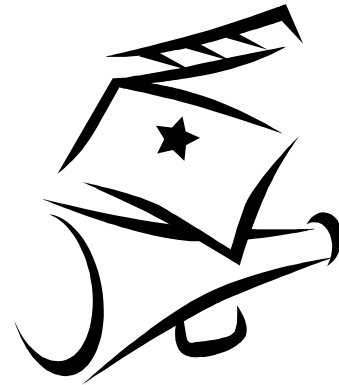


# DEVELOPMENT AND OTHER CHALLENGES

## A PRODUCER'S HANDBOOK



by

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Edited by Daphne Park Rehdner

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## **Introduction and Disclaimer**

This handbook addresses business issues and considerations related to certain aspects of the production process, namely development and the acquisition of rights, producer relationships and low budget production. There is no neat title that encompasses these topics but what ties them together is that they are all areas that present particular challenges to emerging producers.

In the course of researching this book, the issues that came up repeatedly are those that arise at the earlier stages of the production process or at the earlier stages of the producer's career. If not properly addressed these will be certain to bite you in the end.

There is more discussion of various considerations than in *Canadian Production Finance: A Producer's Handbook* due to the nature of the topics. I have sought not to replicate any of the material covered in that book. What I have sought to provide is practical guidance through some tricky territory. There are often as many different agreements and approaches to many of the topics discussed as there are producers and no two productions are the same.

The content of this handbook is designed for informational purposes only. It is by no means a comprehensive statement of available options, information, resources or alternatives related to Canadian development and production. The content does not purport to provide legal or accounting advice and must not be construed as doing so. The information contained in this handbook is not intended to substitute for informed, specific professional advice. You should seek out qualified legal, accounting or other qualified professional advice to address your specific development or production concerns.

I thank the numerous people who contributed to this work through interviews and feedback.

In particular, I would like to thank Daphne Park Rehdner for her astute and careful editorial input and lay out help, again.

I would welcome feedback and suggestions on how this handbook might be improved or expanded. Please send your comments to the author at [kathy.avrich-johnson@humewood.ca](mailto:kathy.avrich-johnson@humewood.ca). You can find a short bio at [www.humewood.ca](http://www.humewood.ca).

Kathy Avrigh-Johnson  
Summer 2002

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## **A. DEVELOPMENT**

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The entire process starts in earnest with securing the rights to your project. You might say the process starts with your having an inspiration or idea but you cannot really do anything with it until you have the rights.

### **I. SECURING THE RIGHTS**

#### What does securing the rights mean or entail?

Whether your project is based on a magazine article, your Aunt Betty's letters, a Broadway play or your own idea, to turn that original material (often called the "Underlying Rights") into a film or television project requires that you are given the rights by the copyright owner to use the material in that way. (See "Who Do You Have to Deal With" for what you need if you've written something yourself.)

#### What is copyright?

Copyright is referred to as a "bundle of rights". It is defined by the Copyright Act of Canada as the sole right to produce or reproduce a work in any material form, to perform the work in public, or, if the work is unpublished, to publish the work. The bundle of rights concept means that the copyright owner of a play incorporating original characters might be able to grant the rights to make and exhibit a motion picture to one person, to create a theme park to another, and merchandising to a third and so on. Any original literary, dramatic, musical or artistic work may be copyrighted. "Original" in this context generally means originating with the author (not as in "never conceived of before") although with a compilation of data, the originality is related not to the data itself but to the organization and presentation.

Copyright in Canada arises upon creation of the work (if the author is Canadian). Registration of copyright is not required although it creates a legal presumption of ownership of copyright which may make proof simpler in a dispute. You can register copyright in Canada on line very simply. The website address is <http://cipo.gc.ca>. Phone is (819) 997-1725, Fax (819) 997-6357, Email [cipo.contact@ic.gc.ca](mailto:cipo.contact@ic.gc.ca).

You will have heard that you cannot get copyright in an idea. That is correct. Copyright is in the form of expression of an idea. So if you have a great idea or concept, you need to write it down or record it in some way in order to protect it.

#### Who is the copyright owner?

This may become a little bit tricky. Generally, the first owner is the author of the work. If you are an employee and the work is created in the course of employment, the owner is your employer. If you are a freelance writer and have been contracted to write a screenplay, the ownership will be (or should be) outlined in the contract between you and the person commissioning the work. Ownership of copyright, or parts of copyright, may be transferred or assigned by contract. In the case of a novel for instance, the motion picture rights may be held by either the publisher or the author. You have to see the contract between them to be sure.

