International Treaty Co-Productions with Canada

An Overview for Producers



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Introduction

Canadian producers know the value of participating in international treaty co-productions and they long ago embraced the co-production structure as a way of producing. In 2010 Canadian producers completed 27 treaty co-productions. The aggregate budgets of the treaty co-productions completed in 2010 was approximately CDN\$216 million. Though these numbers represent a slight increase from 2009, they are still below the highs of 2003 when 30 co-productions with an aggregate value of CDN\$352 million were completed.

While the reasons for the popularity in treaty co-productions are numerous (some are set out below), one of the driving forces is the ability to access sources of financing in two or more countries – the fabled "double dip" and in some cases a "triple dip". In today's difficult financing climate, where pre-sales are more difficult than ever to attract and GAP financing requires two or three times coverage, the holy grail of many independent producers has become soft money.¹ In many instances, productions must qualify as a "national production" of a country in order to access the soft money incentives available in the subject country. In the context of reduced financing sources, it stands to reason that if accessing soft money in one country is good, then accessing soft monies from two (or more) countries is great. Enter the international treaty co-production, which is in many cases the only way to double dip into the soft money schemes available in two or more countries.

Canada has long been a pioneer in the international co-production area with numerous co-production treaties, and as a result Canadian producers have become very adept at using the treaty co-production vehicle. What follows is an overview of treaty co-productions in the Canadian context and the certification process.

CO-PRODUCING WITH CANADA – THE F.A.Q.'S

(a) Who Decides if a Co-Production is an "Official Treaty Co-Production"?

In Canada, the certification of Official Treaty Co-Productions is handled by the Co-Productions office of Telefilm Canada (**"Telefilm"**), the Canadian government body charged with the responsibility of receiving and evaluating applications for certification of treaty co-productions.² When a production is certified as being made in accordance with a co-production treaty, the subject production gains "Official Treaty Co-Production" status. It should be noted that Telefilm is extremely proactive in dealing with producers since there are multiple instances when a production may be on the edge of disqualification, and a tweak is needed in the structuring. Telefilm's unofficial mantra is to assist producers in making co-productions work in this difficult environment and Canadian producers are the beneficiaries having such a cooperative governmental authority.

(b) What are the Benefits of 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 it may consequently be eligible for government incentives and tax benefits in both countries.

In Canada, an Official Treaty Co-Production can qualify for treatment as a Canadian Film or Video Production for the purposes of the federal Canadian Film or Video Production Tax Credit Program (the "**FTC**"). For example, if the Canadian co-producer is responsible for 60% of the co-production budget, then 60% of the budget is generally eligible for Canadian subsidies and the FTC. The production may also be eligible for benefits under similar provincial programs, and, as a Canadian program, will be able to command higher license fees from Canadian broadcasters (who are required to air a minimum amount of "Canadian" programming). It is important to note that these are general rules, and that the level and type of government support available are subject to the terms of the particular treaty and the specific rules of each government.

(c) How many International Co-Production Treaties does Canada Currently have?

Canada is a party to co-production treaties with over 50 nations for film and television works, excluding, notably, the United States. A complete list of these treaties and the relevant guidelines for qualification can be found at Telefilm Canada's web-site at www.telefilm.gc.ca.

¹ The term "soft money" refers to funds which are generated by means other than sales of a product, such as tax credits, government subsidies and equity investments. Soft money schemes have become the incentive of choice for many nations to assist in building their own domestic production industries or attracting foreign productions.

² Telefilm's updated guidelines and additional materials (including copies of the active co-production treaties) are available on the Telefilm website http://www.telefilm.gc.ca/en/coproductions/coproductions/guidelines

(d) Why Structure a Production as an Official Treaty Co-Production?

