

A Terms of Trade Primer - Part 8 (Producer Fees/Overhead, Tax Credits, Audit Rights)

September 21, 2011 by Bob Tarantino

This is the eight (and final) installment in our series about the new Terms of Trade applicable to the English-language Canadian private broadcasting industry ([Part 1](#), [Part 2](#), [Part 3](#), [Part 4](#), [Part 5](#), [Part 6](#), [Part 7](#)). This installment focuses on Section 9 (Producer Fees and Overhead), Section 10 (Retention of Producer Tax Credits) and Section 11 (Audit Rights) of the [Terms of Trade Agreement](#). Archived versions of all eight posts in this series are available at [this link](#).

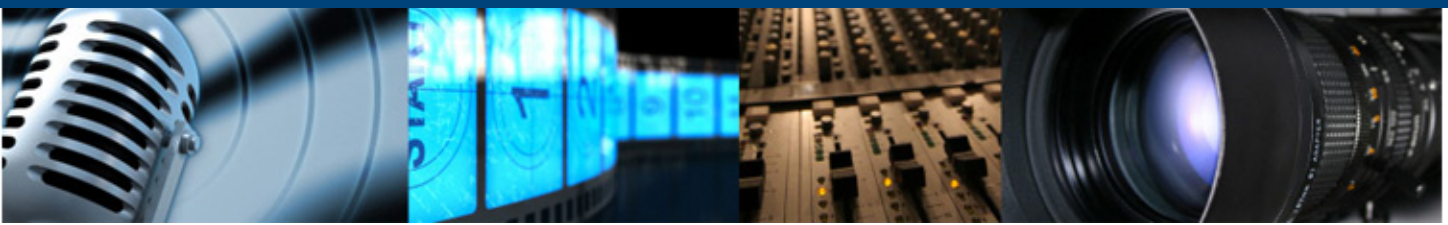
What do the Terms of Trade say about... producer fees and overhead?

Producer fees and overhead "will be industry standard, as accepted by Canada Revenue Agency". CRA policy (as set out in [Application Policy FAS 2009-01](#)) with respect to fees and overhead paid to "incumbent" producers (e.g., those with an ownership interest in the production company) is that fees in the amount "of 10% of the total actual costs in parts B and C of the standardized production budget" are "generally considered reasonable". As the CRA document goes on to point out, that threshold amount "is not intended as a 'cap' or 'maximum allowable'. When justified and supported by the facts of the particular case, amounts greater than the reference threshold may be considered reasonable." (For further information, see this [Heenan Blaikie LLP publication on the topic from 2008](#).)

Producer fees/overhead cannot be deferred or invested. This, along with Section 10 (to be discussed momentarily) is one of the more interventionist elements of the Terms of Trade. Producers routinely defer or "re-invest" their fees (whether a portion or the entirety) in order to facilitate production - a flat prohibition on such activity seems designed to spur broadcasters to increase their license fees in order to "close the gap". Whether the provision will in fact have that result remains to be seen.

What do the Terms of Trade say about... retention of producer tax credits?

Only a maximum of 75% of eligible tax credits may be invested in a project. Similar to the discussion regarding producer fees/overhead, above, this provision seems to run counter to long-accepted practice in the industry. Presumably the motivation for this provision is to attempt to ensure that as much money as possible (in this case, the 25% of "non-investable" tax credits) actually reaches the pocket of independent producers, rather than being "soaked up" by the budgetary needs of the production. While a laudable goal, and completely consistent with the mandate of the CMPA, it raises the question of how this would be enforced: if a broadcaster does not increase their license fee by an amount equal to the 25% of the tax credits which the producer is prevented from "investing" in the budget, would that constitute a breach of the Terms of Trade agreement? To what extent would individual producers be supportive of any action to enforce this particular provision of the Terms of Trade?



What do the Terms of Trade say about... audit rights?

If a producer or broadcaster has an entitlement to a revenue stream, they are entitled to "industry standard audit rights" which include the right to recoup reasonable audit fees if the audit reveals an unpaid amount which is in excess of 5% of the total amount owed and worth more than \$1,000. It remains to be seen what constitutes "industry standard" beyond the circumscribed right to recoup audit costs - for example, audit clauses usually contain restrictions on the number of times per year an audit can be conducted and the number of months or years within which a particular statement must be audited. It is curious that such matters were not dealt with in the Terms of Trade agreement, but the right to recoup audit costs is itself an often-contested contractual right which producers will undoubtedly be pleased to be entitled to.

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