One other thing that should be mentioned in connection with copyright is “moral rights”. The Copyright Act also creates “moral rights” (known sometimes as “droit moral”) which allow the author to prevent the distortion or modification of the work and the right to be associated with the work. While copyright can be assigned, moral rights cannot. They may only be waived. You will usually see a waiver of moral rights in an agreement assigning rights to a creative work (and you can see why that may be necessary) whether it’s a writing contract or a broadcast license agreement.

### Who do you have to deal with?

In many instances this may be fairly clear-cut. For instance, if you have conceived of a story and write it up as an outline or treatment you can note your name and the year with © 2002, Jane Doe, on the document. You might eventually require a one-page declaration stating that you are the originator, etc in a little more detail.

For a published work, you should start with the publisher. The publisher will advise you if the publisher or the writer has the film and television rights to the book, magazine, newspaper article and if the rights are still available. You will need to see the agreement between them to verify this. If the writer is deceased (assuming he died in the last 100 years), you may have to deal with the writer’s estate. You cannot blithely assume that works have fallen into the public domain (ie. no longer protected by copyright). The term of copyright may be different in different countries. I was working on a project that was based on a Sherlock Holmes book. In most countries, Sir Arthur Conan Doyle’s copyright has expired but there was some question about the US and during negotiations with the estate, new GATT (General Agreement on Tariffs and Trade) rules were introduced that altered copyright protection in the UK resulting in some works that had been in the public domain were once again protected by copyright.

Although discussed further under Rights Clearances, you may require a copyright search to determine the rights owner. You will require this search in any event when you are applying for errors & omissions insurance. A search at an early stage may identify potential problems when you have the time and ability to address them. There may be conflicting claims to a particular work which may require that you obtain a legal opinion to identify the proper owner.

If you are acquiring rights in someone else’s ‘original’ script ie. not based on other “underlying rights”, you will probably enter into an agreement directly with the writer or his or her company. You will need to assure yourself, or have your lawyer do so, that the writer has not previously granted the rights to anyone else. If you are contracting with the writer’s loan-out company, you may also want to add a guarantee by the writer individually of all the representations and warranties about ownership and originality. This will allow you to skip seeing the agreement between the writer and his or her company (which may or may not exist) and also gives you a direct contractual relationship with the individual closest to the material. The representations and warranties are further discussed in the sample Rights Agreement.

When you have the original inspiration for a project you can write it up yourself or you can engage a writer to do so. If you are a writer you will likely be preparing a script or proposal yourself. If you are a producer, you may want to write up the story in a few pages so that when you engage a writer you have both evidence of the origination of the story and you can be more certain that you and the writer understand the vision or direction you want to be headed in. Committing your story to paper is important to allow

you to maintain a claim to the original concept or story, even if you are not seeking a writing credit for the project.

### Options and Purchase Agreements

When you are acquiring existing material such as an article, a play, a book or a screenplay, you need to purchase the rights to do so from the owner. Unless you are ready to plunk down the whole acquisition or purchase price at the time or you are absolutely certain the project is about to proceed into production momentarily, you will be optioning the material first. An option is an exclusive (if you specify it is) right for a specified period of time within which to acquire the rights you have negotiated at a specified price. You cannot have an option without specifying how you would exercise the option. For instance, you will not have an effective option with a document that says I pay Writer \$1,000 as an option fee for the film and TV rights to Writer's play. How long is the option? What do you have to pay to actually acquire or purchase the rights? Who knows? Usually you will have a purchase agreement attached to or incorporated into an option agreement. The purchase agreement will spell out in detail the rights to be acquired and the price.

### Option and purchase prices

There are many considerations that go into the negotiation of an option and purchase agreement. The option price is usually a fraction of the purchase price. The WGC IPA (Writers Guild of Canada - Independent Production Agreement) requires that it be not less than 10% of the purchase price for each year of the option term. If your purchase price were \$25,000, your option payment would be at least \$2,500 under the WGC. There are no collective agreements covering film and television rights for written materials other than screenplays. When you are acquiring material other than a screenplay from a guild member, the price of such material is completely negotiable. Although 10% may be a general rule of thumb for an option payment it is by no means a "given". You will want the option term to be as long as possible since development and packaging take an enormous amount of time. Telefilm requires an option period of at least 2 years and that really should be a minimum period. It is possible that you negotiate an initial one-year period and provide for renewals for additional payments. Whether or how many of the option payments are deductible from the exercise price is also a matter of negotiation. Under the WGC IPA however, only 18 months of option payments are deductible eg. if you're purchase price is \$35,000 and the option payment at 10% is \$3,500 for a year, you may have a renewal for an additional year at \$3,500 but only the first year and half of the second year is deductible from the purchase price.