There are a number of compelling reasons for producers to choose the treaty co-production route over a non-treaty co-production:

Access To Additional Sources Of Financing - As noted above, a qualifying co-production will be treated as a "national production" in each of the co-producing countries. As a result, to the extent that subsidies, government incentives and other soft money is available to national productions, they can be accessed by the co-production. In Canada, a certified co-production is able to access federal and provincial tax credit incentives (at higher rates than those available to non-treaty co-productions), other governmental subsidies and higher broadcast licence fees.³

<u>Reduction Of Risk</u> - Co-production treaties are designed to assist Canadian producers and their counterparts in other countries to collaborate on a production and thus reduce the risk on any one producer. The ability to capitalize upon the established relationships of the co-producing partners with service providers, distributors and broadcasters in their home country assists the co-producers by broadening the market for the production. This pooling of the creative, technical and financial resources of the co-producers reduces the various risks of production and enhances the ability of the co-producers to finance and proceed with the co-production.

<u>Culturally Relevant Productions</u> - One of the original goals behind the implementation of co-production treaties was to encourage collaboration and production between nations in order to develop programming that would be specific and relevant to those nations, and thereby less homogenous in nature. In certain parts of the world such as Canada and Europe, the international co-production was even seen as a tool to fight what some people (pejoratively) refer to as the "cultural imperialism" of Hollywood.

<u>Established Procedure</u> - Co-production treaties simplify administrative and regulatory procedures and policies relating to the subject production because they establish the basics of the relationship between the co-producers. In addition, since the co-production is subject to an international treaty, goods and equipment used for production can flow easily between the participating countries. Last, and certainly not least, an established procedure also gives the co-producers and their bankers much needed certainty when they are completing the financing of the co-production.

(e) What Hurdles Does The Official Treaty Co-Production Route Present?

The benefits associated with an Official Treaty Co-Production do not come without a price – and in some instances producers may decide that the price is too high. The following are some of the most common hurdles associated with Official Treaty Co-Productions:

<u>Trust</u> - Producing is at the best of times, a stressful and overwhelming process, so having like-minded co-producers who trust each other will help ensure that a production has the best chance for success. The co-production process is a collaborative effort - from choosing the key creative team and selecting cast through to decisions relating to distribution and exploitation. Accordingly, the process of choosing a co-producer should be taken very seriously, and choices made after due diligence is done on the history and experiences of prospective partners. In choosing a co-producer, it is also important to consider factors which may impact on the relationship, such as differing cultures and business practices of the co-producing nations.

The relationship between the co-producers is a legal one governed by the terms, conditions and limitations contained in the co-production agreement. Given the nature of production, in the best case there should be some substance to the relationship between the co-producers (beyond the agreement) for the project to be a success.

Additional Cost - There is an equation that producers must understand when thinking about co-productions: *more countries plus more rules plus more accountants plus more lawyers equals an increase in your budget*. While this appears to be a simple statement, it is surprising how often it is

³ Canadian broadcasters are required by their terms of license to air a minimum amount of "Canadian" programming every year, and a certified co-production qualifies as such.

ignored. It is generally the case that the increased cost of professional fees, travel, communication etc. will be more than offset by the benefits from certification as an Official Treaty Co-Production. However, this general rule is one that has diminishing returns, and producers would be well advised not to underestimate increases to the budget caused by choosing a co-production structure. It may very well be the case that a production which makes absolute financial sense to do as a two country co-production will not work as a tri-partite co-production, even though the addition of the third nation will allow the producers to access additional funding. The key is that *net benefit* that will result from a co-production must be assessed carefully and with the help of experienced professionals.

Producers will often run into trouble at the structuring stage by trying to "force" a project into an international treaty Co-production structure when there is no logical connection between the production and the potential co-production nations. By "logical connection" we are referring to things like location/setting of the production and the creative personnel and actors who are attached to the production. When faced with the sometimes overwhelming options of the "co-production buffet", an effective method of eliminating unworkable options is to consider what the pre-existing limitations on a project are as a result of the nationality of writer(s), director or performers. For a description of what Telefilm will require see : *What Level of Participation Must Canadians Have*?, below.

