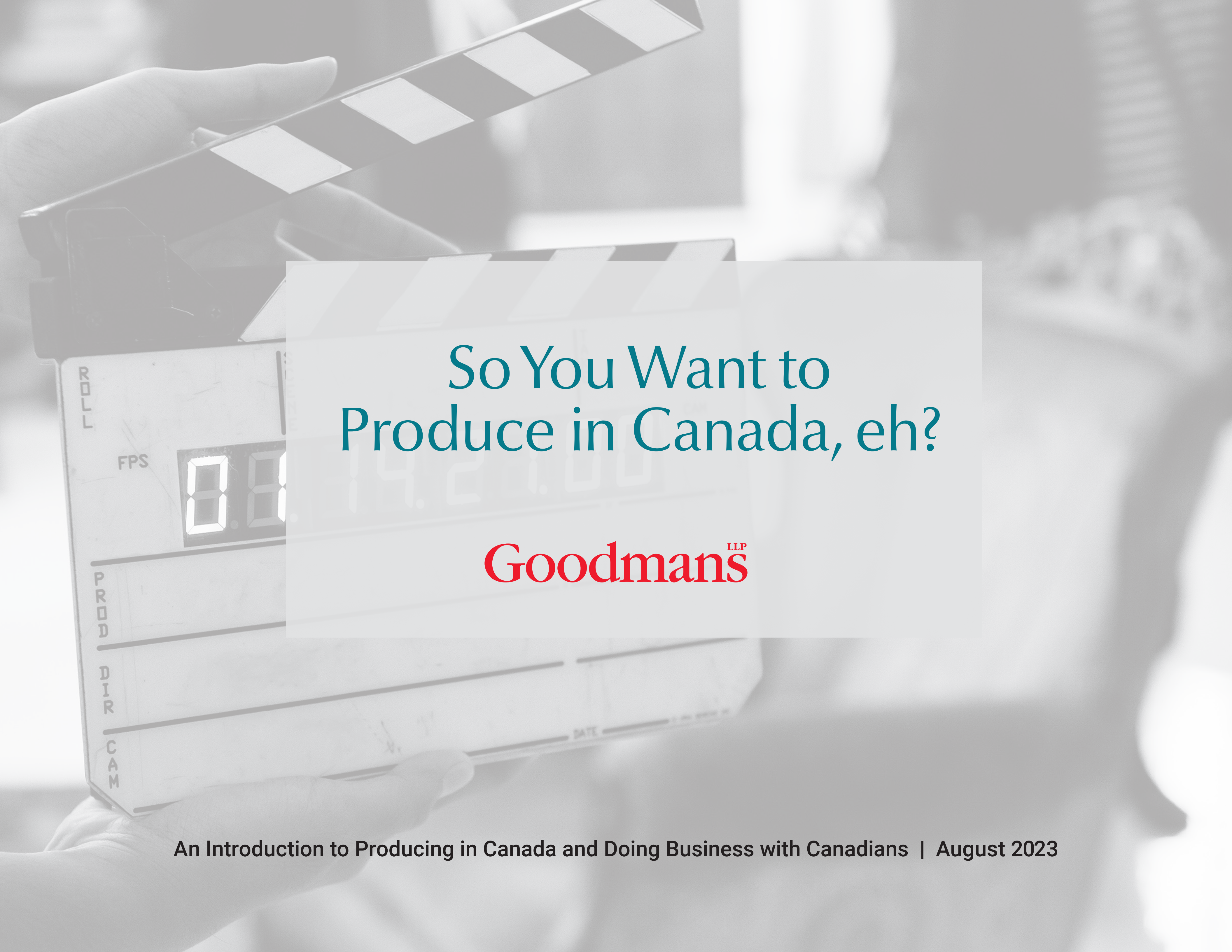


So You Want to Produce in Canada, eh?

Goodmans LLP

An Introduction to Producing in Canada and Doing Business with Canadians | August 2023

Contents

Goodmans LLP

Let's get this show on the road... to Canada!

If you are considering producing in Canada, there's a lot you not only need to know, but want to know. Why? Because it can save you both time and money – and who doesn't want that?

The discussion in this guide is confined to the laws of Canada as of August, 2023. Tax credit rules and government incentives are subject to constant change. It is therefore advisable to check the applicable websites for the latest information.

This guide is intended to provide general information and should not be relied upon as legal advice. We encourage you to consult us directly with specific issues or questions.

Who you gonna call? Goodmans!

Goodmans is recognized worldwide as one of Canada's leading full-service law firms offering expertise in entertainment, mergers and acquisitions, corporate finance, securities, banking and finance, private equity, tax planning, restructurings, litigation and commercial real estate. Our lawyers are consistently recognized by leading industry arbiters, and in various client and peer review surveys.

Most relevant to you, Goodmans is Canada's leading entertainment law firm. We have lawyers exclusively practising entertainment law, specializing in film and television, digital media and book publishing. By blending this expertise with the regulatory work of our communications practice group who deal with the Canadian Radio-television and Telecommunications Commission (CRTC), we distinguish ourselves from other Canadian law firms with comparable practice areas.

We represent a large cross-section of major American, Canadian and European film, television, digital media and publishing companies, and many individual directors, authors and screenwriters, actors and film and television personalities.