The purchase price depends on how popular or well known the underlying work is and possibly how much interest there is in it. A current bestseller may command a six or seven figure purchase price whereas a lesser known or older novel may be \$25,000 or even less. Unpublished works could be hundreds or thousands of dollars. The Harold Greenberg Fund which now assists by paying 100% of an option cost for an underlying work by a Canadian author, sees option payments of \$5,000 to \$10,000 for well-known works but the average option payments are in the \$1,500 to \$3,000 range for 24 months. To access these option monies you need to have a track record as a feature film producer and preferably experience with adaptations.

If you are planning on doing a film or TV project based on someone's life story or based on true events, there are many considerations apart from price. These are discussed under Rights Clearances. If you are acquiring rights to an established screenwriter's

work, you are likely going to be governed by WGC scale or higher. Although the WGC IPA does not set out script fees as purchase prices, you would be paying about 75% of a complete script fee for a draft script, with the requirement of paying more (the production fee) on first day of principal photography. (Under the WGC IPA according to the payment schedule, you will have paid 75% of script fees by end of first draft.) Depending on your negotiating power the writer or his or her agent may require the purchase price be based on 100% of the script fees. However, even if the writer has done fourteen drafts on his or her own, if you believe you have more drafts to undertake with that writer or another writer, you will be looking at the script as a draft and can negotiate to acquire it as a first draft.

### Negotiating Writing Agreements

If you are commissioning the writing of a treatment or outline or draft script, whether it is based on existing material or just an idea you had or the writer pitched you, you would enter into a writing agreement with the writer. If you optioned a play from a playwright and he or she was going to adapt the play into a screenplay, you would probably enter into two agreements - the option/purchase agreement and a writing agreement. You may very well want these agreements to be separate. Unless the writer is powerful enough to negotiate the right to be sole writer, or you just need them to do a polish before its perfect, you will want the right to engage another writer. You also need to ensure you retain the rights to the underlying material that you are building on, whether or not that writer is writing the script.

Considerations in negotiating a writing agreement should include the experience of the writer with the kind of material being written, whose material it is, the resources available to you for development and what else the writer is working on during the period you expect them to be working on your project. If the writer is represented by an agent, the agent will always ask for WGC rates. If the writer is not a WGC member there is no requirement that you pay WGC rates. Although WGC rates are stated as minimums, they are a lot of money. A few writers in this country can command multiples of WGC scale. What the IPA does not acknowledge, particularly with respect to one-of or long form drama, there is no such thing as treatment, two drafts, a polish and then you shoot. That may be the case in series television with an established ongoing series. Usually, you will be doing many drafts, even with very experienced writers. They do not do two drafts, they may do 10 or 15. Not every submission is a full rewrite but certainly more than what is defined as a polish in the IPA. This is not to say you want to try and negotiate 15 drafts with a writer but you may want to anticipate multiple drafts or that a draft includes a few sets of revisions. A senior development executive/story consultant I spoke to considers a stage as two drafts and a polish.

An understanding of how you want to work should be part of your discussions with the prospective writer. Determining who is the contact person, if you are using a story editor or consultant and how you will be providing input eg. you will be meeting after each submission and providing written notes.

More details about various terms and considerations in negotiating writing agreements are set out in the Sample Writing Agreement.

## II. FINANCING DEVELOPMENT

When sitting down to consider development of a project, you should seek to get an overview of the work you believe will be needed, break it down into stages and figure out time lines and budgets for each stage. Then double or triple your estimates. You will need to do this exercise when you apply for development funding to most public and private funding sources. Everything takes longer (and consequently involves more costs) than you first imagine. Most private funders have deadlines for applications and some public funders may as well. They will in turn have fixed timelines for responses – usually two to three months. Telefilm does not have fixed dates for development applications but determinations will also take 6 to 8 weeks on average from the time they have all your materials.

### What do funders require?

There are a variety of funding sources for development including most provincial film and television agencies (not Ontario), Telefilm Canada, various private broadcast funds (created as conditions of license under the CRTC), certain broadcasters without official funds and the occasional distributor. Most of the funders will require the same or very similar documentation and information including:

- Chain of title with attached copies of rights and writing agreements
- Development budget
- Development schedule
- Development financing scenario and support for other financing sources
- Bios of key personnel

Additionally, you should (or may be required to) provide a description of what you are seeking to achieve in the stage of development for which you are seeking funding.

### What costs get financed?

Other than for documentaries, most funders relate to one stage of development at a time:

- Outline or treatment
- First draft
- Second drafts
- Rewrites
- Packaging or really early pre-production

Not all funders participate in all stages of development. For instance The Harold Greenberg Fund (FUND) recently added a new option fund that contributes to option payments for Canadian dramatic or literary underlying rights. However, FUND does not participate in the development of concept to treatment. Most, but not all provincial

agencies, do fund concept to treatment stage. Other funders tend to participate only in stages from treatment or outline on. You will need to check the requirements and guidelines or policies of every fund to which you apply.