<u>Time Zone Challenges</u> - It is a common misconception that technology can overcome great distances. The reality is that while technology certainly can be useful, it is not the panacea that many (including lawyers) think it is. Given the nature of any co-production, there will very likely be multiple time zones and countries to deal with along with all of the related issues that such factors bring.

We recently completed work on the feature film "A Dangerous Method" which was a two country co-production between Canada and Germany. The co-producers, financiers and distributors were located in Canada, Germany, the United Kingdom and Switzerland, with pre-sales being made all over the world. Organizing these disparate parties and directing their time and energy towards a single goal (i.e. a financial closing) was, at times, frustrated by time zones, email problems, and also, on occasion, the business practices in the

various nations involved. The method of communication that was most effective was the conference call- old fashioned as it may be. In the end, the experience confirmed that whenever parties are separated by distance and time, the coordination and organizational capabilities of the co-producers (and their counsel) become paramount in the push towards a timely closing. These additional responsibilities translate into a higher level of stress and lower levels of sleep for all involved, with the danger being that the focus and energies of the people involved are taken off the actual production and directed to handling co-production issues.

<u>Governmental Discretion</u> - This point may seem contradictory in light of what is noted above in section (d) under *Established Procedure*, however there are examples of governments changing their their co-production rules. In 2003, the UK Department of Culture Media and Sport ("DCMS") decided to adopt new minimum contribution and spend requirements in respect of its treaty with Canada. This change was in response to what the DCMS viewed as too many one-sided coproductions. While the new minimums were not a surprise to anyone, the narrowed interpretation of what would be considered UK spend did catch some productions off-guard in early 2004. The changes introduced by the DCMS resulted in a reduction in 2004 in the amount of Canada's bi-partite co-production activity with the United Kingdom, and those lower levels remain to this point in time.

The situation with the United Kingdom highlights the fact that governmental authorities may elect to exercise their discretion. While this does not happen regularly, the best approach to stay aware of potential changes in governmental policy is to maintain an open information flow with the authorities who will be certifying your co-production.

A concern related to government discretion is co-producing with a country which is relatively new to co-productions, but wants to increase their local production infrastructure. As an example, some time ago, Canadian producers were enticed by new and favorable incentives in a country which had recently signed a co-production treaty with Canada. Subsequently, they entered into co-production arrangements with local producers pursuant to that treaty. On paper, everything looked fine however in practice, producers who attempted to co-produce in this country were surprised to find that the governmental and financing entities they were dealing with were not aware of, or responsive to, the tight deadlines of the film production world because of their lack of experience. As a consequence, the bad experiences of a few productions have tainted the larger community. To this day there remains some hesitation on the part of producers when considering the prospect of a co-production with this country.

TELEFILM'S REQUIREMENTS – THE ABC'S

The following are some of the main requirements established by Telefilm in the context of certifying Official Treaty Co-Productions.

(a) What Projects are Eligible to be Certified as Official Treaty Co-Productions?

Subject to certain excluded types of productions set out below, any production of any length, technical medium or genre that meets the requirements and conditions described in the applicable co-production treaties or established by the competent authorities will be certified. The key is whether the producer can comply with the terms of the applicable co-production treaty.

For Telefilm's purposes, the following types of productions are not eligible:

- pornography⁴
- projects containing elements of excessive violence, sexual violence or sexual exploitation, or of a defamatory, obscene or otherwise illegal nature as described in the *Criminal Code* of *Canada*.

An eligible production must comply with: (i) the minimums for financial participation; (ii) minimum expenditure requirements in the co-producing countries; and (iii) creative contribution requirements for the Canadian and foreign co-producer(s), as set forth in the applicable international co-production treaty. (See also: *What Level of Participation Must Canadians Have?*, below). It is important to note that the specific terms of Canada's various international co-production treaties are not identical and there will be some variance in their requirements.

The origin of the subject production is important in determining if it will eligible to be certified as a co-production by Telefilm.