We advise our foreign clients producing in Canada on:

- Canadian tax and legal issues such as film tax credits and Canadian withholding tax
- preparing talent contracts
- dealing with Canadian guilds and unions
- Canadian foreign investment rules and domestic regulatory requirements

For our Canadian clients, we also assist with:

- government funding applications
- negotiating international co-productions and CRTC co-ventures
- arranging Canadian content tax credit applications
- sales to distributors and broadcasters in Canada, and abroad

Goodmans Entertainment Group is ranked Band 1 by *Chambers Canada*, with all team members recognized!

Chambers Canada

The leading lawyers and law firms in Canada

The Canadian Film and Television Industry

The Canadian film and television industry has quickly grown to represent 11.69 billion in production volume in the 2021/2022 fiscal year. The film and television sector sustains over 240,000 high-quality jobs and is a major source of economic activity for people across Canada.

At the same time as the domestic industry's growth, Canada has become a key location for internationally originated productions. Hollywood studios, European film companies, U.S. television networks and cable services have come to Canada to film their productions, attracted by stable and lucrative Canadian film incentives and first-class Canadian casts and crews, locations and facilities.

Major U.S. film studios (e.g. Warner Bros., Paramount, Walt Disney, Fox and NBC Universal), leading U.S. television studios (e.g. ABC, NBC and CBS), American cable services (e.g. Showtime, Discovery, Disney and HBO), leading OTT services (e.g. Netflix, Amazon Prime, Disney+ and Apple TV+) and film companies (e.g. Lionsgate and Media Rights Capital) all have a strong presence in Canada.

European producers such as BBC Worldwide, Endemol, Working Title, Atlantique, Lagardère and Universal International have also taken advantage of Canada's numerous international film and television co-production treaties to access Canadian benefits.

In the 2021/2022 fiscal year, over $6.71 billion was spent on foreign location and service (FLS) production. This was an all-time high and represented an increase from the previous year.

A recent report from PwC said that while the global entertainment and media industry suffered setbacks due to the COVID-19 pandemic, the industry is quickly regaining momentum with a projected compound annual growth rate of 5% from 2021 to 2025. At this rate, PwC predicts the industry revenues to reach US$2.5 trillion in 2025.

So, why Canada?

There are a number of factors accounting for the growing interest in Canadian production.

We're close!

Toronto's a short flight from NYC, and Vancouver's just up the coast from LA. Plus, Canadians love U.S. content (after all, we share many of the same values and interests), which is readily accessible and widely disseminated here.

We're affordable!

Production costs in Canada are generally lower than in the U.S. and other countries, and lower guild and union minimums encourage foreign production in Canada.

Canadians are cool (really).

We have Hollywood's favourite Ryans (Gosling and Reynolds, of course). Ever heard of Rachel McAdams, Christopher Plummer or James Cameron? They're all Canadian. Some of the funniest comedians on the big screen also call Canada home. From Seth Rogen and Michael Cera to comedy legends such as Eugene Levy, Jim Carrey, Martin Short and Mike Myers - Canadians are known for their sense of humour. In addition to acting talent, Canada also boasts a large number of highly trained and professional crews, technicians and production personnel. It doesn't hurt that Canadian trade unions are often more flexible and insist on less onerous requirements than their non-Canadian counterparts.

We have more than just "a great personality," we look good too.

With its wide-ranging, diverse, and interesting topography (3,400 miles from coast to coast) and small population, Canada is ideally suited for location shooting. Toronto often doubles for cities like NYC, Chicago and Philadelphia, owing to its wealth of diverse locations. From urban settings which pass off as their American counterparts, to those rugged landscapes where Leonardo DiCaprio won his Oscar in The Revenant, Canada's landscape has a variety of multifaceted locations just waiting to become what you need them to be. Plus, many Canadian cities and several provinces offer free (free!) location assistance to film and television producers.

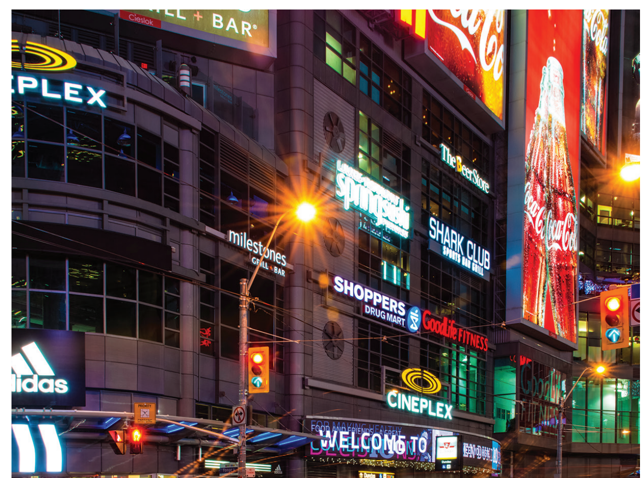
"But aren't all the best studios in LA?"

No! Studio facilities and post-production laboratories in Toronto, Montreal and Vancouver rival those in Hollywood. Canada's largest full-service film and television studio, North Shore Studios in Vancouver, is a $25 million facility in Vancouver that offers eight stages and 120,000 sq. ft of production office space. Bridge Studios, also in Vancouver, has one of the largest sound effect stages in North America. Pinewood Toronto Studios (Pinewood), located near the Toronto waterfront (just minutes from downtown), has one of the world's largest custom-built sound stages, designed to attract large-budget Hollywood productions requiring large-scale studio space and is the largest purpose-built studio in North America. Recent productions such as "A Simple Favour", "Molly's Game", "IT: Chapter Two" and "Fubar" were filmed at Pinewood Toronto Studios.