It is worth noting that Telefilm generally does not relate to past expenses other than option fees. You may also have contracted the rights or negotiated the agreement subject to funding approval from Telefilm. Negotiating such a delayed or conditional payment with the writer may be something you can only achieve with a writer with whom you have a close relationship.

Telefilm and other funders tend to use WGC rates as the acceptable level of writing fees for development budgets. This does not mean you have to pay those rates. No one will look at you askance if you are paying less. If you have engaged one of the writers who can command scale and a half or double scale, you likely will have to look to finance the difference from private sources since Telefilm and other funds will only support the fees calculated at scale.

The funders are quite consistent in the costs they relate to in development:

- Writing fees and fringes, if applicable
- Research costs
- Third party story consultant or editor (Telefilm and most agencies do not allow the producer ie. not a third party, to take a story editor fee. This is considered part of your job.)
- Director consultant, if applicable
- Travel costs
- Legal fees
- Reading or workshopping the script (usually later stages of development)
- Script duplication - if for packaging or casting (usually Telefilm requires that script reproduction in the ordinary course be part of overhead)
- Allowance for producer fees and overhead

The allowance Telefilm makes for producer fees and overhead is 20% each for features and 15% each for television projects. Most other funders have similar allowances e.g. Manitoba Film & Sound allows 20% for both film and television.

Most funders have caps either per project or per company or both or give a limited amount per stage e.g. 50% of costs to a maximum of \$5,000. For instance Telefilm's per project cap is \$100,000 for television and \$150,000 for features to a maximum of 60% of the approved budget in features and 50% in television. (Sixty percent tends to be in exceptional cases, the norm is 50%.) The \$150,000 includes any monies used for development from a company's performance envelope (see Telefilm's Canadian Feature Film Fund guidelines). Other agency or private fund caps are not so large. If you have many projects in development, you might want to verify if your projected financing sources do have caps. Additionally, if you are consistently doing a large amount of

development but no projects are moving into production, funders will take that into account in considering requests for further development.

### Preconditions to securing development financing

Most funders do not require a broadcaster or distributor commitment for development of theatrical features. However, if you are seeking substantial sums or have come back for multiple stages of financing, or are in latter stages (such as the packaging phase) the funder will be seeking at least indications of interest from a distributor and/or indications of interest such as contributions of other funders.

All public and private funds require television broadcast participation to be eligible for development financing. BC Film matches the development money contributed by a broadcaster or distributor (to a cap of \$30,000 per project or \$50,000 per company). COGECO normally will not exceed the broadcaster's commitment. Telefilm requires that the broadcaster commitment be at least 20% of the development budget that you are applying for, for drama and 15% for other projects.

### The nature of development monies

Contributions from Telefilm, provincial agencies and virtually all private funds are loans, not grants or gifts. They are repayable in the event the project is sold or transferred to some other entity or the project goes into production. Many of the financiers take a security interest in the project, registered against the company that owns the project. In the case of COGECO's development loans for feature films, money is loaned against 3 or 4 or 5 projects. When the first project goes into production, 50% of the money is repayable and the balance is due when the second project goes into production. The repayments are due by first day of principal photography. If you are getting production financing from the same entity such as Telefilm or a provincial agency, the development loan may be deducted from your first or second production fund draw down. You have to plan for this in your cash flows.

### A few things you can do to get and maintain a better relationship with a financier

- Be professional - Ensure your application and materials are typed and proofed. Surprisingly, some people do not realize what a poor impression it makes to have to struggle to read an application or to see typos in materials. Now that most application forms are available online or downloadable, there is no excuse for not having them typed and proofed.
- Before you call the agency to ask a hundred questions, familiarize yourself with their guidelines. If you still have questions or require clarifications, they will be informed questions or comments.
- Send your application and required accompanying materials in a complete package. Sending only the application form without the supporting documentation is of no value. It does not mark your place in line or let the funder start reviewing your application any earlier. If there is one document that has not been signed you can send in the unsigned draft or explain it is on its way. If there are several documents missing, wait until you collect them. Nova Scotia Film Development Corporation has implemented a policy that if your application is incomplete, they will not inform you, you will just miss an opportunity to be considered in their competitive rounds of development financing. Applications have become quite complete as a result.

- Provide a cover letter outlining what you have included in your package and anything that is not entirely clear on the face of a document. If you have had previous development on the project, give a brief history of the project to provide context. This is particularly important if there have been multiple writers and/or phases. Put the phase you are applying for in context of the whole from the perspective of the development process and development budget. You may want to supply a chronology of events. If you are not paying WGC rates or according to a WGC payment schedule, briefly say so and explain.
- If you get development money, keep your funders informed through regular updates. This may well be a term of your development agreement with your financiers but even if it is not, it assists your relationship to keep your financiers aware of what it transpiring on your project.

