 50% profit entitlement only. Consequently, the Canadian co-venturer will not be permitted to immediately fully deduct the cost of production against the license fee monies it receives from the applicable Canadian broadcaster and other financing which it receives. Accordingly, it is recommended that the Canadian co-venturer consult its tax advisor to structure its tax position on an optimal basis. To minimize any potential adverse tax consequences to the Canadian co-venturer, it is recommended that (a) a single purpose entity act as the Canadian co-venturer, and (b) any Canadian source revenues, such as broadcast license fees, which are received by the Canadian co-venturer should be paid to the single purpose production entity or “Prodco” (described below) to finance production (and therefore deducted by the Canadian co-venturer). Unfortunately, a more complete discussion of the tax position of the Canadian co-venturer is beyond the scope of this paper.

G. No “Canadian Content” Tax Credits

As mentioned above, the CRTC co-venture structure will not qualify a co-venture production for the federal or provincial “Canadian content” refundable tax credits designed to promote domestic

production and administered by CAVCO and Canada Revenue Agency (“CRA”). In order for a production to qualify as “Canadian content” for tax credit purposes through CAVCO, the production must either qualify as an official treaty co-production or be developed, produced and owned solely by a Canadian producer and meet the Canadian “Points” Test and the minimum 75% Canadian expenditure tests outlined above. The federal “Canadian content” tax credit is available at a rate of 25% of qualified labour expenditures rendered in connection with the Canadian film or video production produced by a “Canadian controlled” corporation as determined under the *Investment Canada Act*. The labour expenditures qualifying for the credit may not exceed 60% of the cost of production, as certified by the Minister of Canadian Heritage.

In determining whether or not a co-venture structure is suitable for any particular production, it is recommended that the Canadian producer calculate the difference between the amount of the applicable “Canadian content” tax credits (payable in the event that the production is produced as a domestic “Canadian content” production) and the amount of the applicable production services tax credits (payable in the event the production is produced as a CRTC co-venture). Such an analysis will assist the Canadian Producer to quantify the foregone tax credit revenues resulting from the co-venture structure and to weigh this up against the benefits of the co-venture structure in terms of inducing a non-Canadian to participate in the financing of the program because of the structure’s benefits to the non-Canadian, namely: (i) allowing the non-Canadian to co-produce the program with equal decision making over creative and financing elements (i.e. as opposed to being a foreign distributor only), (ii) allowing the non-Canadian to own 100% of the copyright in the program (i.e. as opposed to the copyright being owned 100% by the Canadian producer as per a domestic “Canadian content” production), and (iii) allowing the non-Canadian to distribute the program in all markets outside of Canada (i.e. as opposed to a “Canadian content” production pursuant to which it would be an indicator of non-Canadian control under the CAVCO Producer Control Guidelines if a non-Canadian distributed a program in both the U.S. and other ex-Canadian foreign territories).

H. Canadian Production Services Tax Credits

The CRTC co-venture structure is compatible with both the federal Canadian and provincial production services tax credits. The federal Canadian film or video production services tax credit, is a refundable tax credit, also administered by the federal Canadian government, through CAVCO and CRA, and is designed to promote both domestic production and foreign location filming in Canada. This tax credit is based solely on Canadian labour expenditures and is equal to 16% of the total cost of qualifying labour expenditures for services rendered by Canadians in Canada in respect of an “accredited production”. To qualify, the cost for a production for the 24 month period after principal photography has begun must exceed CDN\$1,000,000, except in the case of a series consisting of 2 or more episodes or a pilot for such a series. The cost for each episode in a series, which has a running time of less than 30 minutes, must exceed CDN\$100,000 per episode. The cost for episodes with a longer running time must exceed CDN\$200,000 per episode.

To be eligible for the Canadian production services tax credit, the applicant corporation must be a corporation (which can be foreign-controlled or Canadian-controlled), the activities of which in the year primarily (i.e. more than 50%) consist of the carrying on through a permanent establishment in Canada, of a film or video production business or a film or video production services business; and, must either (a) own the copyright in the “accredited production” or (b) be

contracted directly by the copyright owner of the “accredited production” to perform the production services.

Since the copyright in many co-venture productions will be owned by the foreign co-venturer but the production activities will be undertaken in Canada primarily by the Canadian co-venturer, it is common to use a single purpose production company (“**Prodco**”) established by the Canadian co-venturer (or sometimes owned by a third party) to render production services in respect of the production and for the two co-venturers to engage the Prodco to render such services under a production services agreement pursuant to which, *inter alia*, Prodco is directly engaged by the foreign co-venturer to render the services and Prodco agrees to apply for the applicable Canadian federal and provincial production services tax credits.