Pinewood has now completed its major expansion to help meet the growing demands of domestic and international film and television clients in Toronto, adding five new soundstages. It is now the largest film and television studio in Ontario with 490,000 sq. ft of production space and 16 purpose built soundstages.

Our Prime Minister is more than just "suave".

Not only did Canada's leader grace the cover of GQ's 2016 "Most Stylish Men Alive" issue, followed by a Rolling Stone cover in 2017, but the federal government, in addition to each of the provincial governments, provides generous financial support to qualifying Canadian productions. For example, the Canada Media Fund (CMF) committed approximately $366 million in funding to support Canada's television and digital media industry in the new fiscal year beginning April 1, 2023, and that's just the tip of the iceberg (and we have lots of icebergs up here).



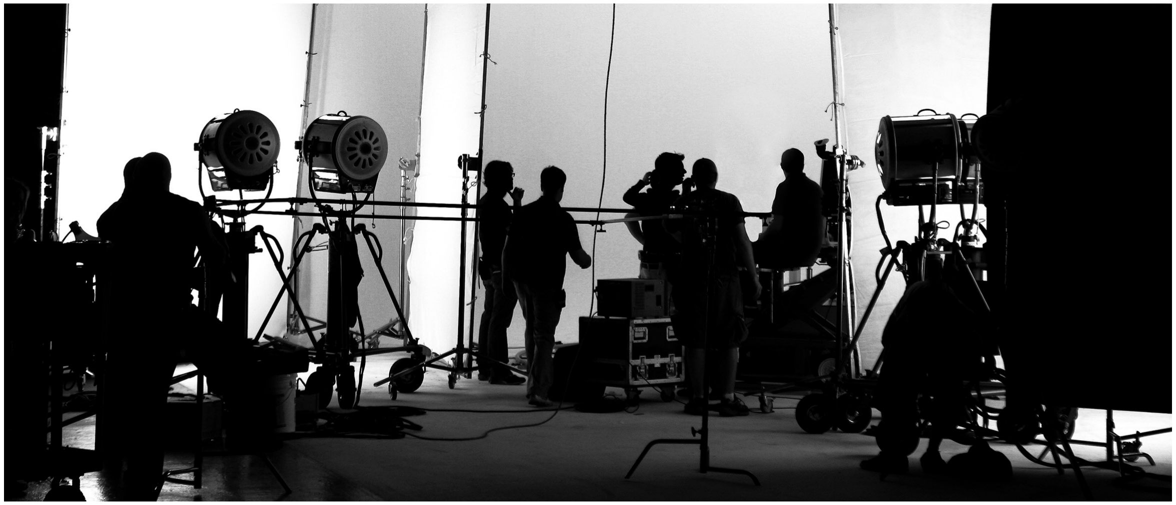
Let's Talk Money

Playing by the rules can really "pay" off...

They say money makes the world go round. When the globe stops spinning, here's why you want your pin dropped in Canada: the incentives are high and the thresholds are low, making Canada one of the most production-friendly places in the world.

The non-Canadian who wants to benefit indirectly from the Canadian government and private sector financing must become familiar with the maze of rules regarding Canadian financial assistance and tax benefits. Non-Canadians can reap the benefits of Canadian financing, provided they understand and adhere to the rules of the game. That's where we come in!

Canada has film, television, and digital media tax incentives at both the federal level and in most provinces and territories. Some of these tax credits, often called "production services" tax credits, are designed to promote and encourage foreign production in Canada, and thereby develop and grow Canadian production service industries. Other credits, colloquially called "Canadian content" tax credits, are only available to Canadian-controlled corporations which produce productions with prescribed Canadian elements and which meet prescribed Canadian spend tests. The eligibility requirements for "production services" tax credits are generally far less stringent than those associated with the "Canadian content" credits, and that's great news for you. Plus, even though "Canadian-content" credits are only available to Canadian-controlled productions, you may want to license or distribute those too. Canadian financial assistance to film and television productions normally falls into one of four broad financing structures.



Main Financing Structures in Canada

Listed below are the four primary financing structures used to produce films, television shows and other productions in Canada. Each structure provides access to various incentives including Canadian content and production services tax credits and direct government assistance. Production companies may also benefit from higher broadcast license fees paid by broadcasters for productions meeting content rules established by the CRTC.

Canadian Owned and Controlled

Canadian owned and controlled productions are eligible for Canadian-content tax credits, CRTC certification and direct government support via the Canada Media Fund and private assistance.

Incentives and Benefits Available:

- Canadian-content tax credits (read more about this in the next section)
- Canadian broadcast sale
- Canadian government and broadcast fund assistance (e.g., Canada Media Fund, Bell, Shaw Rocket, Rogers and Corus Funds)

Examples of Canadian owned productions include: “Cardinal”, “Schitt’s Creek”, “Degrassi”, ‘Orphan Black”. “Anne with an E”, “Workin’ Moms”, “Kim’s Convenience”, “Murdoch Mysteries”, “Letterkenny”, “Paw Patrol” and “Baroness Von Sketch Show”.

International Treaty Co-Productions

Canada has audiovisual co-production treaties and memoranda of understanding (MOUs) with nearly 60 countries.