### III. RIGHTS CLEARANCES

An essential part of development but usually not considered until a ways down the road, is the matter of rights clearances. Rights clearances are complicated and require the assistance of your entertainment lawyer. Although most producers do not contemplate errors & omissions insurance other than as a deliverable to their broadcaster or distributor, there are many matters that come up that may need to be addressed far before that time. It is usually less expensive and painful to do it early than when your show is complete.

There are fewer issues when your project is based on an original and completely fictional script. However, when your project is based on existing material or includes parody or satire, incorporates real people or events or what could be based on real people, rights clearances have to be considered early in the development process.

#### Based on an underlying work

As mentioned earlier, the first step in dealing with an existing property is to ensure the rights are available and who holds them. E & O insurers require that a copyright report be obtained “unless the work is an unpublished original, not based on any other work and it is certain that it was not optioned or licensed to others prior to applicant’s acquisition of the rights”.<sup>1</sup> There are services such as

Thomson & Thomson or lawyers that conduct copyright and title searches for Canada and the U.S. If the author is from another country you should conduct a search in that country as well. You will likely need a U.S. search for most properties if you think the property has been published in the US or if you plan on selling the finished production to the US. You may need a copyright opinion as well if there is any confusion about whether the copyright is still in force, or if certain rights have been assigned or exactly who holds what. There are specialized firms that provide such opinions and you can ask your insurance broker for suggestions.

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<sup>1</sup> Chubb Insurance Company of Canada Producers’ Errors & Omissions Liability Insurance Clearance Procedures Rev. 11/01

### Based on life-stories or true events

What rights do you need if you are doing someone's life story or are portraying real people and/or real events? Although facts are not copyrightable, the source of your facts is very important. You cannot rely on word-of-mouth or an unsupported second hand account. Useful sources of information would include contemporaneous news reports, court transcripts, judgments and convictions that have withstood appeals, recorded interviews of participants, magazine articles and books regarding the event. If you rely heavily on one non-original source such as a magazine article, biography or other work, you may very well infringe the copyright of the author of that work since the unique arrangement of the facts or their theory of a particular set of facts may be protected by copyright. Even if the issue is questionable, the reasonable possibility of the author suing should be enough to consider acquiring the rights to that work.

The issues you are facing in a docudrama or even a documentary of a fictionalized story that includes real people or events, are defamation, invasion of privacy and possibly the right of publicity. How people and organizations are portrayed in a given production will impact on the likelihood of lawsuits. Accuracy and truth are the best defenses but may not be the only considerations.

Each project must be considered carefully and fully reviewed with your lawyer early on. Although having an injunction against your show may be good publicity, you may not ever get to air your program and that is not likely to be the result your financiers are seeking.

Following are the Clearance Procedures from one of the larger film and television errors & omissions insurers. It provides a helpful (if scary) review of the possible issues or concerns and steps that need to be taken to obtain errors & omissions insurance.

## **Clearance Procedures**

The Clearance Procedures below should not be construed as exhaustive and they do not cover all situations that may arise in any particular circumstance or any particular Production.

1. Applicant and its counsel should monitor the Production at all stages, from inception through final cut, with a view to eliminating material that could give rise to a claim.

Consideration should be given to the likelihood of any claim or litigation. Is there a potential claimant portrayed in the Production who has sued before or is likely to sue again? Is there a close copyright or other legal issue? Is the subject matter of the Production such as to require difficult and extensive discovery in the event of necessity to defend? Are sources reliable? The above factors should be considered during all clearance procedures.

2. The Producer and the lawyer need to read the script prior to commencement of Production to eliminate matter that is defamatory, invades privacy or is otherwise potentially actionable.
3. A script research report should also be prepared *before* filming to alert the Producer to potential problems. Such problems may include: names of fictional characters that