Most provincial governments have counterpart production services tax credits to the federal film or video production services tax credit. In many cases these provincial production services tax credits are more generous than the federal production services tax credit both in terms of the scope of the eligible costs and the rates. For example, the Ontario production services tax credit is equal to 25% of all eligible labour and non-labour expenditures. Also, if the production involves any computer generated animation or special effects, certain additional provincial tax credits also may be available to the co-venturers. For example, in Ontario, the Ontario computer animation and special effects tax credit (OCASE), jointly administered by the Ontario Media Development Corporation and the Ministry of Finance (Ontario), is calculated as 20% of the eligible Ontario labour expenditures incurred by a qualifying corporation with respect to eligible computer animation and special effects activities (i.e. designing, modeling, rendering, lighting, painting, animating and compositing). B.C. and Québec have similar tax credits as well. As in the case of any combination of federal and provincial film tax credits, note that the provincial film credits will normally constitute “assistance” and will reduce the otherwise available quantum of the federal tax credit (but not vice versa).

I. How is a CRTC Co-Venture Financed?

In accordance with the CRTC Public Notice, the Canadian co-venturer must contribute no less than 50% of the production financing to the co-venture. In this regard, the co-venture agreement between the Canadian and foreign co-venturers generally provides that all Canadian source revenues, including any Canadian broadcast license fees and any Canadian federal and provincial tax credit proceeds will be paid to the Canadian co-venturer (and/or the Producer) and allocated towards its 50% production financing contribution. If the Canadian license fees and tax credit monies are less than 50% of the budget, the Canadian co-venturer may be allocated a portion of the financing derived from outside of Canada as discussed below or other arrangements will be made to ensure that the Canadian co-venture contributes no less than 50% of the financing to the co-venture as required under the CRTC Public Notice.

J. What if Canadian Source Revenues are Less Than 50% of the Budget?

If there is a shortfall and the aggregate Canadian source revenues represent less than 50% of the total production financing for the co-venture, a portion of the production financing from outside of Canada may be allocated to the Canadian co-venturer so that it contributes no less than 50% of the total production cost as required by the CRTC. To achieve this result, the co-venture agreement may provide that both co-venturers will initially control all distribution rights outside

of Canada. They will jointly appoint an affiliate of the foreign co-venturer or an arm's length third party distributor (“**Distribco**”), as the worldwide distributor of the production outside of Canada. Distribco will pay a distribution advance (often recoupable by Distribco) in an amount (typically) equal to all revenues which it receives from the licensing of the production outside of Canada, which monies are then allocated between the two co-venturers in accordance with the terms of an international distribution agreement between them so that the Canadian co-venturer contributes the minimum 50% of the total production cost (i.e. its allocated share of the international distribution advance is added to any applicable Canadian broadcast license fees and the Canadian federal and provincial tax credits contributed by the Canadian co-venturer to the production financing so that it contributes no less than 50% of total production financing).

K. Do the Financing Sources have to “Match” the Expenditures?

Regardless of the sources of production financing, the CRTC requires that (other than for co-ventures with Commonwealth or treaty country foreign co-producers) at least 75% of all production costs must be spent on Canadian elements, crew and post-production/laboratory costs as required by the two 75% expenditure tests discussed above. This means that up to 25% of the total production costs may be paid to non-Canadian individuals or companies in compliance with the CRTC Public Notice. However, although the two minimum 75% expenditure tests must be met in order for the production to qualify as a CRTC co-venture, the sources of financing need not necessarily “match” the expenditures. Accordingly, it is permissible for the Canadian co-venturer to contribute more than 50% of the production financing so long as it contributes no less than 50% of the total production financing.

L. How are “Profits” Calculated?

In accordance with the CRTC Public Notice, all “profits” derived from the co-venture production must be shared between the co-venturers on an equal 50/50 basis (technically, the Canadian co-venturer must receive “no less than 50%”). However, since the CRTC Public Notice includes no definition of “profits”, the co-venturers are free to negotiate a commercially reasonable definition of “profits” which may or may not include various deductions from “gross receipts”. A typical definition of “profits”, however, will include, for example, the deduction of distribution fees and expenses, the deduction of any distribution advance (plus interest) and any third party profit participations before any “profits” are distributed to the co-venturers. In some instances, the co-venturers may negotiate a business deal whereby certain revenues from “ancillary” exploitation (i.e. merchandising, soundtrack, radio, etc.) of the production may be excluded from the profit sharing arrangement between the co-venturers if permitted by the CRTC. Note, however, that the profit sharing arrangements must include all primary forms of exploitation, so, for example, in the case of a television production, all “profits” derived from television and home video exploitation must be shared on no less than an equal 50/50 basis. In any event, the acceptability of all profit sharing arrangements between the co-venturers will be subject to the discretion of the CRTC which discretion will be exercised with regard to the facts and circumstances of each particular co-venture.