Co-production treaties assist Canadian producers and their foreign counterparts in collaborating and pooling financial and creative resources on a given production. Telefilm Canada reports that every year co-production in Canada represents:

- more than 60 official treaty co-productions
- a production volume of $500 million

Incentives and Benefits

A production made in accordance with an international co-production treaty and certified by the Co-Productions Office of Telefilm Canada gains “official treaty co-production” status. As an official treaty co-production, the production is treated as a “national production” of each co-producing country making it eligible for government incentives and tax benefits in each of the co-producer’s respective countries.

These incentives and benefits include eligibility for government financial support from Telefilm Canada and the Canada Media Fund, access to federal and provincial Canadian content tax credits and qualification for the “Canadian-content” designation established by the CRTC.

Also, despite not being directly eligible, U.S. companies can take indirect advantage of these benefits as distributors or broadcasters.

Requirements:

• the non-Canadian producer must be located in a treaty country

• the Canadian producer must be Canadian-owned and controlled

• creative and technical personnel must meet residency/citizenship requirements of treaty countries

• there may be limited participation by personnel from third-party countries as permitted by the respective treaty

• the minimum financing contribution varies from 15% to 30% of the total production costs, depending on the treaty

• copyright in production must be owned by co-producers in proportion to their financial contributions

• a U.S. broadcaster/distributor may broadcast/distribute the production outside of the co-producers' territories

Examples of co-productions include: "Ballerina", "What If", "Rogue", "Brooklyn", "The Book of Negroes", "Vikings", "Room", "Versailles", "Tee and Mo" and "Van Helsing".

CRTC Co-Ventures

These productions are co-ventures between non-Canadian (e.g. American) and Canadian producers. They qualify as "Canadian-content" for the purposes of CRTC broadcast quotas; however, they are only eligible for the lower production services tax credits and not the higher Canadian content tax credits.

Benefits

The key benefits of CRTC co-ventures are that these productions generally garner higher broadcast license fees, are easier to sell in Canada and non-Canadian producers can be openly involved in the production process.

Requirements:

- the Canadian co-producer must have an equal measure of decision-making responsibility over all creative elements
- the Canadian co-producer must contribute at least 50% of the production financing and receive at least a 50% share of the profits
- the foreign co-producer may own 100% of the copyright
- in the case of a U.S./Canadian co-venture, the production must obtain at least 6 out of 10 Canadian "points" and these expenditure tests must be met:
  - 75% of remuneration for all costs paid or payable for services provided in respect of producing (other than post-production work) must be paid to, or in respect of services provided by Canadians
  - 75% of all costs incurred for processing, post-production and final preparation of the production must be incurred in respect of services provided in Canada
- the bar is lower for European/Canadian co-productions:
  - the production must obtain 5 out of 10 Canadian "points"
  - the two 75% expenditure tests above are reduced to 50%

Examples of CRTC co-ventures include: "Beauty and the Beast", "High Moon", "Glen Martin, DDS", "Super Why", "Reign", "Odd Squad", "Daniel Tiger's Neighborhood" and "Mother of the Bride".

Foreign-Controlled "Service Productions"

These productions are foreign controlled, but qualify for production services tax credits based on the cost of qualifying Canadian labour costs and subject to the tests below.

To qualify for the production service tax credits, they must meet certain prescribed minimum production tests: the cost for a production for the period ending 24 months after principal photography has begun must exceed $1,000,000, except in the case of a series consisting of two or more episodes or a pilot of such a series; the cost for each episode in a series with a running time of less than 30 minutes must exceed $100,000 per episode; and the cost for episodes with running time of more than 30 minutes must exceed $200,000 per episode. As well, the production company must either own the copyright in the film during the production period or be engaged directly by the copyright holder to provide production services.

Source: Film or Video Production Services Tax Credit

Examples of foreign controlled service productions include: "The Handmaid's Tale", "Deadpool", "Designated Survivor", "The Flash", "Lucifer", "Star Trek Discovery", "Supergirl", "Once Upon a Time", "Timeless", "Suits", "The Man in the High Castle" and "A Series of Unfortunate Events".

Canadian Tax Credits and Other Incentives

Funding – Tax Credits

As discussed, Canada's federal government offers attractive film tax credits to aid the Canadian film and television production industry and to promote Canadian film and television programming. They are typically administered jointly by Canada Revenue Agency (CRA) and the CAVCO.

Most Canadian provincial and territorial governments have introduced similar or additional incentives to the federal tax credits. In most cases, these tax credits are more generous than, and supplement the federal incentives.

The Canadian Film or Video Production Tax Credit

What is the benefit?

The CPTC is a federal refundable tax credit available to qualified corporations (see "Who is eligible?" below). The CPTC is equal to 25% of qualifying Canadian labour expenditures capped at 60% of production costs net of assistance, providing up to a maximum of 15% (25% of 60%) of the total production costs. Qualifying labour expenditures can include eligible salaries, wages and other remuneration paid or payable for services rendered in connection with the production of a Canadian film or video production. Such qualifying expenditures are net of any assistance which the producer receives from any Canadian federal or provincial film agency, provincial tax credit program or other grants, subsidies and similar benefit as described below.

Rate

25% of qualifying Canadian labour expenditures, and those qualifying labour expenditures cannot exceed 60% of production costs net of assistance.

The CPTC is capped at a maximum 15% of total production costs after the deduction of any assistance. Assistance refers to any financial assistance from public or private Canadian or foreign sources, (e.g., grants, subsidies, provincial tax credits, forgivable loans, services and any other similar forms of assistance). Production costs are limited to the amounts incurred in respect of the production. Where a production is a treaty co-production, eligible production costs include only those incurred by the Canadian co-producer.