- are coincidentally similar to real people; script references to real products, businesses or people if not cleared; or uses of copyrighted or other protected materials, etc. Fictional character names should be checked in relevant telephone directories, professional directories or other sources to minimize the risk of accidental identification of real people. Similar checks should be done for the names of businesses, organizations and products used in the Production. Special care should be taken to check names of person, businesses, etc., that are negatively portrayed. The Producer also must be alert to elements that do not appear in the script (such as art works used on the set) but that may need clearances.
4. If the Production is a documentary and there is no script, the Producer should provide its counsel with a detailed synopsis of the project in advance of production. (If it is a documentary series, the lawyer should receive a detailed synopsis of each episode.) If the Production will involve negative statements about people or businesses, the Producer should provide counsel with full details about the allegations and their merit. Problem statements can then be identified and thus avoided while filming. During filming, the Producer should be careful to avoid (or consult with counsel about) possible problem areas. (Examples include: filming identifiable copyrighted items or performances, trademarks, persons who have not specifically consented to be filmed, or minors.) Relevant laws differ from place to place: some jurisdictions have very restrictive rules about filming persons, signs, buildings, public art, etc. Also, be careful to avoid narration or editing that accidentally implies negative things about pictured people, products and businesses.
  5. A copyright report on the underlying script, book or other work must be obtained, unless the work is an unpublished original, not based on any other work, and it is certain that it was not optioned or licensed to others prior to the Applicant's acquisition of rights. Both domestic and foreign copyrights and renewal rights should be checked. If a completed film is being acquired, a similar review should be made of copyright and renewals on any copyrighted underlying property.
  6. The origins of the work should be ascertained — basic idea, sequence of events and characters. Have submissions of any similar properties been received by the Applicant or someone closely involved with the Production? If so, the circumstances as to why the submitting party may not claim theft or infringement should be described in detail.
  7. Prior to final title selection, a title report must be obtained. **TITLE COVERAGE WILL NOT BE OFFERED UNLESS A RECENT TITLE REPORT HAS BEEN SUBMITTED TO AND APPROVED BY THE COMPANY.**
  8. Whether the Production is fictional or factual, the names, faces and likenesses of any recognizable living persons should not be used unless written releases have been obtained. A release is unnecessary if person is part of a crowd scene or shown in a fleeting background. Releases can only be dispensed with if the Applicant provides the Company with specific reasons, in writing, as to why such releases are unnecessary and such reasons are accepted by the Company. The term "living persons" includes thinly disguised versions of living persons or living persons who are readily identifiable because of identity of other characters or because of the factual, historical or geographic setting.

9. All releases must give the Applicant the rights to edit, modify, add to and/or delete material, juxtapose any part of the film with any other film, change the sequence of events or of any questions posed and/or answers given, fictionalize persons or events, and make any other changes in the film that the Applicant deems appropriate. If a minor, consent has to be legally binding.
10. If music (pre-existing or original) is used, the Applicant must obtain all necessary synchronization and performance licenses from copyright proprietors. All necessary licenses must also be obtained for recordings of such music.
11. Written agreements must exist between the Applicant and all creators, authors, writers, performers and any other persons providing material (including quotations from copyrighted works) or on-screen services.
12. If distinctive locations, buildings, businesses, personal property or products are filmed, written releases must be secured. This is not necessary if such real property is seen only as non-distinctive background.
13. If the Production involves actual events, it should be ascertained that the author's major sources are independent and primary (contemporaneous newspaper reports, court transcripts, interviews with witnesses, etc.) and not secondary (another author's copyrighted work, autobiographies, etc.).
14. Shooting script and rough-cuts should be checked to assure compliance with all of the above. During photography, persons might be photographed on location, dialogue added or other matter included that was not originally contemplated.
15. If the intent is to use the Production or its elements on videocassettes, web sites, multimedia formats or other technology, rights to manufacture, distribute and release the Production must include the above rights and must be obtained from all writers, directors, actors, musicians, composers and others necessary therefor, including proprietors of underlying materials.
16. Film/video clips are dangerous unless licenses and authorizations for the second use are obtained from the owner of the clip, as well as licenses from all persons rendering services in or supplying material contained in the clip; e.g., owners of underlying literary rights, writers, directors, actors, music owners or musicians. Special attention should be paid to music rights as music owners often take the position that new synchronization and performance licenses are required.
17. Living persons and even the deceased (through their personal representatives or heirs) may have a "right of publicity." Clearances must be obtained where necessary. Where the work is fictional in whole or in part, the names of all characters must be fictional. If for some special reason particular names need not be fictional, full details must be provided to the Company in an attachment to the Application.

## **CHAIN OF TITLE**

January 1, 2000	Option and Purchase Agreement between My Development Co. Ltd. ("Myco") and Famous Author, whereby Myco acquires an exclusive and irrevocable option (the "Option") for a period of twelve (12) months (the "Initial Term") to the original literary work ("Property") entitled "Hot Non-Fiction Book". Option may be extended for an additional consecutive Twelve (12) month period (the "Successive Term").
January 15, 2000	Writer's Agreement whereby Myco engages Guy Writer to write and deliver a screenplay in stages of the Project.
December 31, 2000	Myco, pursuant to the terms of the Option/Purchase agreement, extends its Option for a further twelve (12) months (the "Successive Term") beginning on January 1, 2001.
December 31, 2000	Agreement, whereby Myco requests and Famous Author grants a third consecutive Option period for a further twelve (12) months (the "Second Successive Term") beginning on January 1, 2002.
June 15, 2002	Assignment agreement whereby Myco assigns and transfers all right, title and interest in and to the Option/Purchase Agreement, as extended and the Writers Agreement of January 15, 2000 and any and all right and interest in and to the Screenplay to My Canadian Production Co. Ltd.