Productions based on concepts, bibles, screenplays and other audiovisual projects conceived from a third-party country⁵ may be eligible, subject to the co-producers demonstrating to the co-production authorities that they have meaningfully developed and scripted the project. Whether a project has been "meaningfully developed" will be determined by the facts and history of each particular project and the steps undertaken by the co-producers once they acquired the underlying property.

Co-producers may acquire the rights to produce audiovisual works based on pre-existing works from third-party countries which were originally conceived for purposes other than audiovisual production (e.g., the co-producers of a Canada/France co-production may obtain the feature film rights to a novel published in the United States or Japan).

What is not permitted is the acquisition of a project which has been fully conceived, developed or scripted by professionals from a third-party country and then assigned to the co-producers for financing and filming.

(b) Who Is An "Eligible Applicant" For Telefilm's Purposes?

The Canadian co-producer must:

- be a Canadian-owned company under the effective control of Canadians, as defined in the *Investment Canada Act* and the *Income Tax Act* (Canada);
- not be affiliated or associated with the foreign co-producing entity; and
- own the exploitation and distribution rights in Canada and must retain a fair share of the net revenues from all other territories, including the co-producing country or countries;

All individual producers and other key production personnel who will exercise financial or creative control over the subject production must be Canadian citizens as defined in the *Citizenship Act* or a permanent resident as defined in the *Immigration and Refugee Protection Act*.⁶

^{*} It should be noted that there is no definition of "pornography" provided in Telefilm's guidelines. If you are not certain on this point, a discussion with Telefilm at an early stage is suggested.

⁵A "third-party country" means any country which is not a party to the subject co-production agreement. In the case of a co-production with a country that is a member of the European Union ("EU"), Telefilm's view is that a third-party country means a country that is not a member of the EU.

⁶ For the purposes of Telefilm, the individuals must have this status "at all relevant times", which means at all times during their work on the subject production

(c) What Level Of Participation Must Canadians Have?

Subject to what is contained in the relevant co-production treaty, the following is an overview of some of Telefilm's key requirements regarding the participation of Canadians.

- Minimum Financial Contribution: Some co-production treaties stipulate minimum contribution requirements. Each coproducer must provide no less than a specified percentage of the total budget, which may vary between 15% and 30%, depending on the relevant co-production treaty.⁷
- Development and Scriptwriting: As noted above, the coproduction may be based on a work, regardless of country of origin provided that the work is meaningfully developed by the co-producers.
- Intellectual Property Rights: The intellectual property rights in and to the co-production must be equal to the proportion of the financial contribution made by each co-producer. Accordingly, it is typically the case that the copyright in and to the co-production is split amongst the co-producers in the same proportion as their respective financing contributions, subject to each of the co-producers exclusively owning copyright for their home countries.
- Allocation of Creative and Technical Positions: The distribution of key creative and technical positions between coproducers must correspond with their respective financial contributions.⁸

Where the allocation of creative and technical positions for a project does not meet the requirement to correspond to the financial contribution, Telefilm has made available certain creative evaluation grids on their website⁹ which provide additional flexibility and grant "points" for certain positions. Telefilm has identified the persons listed below as "key personnel" for purposes of their analysis:

For live action productions:

Director Scriptwriter(s) 1st lead performer (based on on-screen time) 2nd lead performer (based on on-screen time) Director of photography Production Designer / Art Director Picture Editor Music Composer

For 2-D animated productions:

Director Scriptwriters Storyboard supervisor Design supervisor (art director) 1st lead voice (based on on-screen time) 2nd lead voice (based on on-screen time) Picture Editor Music Composer

For 3-D animated productions:

Director Scriptwriters Storyboard supervisor Design supervisor (art director) Character model supervisor Motion capture supervisor Animation director 1st lead voice (based on on-screen time) 2nd lead voice (based on on-screen time) Picture Editor Music Composer

⁷ Under the Canada- France treaty, in the case of a feature film with a budget of more than \$3.5 million, the minimum contribution is 10%.

