



Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

January 14, 2009

Via Email

Mr. Pierre Mercier
Manager
Film Advisory Services
Provincial Compliance Division
Small and Medium Enterprises Directorate
Canada Revenue Agency
112 Kent Street, Place de Ville, Tower B, 19th Floor
Ottawa, ON
K1A 0L5

Dear Mr. Mercier:

RE: Guidelines for determining the reasonableness of producer fees for the purposes of the provincial and federal film, video and television tax credits co-administered by the CRA (version: 2008-06-16)

1. The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.
2. The following are the comments of the CAB's regarding the above-noted guidelines.

Strict Adherence to 10% of B + C as "industry standard"

3. The CAB acknowledges that many government and non-government funding agencies across Canada rely on the measure of 10% of parts B and C of the Canadian film and TV industry's standardized budget (the "B + C") as being a reasonable amount for producer fees. It must be understood, however, that this measure comes from set rules and allowances which govern eligibility for specific Canadian programs for funds, grants or equity programs and are not indicative of the industry as a whole. Many film incentive programs and tax credits in other jurisdiction, including the US, UK and Australia, have no cap on producer fees and many productions that do not subscribe to film financing programs do not follow a B + C measure in determining producer fees. These productions rely on market forces and external financiers to determine the amount said production will incur in producer fees.

4. Film and TV productions are not internally financed by a production company but are externally financed. As such, a production budget has been vetted, reviewed and accepted by third party financiers, banks, lenders, bonders and other financing sources and the determination of producer fees has been established by market forces.
5. As noted in the discussion guidelines, various government and non-government funding organizations allow for greater percentages of B + C or have established a combined limit for both producer fees and overhead. While the CAB recognizes that it is very practical to use B + C as a starting point in determining the reasonableness of producer fees, we feel a strict adherence to this 'cap' will not allow for flexibility in many instances of *bona fide* producer labour costs or overhead labour costs.
6. Producers are risk managers. Fees paid to producers are dictated by market value, in other words by the supply versus demand of the producer talent pool. Broadcasters and financiers influence choice and depth of producer teams before they invest money in a production. If a production requires a highly seasoned and very expensive producer team, it would be unfair to restrict that portion of *bona fide* producer fees automatically because the total exceeds B + C.
7. There is no mention in the discussion guidelines of the CRA's policy with respect to determining the reasonableness of the allowance of eligible labour in overhead costs. The CAB recommends there be flexibility to allow more than 10% of producer fees and/or taking into account overhead labour in assessing reasonableness.

Big budget productions (\$5M and up) and low budget productions (\$500,000 or less)

8. As mentioned above, the CAB acknowledges that it is most practical to begin with B + C as a starting point in determining the reasonableness of producer fees, but there should not be an automatic 'cap.' The language suggests the B + C rule will be administered as a hard ceiling while noting that big budget productions may not automatically be allowed to claim 10% while low budget productions may be allowed to claim "up to 15%."
9. It is unclear in the draft guidelines how CRA will determine that little or no extra work was performed to justify 10% of producer fees in big budget productions or that a low budget production is reasonable in claiming "up to 15%" in producer fees. The CAB feels this may create an automatic assumption from auditors that producers of big budget productions are padding producer fees while not contributing "extra work" that does not reflect the reality of the situation. Big budget productions are not only more technically challenging, but create larger financial risk. This demands greater control levels from producers. This arbitrary policy applied to big and low budget productions is contrary to the exercise of determining "reasonableness" when producer fees have been determined by market forces. As discussed, producer fee amounts are not arbitrary as third party financiers have already reviewed the locked budget and have agreed to cover a portion of the financing.
10. The CAB submits that, if CRA follows our recommendation that the B + C rule is used as a starting point only and not a hard "cap" and further recognizes that third party financiers have vetted the production budget and producer fees have been determined by market forces, there

will be enough flexibility in the policy to allow the determination of *bona fide* producer fees on a case by case basis with no automatic assumptions based on budget amounts.