**Option and Purchase Agreement**

**MY DEVELOPMENT COMPANY LTD.**

**AND**

**55555 MANITOBA LTD.  
C/O LITERARY TALENT AGENCY**

**AND**

**FAMOUS AUTHOR**

**OPTION/ PURCHASE AGREEMENT**

**FOR**

**HOT NON-FICTION BOOK**

**STREET ADDRESS  
SUITE NUMBER  
BIG CITY, MANITOBA  
POSTAL CODE**

## OPTION AGREEMENT

THIS OPTION AGREEMENT made this 1st day of January, 2000

BETWEEN:

**MY DEVELOPMENT COMPANY LTD.**  
a corporation incorporated under the laws of the  
Province of Manitoba  
(hereinafter referred to as "Producer"),

- and -

**55555 MANITOBA LTD.**  
a corporation incorporated under the laws of the  
Province of Manitoba  
(hereinafter referred to as "Owner")

- and -

**FAMOUS AUTHOR**  
(hereinafter referred to as "Author")

**WHEREAS** Owner is the sole owner throughout the world of all motion picture, television and ancillary rights in and to the original literary work described as follows:

**Title:** "HOT NON-FICTION BOOK" being an original literary work;

**Written by:** Author (which original literary work, and the plots, themes, titles, characters and copyright(s) thereof, along with any arrangements, translations, dramatizations, and other adaptations or versions thereof now or hereafter created, are herein together referred to as the "Property") and published in Canada by Big Green and Company Limited;

***The owner here is the Author's company, not the publisher. Frequently, the publisher will not acquire the film and television rights but you should look at the publishing agreement in any event to see if there are any rights the publisher has which may encroach on the rights you need or want. Because the writer is a party to the agreement, you do not necessarily need to see the agreement between the writer and his company.***

**AND WHEREAS** Producer intends, but does not undertake, to produce or cause to be produced a motion picture based upon, suggested by or adapted from the Property;

**AND WHEREAS** Producer, relying upon Owner's and Author's warranties and representations, desires to acquire from Owner and Owner agrees to grant to Producer the exclusive option to purchase certain rights in and to the Property upon the terms and conditions hereinafter set forth and provide Producer with a Publisher's Release immediately following execution hereof;

**NOW THEREFORE** in consideration of the mutual covenants, representations and warranties herein contained, the parties agree to and with each other as follows:

1.0 **GRANT OF OPTION**

1.1 Option: In consideration of the payment by Producer to Owner of the sum of Ten Thousand (\$10,000.00) Dollars, payable upon mutual execution hereof, and other good and valuable consideration, Owner agrees to and does hereby give and grant to Producer the exclusive and irrevocable option for a period commencing upon the execution hereof and extending for a period of two (2) years (hereinafter called the "Initial Term") to acquire from Owner all motion picture, television and ancillary rights in and to the Property on the terms and conditions set out in the Purchase Agreement annexed hereto as Schedule "A".

***Exclusivity of the option is essential. You don't want to find you have spent two years developing something and the author has given someone else the right to do so as well.***

***As mentioned in the discussion, this amount is fairly hefty for an option payment. The book was well known and the topic was popular.***

1.2 Successive Term: Producer may extend the option for the Property for an additional period of one (1) year from the expiry of the Initial Period ("First Successive Term") by notice in writing given to the Owner accompanied by payment of the sum of Five Thousand (\$5,000.00) Dollars on or before the expiry of the Initial Term.

1.3 Successive Term: Producer may extend the option for the Property for an additional period of one (1) year from the expiry of the First Successive Term ("Second Successive Term") by notice in writing given to the Owner accompanied by payment of the sum of Five Thousand (\$5,000.00) Dollars on or before the expiry of the First Successive Term.

***Here you have a total of 4 years for development which is likely what you need as a minimum for adaptation of a book. In this case, it was a non-fiction book that was being used as a source for development of a dramatized movie.***

1.4 Deductibility: The payment for the Initial Term (but not the payment for the First or Second Successive Term) shall be deducted from the Purchase Price payable pursuant to the Purchase Agreement.

***The deductibility of option payments and how many is entirely a matter of negotiation unless you are under the WGC IPA. Frequently you will have the first payment is deductible but subsequent payments are not. You may have the first two are deductible. At some point, having many extensions that are all deductible would mean you had paid the purchase price. Usually there is a limit before that.***

1.5 Exercise/First Day: The option may be exercised by Producer by written notice to Owner at any time during the Initial Term, First Successive Term, or the Second Successive Term ( the "Option Term") provided that it shall be exercised no later than the first day of principal photography of a motion picture, television or home video production based on the Property.