⁸ By way of example, if Canada was contributing 65% of the financing of the subject production, then 65% of the creative and technical positions must be filled by Canadians. ⁹ http://www.telefilm.gc.ca/en/coproductions/coproductions/useful-tools

Subject to Telefilm's discretion and the terms of the applicable treaty, the foregoing persons must be citizens or permanent residents of Canada or of the co-producing country or, in the case of a co-production with an EU member country, of an EU country.

- Financial and Creative Participation of the Co-Producers: The approach taken by Telefilm is that creative and technical participation, royalties and expenses of each co-producer should be in an equal proportion to that co-producer's financial contribution to the co-production.
- Distribution: There must be an equitable sharing of markets and potential revenues among the co-producers, depending on the percentage of each co-producer's respective investment in the co-production. Exploitation of the co-production in a co-producer's home country is the responsibility of that producer, and the proceeds from such exploitation will generally remain with that producer. As a result, the Canadian coproducer must own the exploitation and distribution rights in Canada and must retain a fair share of the net revenues from all other territories. For the territories outside of the home countries of the co-producers, the co-producers will typically share responsibility for the exploitation of the co-production. The receipts from exploitation in these other countries are then shared among the co-producers in proportion to their contribution to the production budget. Profit participation of the Canadian co-producer must be the greater of: (i) the amount as provided in the applicable treaty; and (ii) the Canadian share of the subject co-production.
- Production Locations, Versioning and Dubbing: While the general rule is that there should be no shooting or production in a third-country, there are certain exceptions. Location shooting in a third-country may be permitted, provided that the script or action so requires.¹⁰ For animation co-productions, subject to the applicable treaty and approval of the relevant co-production authorities, subcontracting of technical animation services to a third-party country up to 25% of the co-production's budget may be permitted. Subject to the applicable co-production treaty, versioning or dubbing into French or English must be done in either co-producing country.

(d) To What Extent Can Third-Party Performers Participate?

Subject to the prior approval of Telefilm, the following participation by third country performers is permitted:

Feature Films/MOWs:

1 performer + 1 cameo (3 shooting days maximum)

Television Series:

- up to 6 episodes: 1 lead performer + 1 cameo OR 1 guest star;
- 7-13 episodes: 1 lead performer + 2 cameos OR 1 lead performer + 1 cameo + 1 lead performerr OR 1 lead performer + 2 guest stars;
- 4-26 episodes: 1 lead performer + 4 cameos OR 1 lead performer + 2 cameos + 2 guest stars OR 1 lead performer + 4 guest stars.

For these purposes:

- "cameo" means the brief appearance of an internationally known personality from a third-party country, involving no more than three shooting days; and
- "guest star" means the participation of a third-party country performer in one or more episodes of a series, according to the ratio set out above.

(e) What are the Restrictions on Granting on-Screen Credits?

Please refer to Schedule A which contains a table setting out Telefilm's credit guidelines. The credits must be used in exploitation in all territories as well as in all marketing material, and must be those authorized by Telefilm.

¹⁰ Studio shooting must take place in one of the co-producing countries, although, Telefilm may consider exceptions to this rule on a case by case basis.

CO-PRODUCTION CERTIFICATION IN CANADA

The process involves two stages – *preliminary recommendation* and *final recommendation*. It should be noted that both steps must be completed before a project is certified and a project cannot receive final recommendation unless it has first received a positive preliminary recommendation from Telefilm.