Inclusion

11. The draft guidelines are clear in stating that CRA will include all services provided from credited 'producer' titles (including line producer, associate producer "or other type of producer") and all staff from "below the line" that "render producer services" as per CAVCO's 'Producer Control Guidelines' in the determination of producer fees. The CAB recommends that labour costs for only those individuals that meets the *total* definition of "producer" as per CAVCO's 'Producer Control Guidelines' should be included in determining the reasonableness of producer fees.
12. Automatically including individuals with 'producer' titles in determining the reasonableness of producer fees, irrespective of the services rendered - especially including such fees under the 10% of B + C 'cap' - is contrary to the spirit of the legislation and expressly contrary to CAVCO's 'Producer Control Guidelines.' There is a difference between an Executive Producer ("EP") that meets all of the requirements of a producer under CAVCO's 'Producer Control Guidelines' and a credited Executive Producer who was paid for primary job duties as an actor or a writer and given an EP credit as a courtesy. Including fees paid to someone with an Associate Producer credit for services rendered that meet only one of the definitions of producer (e.g., was instrumental in securing the lead actor; or helped secure vital financing) is also different than the CAVCO requirements.
13. Similarly, the automatic inclusion of a credited line producer or production manager is expressly contrary to CAVCO's 'Producer Control Guidelines.' The functions of line producer and production manager, in and of themselves, are not sufficient to confer producer status to a production under CAVCO guidelines. There may also be other internal labour or staff whose services may meet one of the roles outlined for a producer, including accounting (cheque signing authority), distribution (arranging of commercial exploitation) and lawyers (binding of production company to talent/crew contracts); however, although they may 'render services' that are listed under the definition of producer, they are not in fact ultimately responsible for and are not in control of the production.
14. The inclusion of fees for "producers for hire" where they have no copyright interest in the production or ownership interest in the production in the determination of 10% of B + C is also contrary to similar Canadian programs that use the B + C measure in determining the reasonableness of (true) producer fees.
15. The CAB recommends that if CRA is to include in the evaluation of reasonable producer fees those fees paid to individuals with "producer" titles and below the line internal labour that "render producer services", these individuals should meet the *total* definition of "producer" as per CAVCO's 'Producer Control Guidelines.' Otherwise, producers will ultimately be penalized for building their companies with internal staff and have more incentive to alternatively hire outside labour for each production which does not promote or support the building of an efficient business or support a good economic model.

Application of the Guidelines

16. The draft guidelines do not articulate when this policy will be officially announced. The CAB understands that this policy is already being implemented with many taxpayers and applied to previous taxation years.
17. The CAB submits that applying the guidelines retroactively is unfair and deleterious to taxpayers that have set their business up, secured appropriate financing and counted on tax credit returns based on an understanding of one regime without official notice of a policy/practice shift. Financing for these productions have already been secured and as application of these new guidelines will reduce the tax credit returns, producers will experience a shortfall. Given an already unstable economic climate and the state of lenders and banks, this could have serious repercussions for many.
18. Once the final policy has been determined, the CAB recommends an official announcement to the industry in order for all industry stakeholders to have due notice in order to properly re-evaluate their tax credit estimates appropriately and support the accurate methodology in securing third party financing. Without proper notice to the industry, this will cause uncertainty. Broadcasters, lenders, government and non-government agencies vetting financing scenarios will not understand why producers are not including portions of their (or their staff's) fees in their estimates of tax credits and mistrust between the parties will be created as potential financiers will suspect the producer is low-balling their estimates and not following CRA's current strict practices of disallowing previously eligible labour.
19. The CAB also recommends CRA announce an administrative 'date' in order to give a 3 to 6 month period for producers to organize their financing according - for example, that this policy applies to all productions starting principal photography on or after August 1, 2009.
20. The CAB looks forward to providing the CRA with more information about subsequent drafts of these guidelines or other guidelines which affect the administration of the tax credit programs.

Sincerely,

Original signed by

Jay Thomson
Vice-President, Regulatory and Policy