Who is eligible?

The production company must:

- be a Canadian-owned and controlled corporation, taxable in Canada, whose primary activity is the production of Canadian films or television programs
- be the exclusive worldwide copyright owner in the production for at least 25 years after production completion
- retain an acceptable share of revenues (generally, no less than 25%) from exploitation in non-Canadian markets
- control the initial worldwide exploitation rights over the production

Which productions are eligible?[1]

To be eligible for the CPTC, the production must meet all of the following requirements:

- an application for the project must be sent to CAVCO within 24 months of the first fiscal year end following the commencement of principal photography. CAVCO must issue a Part B certificate within 6 months of this date
- the production cannot fall under any of the excluded genre categories (e.g. pornography, corporate video, talk show, etc.)
- a production must meet CAVCO's minimum 6 out of 10 Canadian "points requirements"
- all producer-related personnel (other than those receiving exemptions permitted in limited circumstances) must be Canadian[2]
- at least 75% of the production costs must be paid to Canadians, and at least 75% of the post-production costs must be incurred in Canada
- a Canadian distributor or a CRTC-licensed broadcaster must agree to show the production in Canada within 2 years of its completion
- the production cannot be distributed in Canada by a non-Canadian entity within 2 years of completion

For more information, please visit Canadian Film or Video Production Tax Credit or contact any of our lawyers listed on the last page of this guide.

[1] Many of these requirements do not apply to treaty co-productions.

[2] A Canadian is defined as a Canadian Citizen, permanent resident, or corporation that is "Canadian-controlled" in law and in fact as determined under the Investment Canada Act.

The CAVCO Canadian Content Tax Credit Live Action Points Test

To be eligible for the CPTC, the production must earn a minimum of 6 points based on key personnel qualifying as "Canadian":

Director	2 points
Screenwriter	2 points
Highest Paid Actor/First Lead Performer	1 point
Second Highest Paid Actor/Second Lead Performer	1 point
Art Director/Production Designer	1 point
Director of Photography	1 point
Music Composer	1 point
Picture Editor	1 point

In addition, the producer, either the director or the screenwriter, and either the highest paid or second highest paid actor must be Canadian.

For more information, please visit: **Application guidelines - Canadian Film or Video Production Tax Credit (CPTC) or contact any of our lawyers listed on the last page of this guide.**

The CAVCO Canadian Content Tax Credit Animation Points Test

To be eligible for the CPTC, the production must earn a minimum of 6 points based on key personnel qualifying as "Canadian":

Director	1 point
Scriptwriter and Storyboard Supervisor	1 point
Highest or Second Highest Paid Lead Voice/Actor	1 point
Design Supervisor	1 point
Camera Operator and Operation	1 point
Music Composer	1 point
Picture Editor	1 point
Layout and Background (performed in Canada)	1 point
Key animation (performed in Canada) excluding pixilation	1 point
Assistant Animation and In-Betweening (performed in Canada)	1 point

In addition, the producer, either director or screen-writer and storyboard supervisor, and lead voice must be Canadian while key animation must be done in Canada.

Canadian Film or Video Production Services Tax Credit

What is the benefit?

The Canadian Film or Video Production Services Tax Credit (PSTC) is a refundable tax credit that primarily supports non-Canadian content film and television productions produced in Canada. The PSTC is designed to strengthen Canada's international reputation as a top location for film and video productions employing the services of Canadians. Both Canadian producers and foreign producers with a permanent establishment in Canada can qualify without having to meet the Canadian content criteria. The PSTC is not available where a production received the CPTC, but the PSTC can be claimed with complimentary provincial tax credit programs (more details on which can be found below).

The PSTC is particularly attractive to U.S. and other international producers since the PSTC imposes no restrictions on their ability to own, control and exploit their productions around the world.

Rate

The PSTC is available at a rate of 16% of the qualified Canadian labour expenditure incurred by an eligible production corporation for services provided in Canada by Canadian residents or taxable Canadian corporations (for amounts paid to employees who are Canadian residents) for the production of the accredited production. Canadian labour expenditure for a production includes all amounts which are "Canadian labour expenditures" less assistance received (such as other provincial tax credits) for these expenditures.

There is no cap on the amount of the PSTC which can be received for a production.

Who is eligible?

To be eligible for the PSTC, the applicant must:

- be a corporation that carries on in Canada, primarily through a permanent establishment, a film production business or a production services business and must either:
  - own the copyright in the production throughout the period during which the production is produced in Canada or
  - be contracted directly by the owner of the copyright in the production to provide production services

Which productions are eligible?

To qualify for the PSTC, productions must meet minimum expenditure requirements of $1 million for feature films, $200,000 for a one-hour television episode or pilot or $100,000 for a 30-minute television episode or pilot.

The following types of programs are not eligible for the PSTC or the CPTC:

- news programs
- talk shows, game shows, reality television
- a sports event or activity
- a gala presentation or an awards show
- productions that solicit funds
- advertising, industrial, corporate or institutional productions
- pornography
- a production, other than a documentary, all or substantially all of which consists of stock footage

For more information, please visit Film and video tax credits - CAVCO or contact any of our lawyers listed on the last page of this guide.

Provincial

Several provincial governments in Canada also provide various forms of financial assistance to qualifying Canadian productions. Provincial funding is available either as a refundable tax credit or as a grant, depending on the province.