M. What is the Tax Treatment of “Profits” Payable to Canadian Co-Venturer?

To the extent that the Canadian co-venturer receives any “profits” from the exploitation of the production by Distribco or otherwise, such monies will be *prima facie* taxable in Canada.

N. Key Differences between CRTC Co-Ventures and Treaty Co-Productions

As described above, there are many differences between co-ventures and co-productions. Among those to note in particular:

- A Canadian treaty co-producer must contribute no less than a minimum (typically 20%) and no more than a maximum (typically 80%) of production financing – in the case of a co-venturer, the Canadian co-producer must contribute no less than 50% of the production financing.
- Development of a treaty co-production can normally only be undertaken by the applicable treaty nationals – in the case of a co-venturer there are no restrictions on development *per se* as long as one of the co-venturers controls the chain of title.
- All of the key production and technical elements in a treaty co-production must be treaty nationals with the exception of a few actors in prescribed circumstances – in the case of a co-venture, the minimum Canadian “Points” Test must be complied with but, subject to this, the key elements can be from any country.
- In the case of a treaty co-production, the financing, production expenditures and profit participation as well as copyright ownership must all be proportionate as between the co-producers – in the case of a co-venture, the Canadian co-venturer must always contribute at least 50% of the production financing, the expenditures are governed by the applicable CRTC minimum spend tests and copyright can be owned by either the non-Canadian co-venturer or by the Canadian co-venturer or co-owned by them, as the co-venturers mutually desire (but the Canadian co-venturer must always receive no less than 50% of the profits as described above).

O. Co-Venture Chart

Attached as Schedule “A” to this paper, is a sample chart which sets out a possible structure of a CRTC co-venture between a United States co-venturer and a Canadian co-venturer.

Please note that the discussion in this paper is general in nature and should not be relied upon as legal advice. We encourage you to consult qualified legal counsel directly with specific problems or questions regarding the various rules discussed above and their application in your particular circumstances.

This paper is based, in part, on a prior paper written by David Zitserman and Tara Parker for the Entertainment, Advertising and Media Law Symposium (April 27-28, 2007) of Women in Film and Television – Toronto entitled “CRTC Co-Ventures: An Overview”. David Zitserman is the head of, and Tara Parker is a partner in, the Entertainment Law Group of Goodmans LLP. Goodmans LLP is a full service law firm of over 200 lawyers based in Toronto and Vancouver with expertise in all aspects of film, television and interactive production, distribution and financing as well as CAVCO, CRTC, Telefilm Canada and CRA regulatory matters.

CANADA

CO-VENTURE STRUCTURE

U.S.

CANADIAN CITIZEN

CANADIAN CITIZEN/ AMERICAN CITIZEN

100%

100%

CO-VENTURE AGREEMENT

Canadian Controlled Company ("Can.Co.")

- entered into Co-Venture Agreement with U.S. Co.
- with U.S. Co., jointly engaged Can. Prod. Co. under the Production Services Agreement to produce the Production
- responsible for contributing 50% of financing of Production and has right to receive 50% of "profits" from the Production
- controls Canadian distribution rights
- jointly controls with U.S. Co. worldwide distribution rights (excluding Canada)

American Controlled Company ("U.S. Co.")

- entered into Co-Venture Agreement with Can. Co.
- with Can. Co., jointly engaged Can. Prod. Co. under the Production Services Agreement to produce the Production
- responsible for contributing 50% of financing of Production and has right to receive 50% of all "profits" from the Production
- jointly controls with Can. Co. worldwide distribution rights (excluding Canada)

Production Services Agreement

Production Services Agreement

Production Services Agreement

100%

Canadian Production Company ("Can. Prod. Co.")

- single purpose production company owned 100% by Can. Co. and jointly engaged by Can. Co. and U.S. Co. to produce the Production
- responsible for claiming all production services tax credits ("Tax Credits")
- Tax Credits attributed to Can. Co.'s 50%

U.S. Distributor Company ("U.S. Dist.")

- owned 100% by U.S. Co. and appointed by U.S. Co. and Can. Co. as worldwide distributor (excluding Canada)
- distribution advance attributed and allocated to Can. Co.'s and U.S. Co.'s respective 50% financing contribution to the Production, as required to ensure ultimate 50%/50% contribution split
- recoups distribution advance, maximum fees, costs and expenses with remaining "net profits"

100%

Canadian Broadcaster

- granted Canadian broadcast rights by Can. Co.
- license fee per episode attributed to Can. Co.'s 50% financing contribution to the Production

Broadcasting Arrangements

- granted worldwide (excluding (i) U.S. broadcast rights and (ii) Canadian broadcast rights) distribution rights by U. S. Dist.; Distribution advance per episode payable to U.S. Dist..
- Granted U.S. broadcast rights by U.S. Dist.; licence fee payable to U.S. Dist..