(a) Preliminary Recommendation:

The preliminary stage involves the submission of an application and a number of documents to Telefilm.¹¹ The application must be duly completed and signed by an authorized representative of the Canadian Co-Producer and submitted to Telefilm's Co-Production office. Applications for preliminary recommendation are required to be submitted at least **30 days prior** to the commencement of principal photography for live-action, feature films and documentaries. If the production is an animated production, the application must be submitted to Telefilm at the time of key animation or in the case of a series, at the latest, production of the video master of the first episode. A parallel procedure is adhered to by the foreign co-producer with the applicable agency in their home nation. In addition to the application process with Telefilm, the Canadian producer must apply to the Canadian Audio-Visual Certification Office ("CAVCO") for a Part "A" Certificate and CAVCO will provide a calculation of the amount of labour expenditures that qualify for the FTC.

(b) Final Recommendation:

Applications for final recommendation for both live action and animated productions must be submitted as soon as the production is completed and **no later than 19 months** following the end of the Canadian co-producer's taxation year in which principal photography began, or in the case of animation co-productions, in which key animation of the first episode was undertaken.

" Copies of the applications for preliminary recommendation and final recommendation can be found on the Telefilm website http://www.telefilm.gc.ca/en/coproductions/coproductions/forms-and-affidavits

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Ken Dhaliwal is a partner in the Toronto Office of Heenan Blaikie. Mr. Dhaliwal's focus is on media and entertainment law, with an emphasis on motion pictures and television in Canada and internationally.

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Schedule "A"

TELEFILM CREDIT GUIDELINES

- Telefilm Approval Telefilm must approve the credits to be used in the exploitation of the production in all territories (including the marketing material).
- <u>Courtesy Credits</u> In November 2010, Telefilm set out permitted exceptions to the rule that no third country producer-related credits will be allowed.

Certain third country courtesy credits will be allowed, provided: (i) the functions of the individuals did not interfere with the co-producers' financial and creative authority and they are related either to distribution or financing, or to the provision of production services under the strict control of the co-producers. A sworn affidavit to this effect must be submitted to Telefilm; and (ii) that the total number of such courtesy credits does not exceed the total number of credits given to Canadians or individuals from the co-producing country.

Under this exception, if a third country individual is given a credit under Group A below, then at least one Canadian or co-producing country individual must be given a credit from Group A as well. The same applies to Group B credits: for every third country individual accorded a credit from Group B, a matching number (or more) of Group B credits must be accorded to Canadians or co-producing country individuals.

Group A	Group B
Executive Producer	Supervising Executive
Senior Executive	Production Supervisor
Executive in Charge of Production	Production Executive
Supervising Producer	Production Associate
Associate producer	Executive Consultant
	Production Consultant
	Creative Consultant

- <u>Co-producer's credits</u> The Canadian and foreign co-producers must appear in the credits and be clearly and predominately identified in the head and tail credits.
- Maximum Number of Credits No more than two credits will be authorized for any one company and/or its representatives.

	Canada and Co-producing Countries	Third-party Countries
Individuals.	At the co-producers' discretion.	See note above. At the co-producers' discretion, provided that the total number does not exceed total number of credits granted to Canadians or individuals from the co-producing country.
Third-party country production companies	At the co-producers' discretion. The company's country of origin must have signed a co-production agreement with Canada or with a country that has signed an agreement with Canada.	No credits for production companies or co-producers from countries that have not signed a co-production agreement with Canada will be allowed.
Distributors	At the co-producers' discretion. One credit for a foreign distributor may be given when authorized by Telefilm Canada.	Telefilm Canada may agree to "in association with" or a similar formulation for distributors, taking into account the terminology used in the distributor's country of origin.
Broadcasters	At the co-producers' discretion.	One credit may be given for a foreign broadcaster holding a broadcast license to the production when authorized by Telefilm Canada. Telefilm Canada may agree to "in association with" or a similar formulation for broadcasters, taking into account the terminology used in the broadcaster's country of origin.
Other foreign corporations, including finance companies	At the co-producers' discretion.	Other foreign corporations, such as finance and syndication companies, may be given a credit when authorized by Telefilm Canada.
Logos		The logos of foreign distributors, broadcasters, syndication companies and finance companies may appear in the tail credits provided those of the co-producing companies and other Canadian participants appear in an equally prominent position.

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