Grants and Incentives

Certain provinces, rather than offering tax credit refunds, offer outright grants or incentives to eligible productions. For detailed information on each jurisdiction's particular programs, including eligibility requirements, please visit their respective websites:

Alberta Media Fund	https://www.alberta.ca/alberta-media-fund.aspx
Nova Scotia Film and Television Production Incentive Fund	www.novascotiabusiness.com
New Brunswick Film, Television and New Media Industry Program Production Incentive	www.gnb.ca
Nunavut Spend Incentive Rebate	www.nunavutfilm.ca
Yukon Film Location Incentive	https://tinyurl.com/2axh5duc

Provincial Tax Credits

Most provinces offer funding through refundable tax credits for qualifying productions, with rates ranging from 17.5-45% of eligible labour and, where permitted, non-labour costs. These provincial tax credits can be combined with the aforementioned federal tax credits, which results in an attractive advantage for productions looking to get the most bang for their buck.

The three largest Canadian provinces, British Columbia, Ontario and Quebec each have three separate refundable provincial film tax credits, namely:

- a "Canadian content" provincial film tax credit which is only available to productions which are eligible to access the CPTC and with certain additional provincial requirements
- a production services film tax credit which is available to both Canadian and non-Canadian controlled productions which also access the PSTC and
- a computer animation and special effects tax credit which can be combined with either of the aforementioned provincial credits and with either the CPTC or the PSTC

The "Canadian content" provincial tax credits are based on eligible provincial labour costs (35% in BC and Ontario and 28-40% in Quebec, depending on the production format). The provincial computer animation and special effects tax credits are also based on eligible provincial VFX costs (16% in BC and Quebec and 18% in Ontario). The production services tax credit in BC is based on eligible provincial labour costs (28%); however, the provincial production services tax credits in both Ontario and Quebec are based on eligible labour and non-labour costs (21.5% in Ontario and 20% in Quebec). The other Canadian provinces and territories generally have a single refundable film tax credit or, in some cases, a provincial or territorial grant in lieu of a film tax credit. The credits in these smaller provinces can be quite high (several are in the range of 40-45% of eligible costs). Most provincial film tax credits are based on eligible provincial labour costs, however, certain provinces (for example, Manitoba) give producers the option of accessing a higher credit (45%) based on provincial labour costs or a lower credit (30%) based on provincial labour and non-labour costs. Some provinces and territories, such as Nunavut, provide provincial grants rather than film tax credits.

For detailed information on each provincial or territorial jurisdiction's particular incentive programs, including eligibility requirements and the latest rates, please visit the respective websites below:

British Columbia Production Services Tax Credit	www.creativebc.com
Manitoba Film and Video Production Tax Credit	www.mbfilmmusic.ca
Newfoundland and Labrador Film and Video Industry Tax Credit	www.nlfdc.ca
Ontario Film and Television Tax Credit (formerly known as Ontario Media Corporation)	www.ontariocreates.ca
Quebec Film and Television Production Tax Credit	https://sodec.gouv.qc.ca/services/mesures-fiscales/
Quebec Production Services Tax Credit	https://sodec.gouv.qc.ca/services/mesures-fiscales/
Quebec Film Dubbing Tax Credit	https://sodec.gouv.qc.ca/services/mesures-fiscales/
Saskatchewan Film/TV and Digital Tax Credit	www.creativesask.ca

Canada Media Fund

The Canada Media Fund (CMF) is a not-for-profit funding agency, funded by Canada's cable, satellite and IPTV distributors, as well as by the Government of Canada. It finances the development and production of 10 out of 10 point "Canadian content" domestic television productions and international treaty co-productions as well as interactive digital media content.

The CMF delivers financial support to the Canadian television and digital media industries through two streams of funding:

- The Experimental Stream encourages the development of innovative, interactive digital media content and software applications
- The Convergent Stream supports the creation of convergent television and digital media content for consumption by Canadians anytime, anywhere

The majority of the CMF's funding is dispursed through the Performance Envelope Program. The Program's objective is to encourage partnerships between broadcasters, television producers and digital media producers to create convergent content that Canadian audiences can consume on-demand. As part of the CMF's Convergent Stream, projects funded must include content to be developed for distribution on at least two platforms, one of which must be television. Through this Envelope Program, the CMF allocates funding envelopes to Canadian broadcasters in an amount that reflects their track record of supporting Canadian programming. Canadian broadcasters commit these funds to designated Canadian projects that they believe will appeal to their viewers. Even though Canadian broadcasters are allocated a CMF funding envelope, the actual CMF funding is paid directly to the producer according to a payment schedule.

The CMF program budget was based on total revenue of $374.9 million for the 2022/2023 fiscal year.

For more information on the CMF and its funding programs please see Canadian Media Fund's website or contact any of our lawyers listed on the last page of this guide.

Private Sector Assistance

Several private sector non-profit organizations have been established, primarily by Canadian broadcasters and specialty television services, which invest in the development and production of qualifying Canadian film and television projects. Examples include:

The Bell Fund	www.bellfund.ca
The TELUS Fund	www.telusfund.ca
Independent Production Fund	www.ipf.ca
Rogers Group of Funds	www.rogersgroupoffunds.com
Shaw Rocket Fund	www.rocketfund.ca
Northern Ontario Heritage Fund	www.nohfc.ca

Producing In Canada Without Canadian Financing

As a non-Canadian producer, you may simply wish to produce in Canada to save money or utilize Canadian talent, production services or locations.

In the case of such “straight” non-Canadian productions, it is not necessary for you, the non-Canadian producer, to master the details of “Canadian content” productions. However, you should bear in mind that a number of Canadian laws and regulatory policies apply to all non-Canadian productions in Canada, whether they are location based service productions or “Canadian content” productions.

We have tremendous experience helping our international clients navigate the complexities of the *Investment Canada Act*, production services tax credits, extra-provincial licensing, immigration requirements and work permits, taxes (e.g. the Income Tax Act, GST, and HST) and more.

Copyright: Canada vs. U.S.

Copyright Term

Last year Canada's Copyright Act was amended to extend the term of copyright for literary, dramatic, musical and artistic works from 50 years to 70 years after the end of the author's death. This amendment came into force on December 30, 2022.

Copyright can be assigned or licensed either wholly or partially and subject to both temporal and geographic limitations.

Moral Rights

Under Canada's Copyright Act, in addition to economic rights, authors are granted extensive moral rights. These include the right to seek an injunction or sue for damages for any modification of their works or use of their works in association with a product, cause or institution that prejudices their honour or integrity. Moral rights may not be assigned but may be waived by authors. This differs from the American model given that the U.S. only recognizes moral rights in the context of visual arts, while in Canada moral rights are conferred to all kinds of protected works.

Works Created During Employment

Unless an agreement states otherwise, works created during employment are owned by the employer. This principle is similar to the U.S. concept of "works made for hire", but differs in the following ways:

- unlike the U.S. concept, the principle only applies to works created by employees and does not extend to works created by independent contractors commissioned to render services in respect of a film production
- the words "work made for hire" have no particular status under Canada's Copyright Act
- under Canada's Copyright Act, the employer owns the work but is not deemed to be the author, in contrast to the U.S. approach
- the term of copyright for all film productions created in Canada is generally the life of the author plus 50 years

"Fair Use" vs. "Fair Dealing"

Canadian and U.S. copyright laws differ somewhat with respect to the use of copyrighted materials without permission.

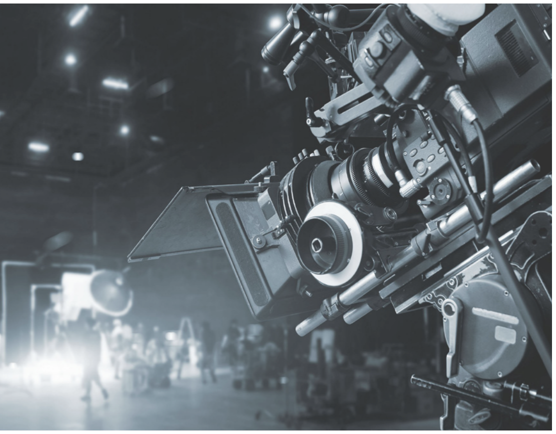
In the U.S., the defence of "fair use", which allows for the use of copyrighted materials without permission from the copyright holder, is broad and open-ended with a non-exhaustive list of examples in the U.S. copyright statute.

In Canada, the similar yet distinct defence of "fair dealing" is much more narrow and limits the use of copyrighted works without permission to certain specific statutory purposes: education, satire, parody, research, private study, criticism, review and news reporting. There is also a requirement to cite the source of the work and author in certain circumstances.

Online Streaming Act and Broadcasting Act

On April 27, 2023, the *Online Steaming Act* came into force in Canada. The Act amends the *Broadcasting Act* and grants new powers to the CRTC to regulate non-Canadian streamers which operate in Canada. Among other things, it gives the CRTC the power to: (i) decide which streaming services (eg. Netflix, Amazon, Spotify) to regulate, (ii) determine their respective financial contributions, and (iii) regulate the discoverability of Canadian programs on streaming platforms. The Act also authorizes the CRTC to make orders re: such online services that will foster diversity, equity and inclusion, and ultimately help support the creation of Canadian content. It also allows the CRTC to issue monetary penalties for the violation of certain provisions of the *Broadcasting Act*.

> *" In the present notice, the Commission is launching Step 1 of a three-step process to establish a modernized contribution framework to support the Canadian broadcasting system, including Canadian and Indigenous content. This framework, once implemented, will set out the contributions that broadcasting undertakings, including online audio and video undertakings (online undertakings), will be required to make to support the creation, distribution, promotion and discoverability of Canadian and Indigenous audio and video content. In Step 2, the Commission will build on information gathered in Step 1 and examine more closely the various policy elements of the framework. In Step 3, the Commission intends to finalize each applicable undertaking's or ownership group's tailored contribution requirements."*



During the summer of 2023, the CRTC received many submissions from interested parties in response to Broadcasting Notice of Consultation CRTC 2023-138 . As part of Step 1, the CRTC will hold a public hearing in Gatineau , Quebec on **November 20, 2023** in order to evaluate the contribution requirements for online undertakings as follows:

> *"As part of Step 1, the Commission will hold a public hearing in Gatineau, Quebec, to begin* ***20 November 2023****, that will focus on whether the Commission should establish initial base contribution requirements for online undertakings, and on the possible recipients of those contributions. Once the new contribution framework is finalized, the base contribution requirements will form part of the overall contribution requirements that an online undertaking may be required to make. In other words, the* ***CRTC*** *is requesting interested persons to comment on who should contribute, how much they should contribute, and how they should make their contributions."*

On May 12, 2023, the CRTC announced several public consultations re: the implementation of the *Online Steaming Act*. In particular, in Broadcasting Notice of Consultation CRTC 2023-138 entitled "*The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*" the CRTC announced that it was seeking input from all stakeholders re: its new mandate to determine the contributions from different streamers to the Canadian system and it announced a related three-step public consultation process as follows:

We are acting for several participants in the upcoming CRTC public hearing and we are continuing to monitor developments for our clients.

Other Recent Developments

The Growth of SVOD and OTT streaming services

SVOD (Subscription Video On Demand) streaming services have penetrated Canada's digital ecosystem as new foreign OTT (over-the-top) programs continue to emerge. Statista recently reported that 46% (almost half!) of Canadians are subscribed to some kind of online video service. Despite the recent introduction of US-based services such as Disney+ and Apple TV+, Netflix continues to be by far the most popular subscription OTT service in Canada, with the number of subscribers expected to reach 7.96 million by 2023.

A report released by Convergence Research found that Canadians spent an estimated $2.05 billion on OTT services in 2020. The report noted that Canadian OTT access revenue grew by 35% in 2020 in large part due to the COVID-19 pandemic, and predicts that it will reach a whopping $3.96 billion by 2023.

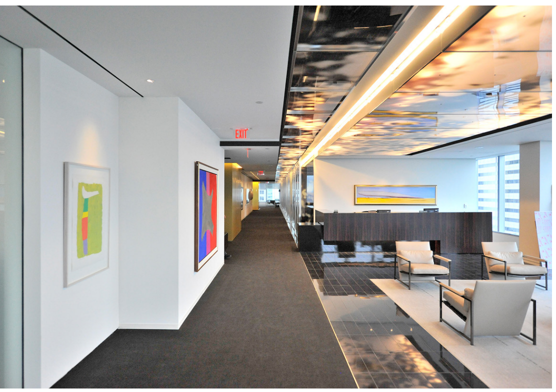
Taxation of Digital Services

In 2019, Quebec and Saskatchewan elected to pursue provincial sales tax on Netflix subscriptions. The province of Quebec cited e-commerce tax losses as the driving factor, whereas Saskatchewan amended their *Provincial Sales Tax Regulations* in order to collect tax from non-resident businesses, provided their services were consumed within the province. Federal tax laws in Canada now require foreign multinationals to collect GST/HST on digital products and services. As such, Netflix and other international streaming services are now charging GST/HST to their subscribers.

In addition, on December 14, 2021, the federal government released draft legislation which proposed a digital services tax (DST) of 3% on a taxpayer's Canadian source revenue relating to digital services. The tax will apply to both corporations and consolidated groups who have a Canadian source revenue of $20 million and a global revenue of at least €750 million in each respective tax year. The earliest time the legislation will come into force is January 1, 2024, but it will apply retroactively from January 1, 2022 onward.

Source: Digital Services Tax Act

How Goodmans Can Help



With approximately 200 lawyers and 9 lawyers practicing in our entertainment and media departments, we can work with your team to:

- explain the details of available alternative Canadian financing structures and explore whether your production qualifies and how Canadian incentives can be maximized
- advise re: the application of Canadian laws to your production including copyright, foreign investment, guild and tax requirements
- recommend changes to a project so that it meets applicable Canadian tax credit rules and incentive programs
- assist with interim financings and the cash flowing of your production
- provide counsel re: investments in Canadian-controlled companies in compliance with the *Investment Canada Act*

Goodmans represents a large cross-section of major North American and international film, television, digital media and publishing companies; and many individual directors, authors and screenwriters; actors and film and television personalities. Our foreign clients include Netflix Studios, Amazon Studios, Apple Studios, NBC Universal, HarperCollins, Tornante, AMC, Paramount Global, Warner Bros., Universal International Studios, EPIX, Google, IDW, MGM, Live Nation, Alcon, Topps, Endeavor Content, Comcast, Black Bear Pictures, CBS, Original Productions, Showtime, Smithsonian Channel, The Walt Disney Company, Disney ABC Cable, Working Title, Discovery, Nickelodeon, VH1, DreamWorks, Cartoon Network, Classic Media, RH1, Spike TV, Scholastic, MTV Networks, Media Rights Capital, OneWest Bank, Union Bank, Comerica Bank, HSBC, CIT Financial, City National Bank, Providence Equity Partners, Shamrock Capital and New Bridge Film Capital.

Our domestic clients include Bell Media, WildBrain, Corus Entertainment, Rogers Media, Blink49 Studios, 9 Story Media, Cineplex, Insight Productions, Creative Wealth Media, Frantic Films, Shaftesbury, Nelson Education, EntertainmentOne, The Stratford Festival, Canadian Film Centre, The Historica-Dominion Institute, Urban Post, Boat Rocker Media, 90th Parallel, Export Development Canada, Rogers Telefund, Royal Bank, OMERS, CIBC, Independent Film Financing, Canadian Screenwriters Collection Society, Westwood Creative Artists and the Writers Guild of Canada. In the sports field, Goodmans represents Maple Leaf Sports and Entertainment (which owns the Toronto Maple Leafs, Toronto Raptors and Toronto FC), Insight Sports and the NHL Players Association among others.

For more information, visit Goodmans Entertainment Group or contact any of our lawyers listed on the last page of this guide.

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