1.6 Pre-Production Authorized: Owner acknowledges that Producer may, during the Initial Term or the Successive Term(s), undertake pre-production activities in connection with any of the rights to be acquired under the Purchase Agreement including preparing a script, seeking financing, and other standard pre-production activities.

## 2.0 EFFECTIVENESS OF EXHIBITS

If Producer shall exercise said option, the Owner and Producer shall enter into an agreement in the form of Schedule "A" which is undated and it is agreed that if Producer shall exercise this option (but not otherwise) then the signatures of Owner to the Purchase Agreement shall be deemed to be effective and said Schedule shall constitute a valid and binding agreement effective as of the date of exercise of said option and Producer is hereby authorized and empowered to date such instrument accordingly. If Producer shall fail to exercise said option, then the signature of Owner to the Purchase Agreement shall be void and of no further force or effect whatever and Producer shall not be deemed to have acquired any rights in or to the Property except pursuant to this Option Agreement. If Producer exercises the said option, Producer shall execute and deliver to Owner a copy of the Purchase Agreement dated as of the date of the exercise of said option, and Owner will, if requested by Producer, execute and deliver to Producer any additional documents required to give effect to the Purchase Agreement. It is agreed that upon the exercise of said option by

Producer, all rights in and to the Property agreed to be transferred to Producer pursuant to the provisions of the Purchase Agreement shall be deemed to be vested in Producer, effective as of the date of the exercise of the said option, which rights shall be irrevocable under any and all circumstances except as specifically provided herein and in the Purchase Agreement.

***This clause means yes you do sign the attached purchase agreement but you do not date it until you exercise the option.***

### **3.0 INCORPORATION OF PURCHASE AGREEMENT / EXCLUSIVE OPTION**

3.1 All of the representations and warranties contained in the Purchase Agreement shall be deemed to be incorporated herein by reference with the same force and effect as though set out here in full and shall be applicable throughout the option period(s). Without limiting any other rights Producer may have in these premises, the Owner hereby agrees that if there is any third party claim and/or litigation involving any material breach of any of such provisions of the Purchase Agreement, the option period granted hereunder shall automatically be extended until no claim and/or litigation involving any such breach of the aforementioned provisions is outstanding, such period not to exceed six months following resolution at which time Producer must waive the breach or terminate the agreement. At any time after the occurrence of such a claim and/or litigation until the expiration of the option period, as extended, the Producer may, in addition to any rights and remedies the Producer may have on the premises, rescind this agreement and in such event, notwithstanding anything else to the contrary contained in this agreement, the Owner hereby agrees to repay the Producer any money paid by the Producer to the Owner hereunder.

3.2 Without limiting the generality of the foregoing Owner agrees that it will not, at any time during the Initial Term (or the First and Second Successive Terms, if applicable), exercise or authorize or permit the exercise by others of any of the rights covered by this option.

3.3 Subject to 3.1 above, if Producer fails to exercise the option, upon the expiration of the relevant option period, the signature of the Owner to the Purchase Agreement shall be void and of no further force or effect.

***The incorporation of many of the terms of the Purchase Agreement by reference such as the outlining of the rights to be obtained and the representations and warranties, reduce the requirement to have a long option agreement. You could combine both into one document with modifications.***

#### 4.0 **ADDITIONAL DOCUMENTS**

The Owner agrees to execute or cause to be executed, acknowledged and/or delivered to Producer of any further documents or instruments which the Producer may reasonably require to fully effectuate and carry out the intent and purpose of this agreement and to convey to the Producer the good and marketable title in and to the Property in the event said option is exercised by the Producer. Without limiting the generality of the foregoing, Owner agrees to execute and deliver to Producer's request a short form option agreement or other evidence of the grant of the written option in a form satisfactory to Producer which instrument shall become effective immediately and may be recorded by Producer with the United States Copyright Office as evidence of the option herein granted to producer.

#### 5.0 **FAILURE TO EXECUTE DOCUMENTS**

If the Owner shall fail to execute any agreements, assignments, or other instruments which relate to the development, ownership or production of the Property and are consistent with the agreement to be executed by Owner hereunder following reasonable notice by the Producer, the Producer is hereby appointed Owner's attorney-in-fact with full right, power, and authority to execute the same in the name of or on behalf of the Owner and Owner acknowledges that the authority and agency given Producer is a power coupled with an interest and irrevocable.

***Although I have never seen any party invoke the attorney-in-fact provision, you could imagine the situation where the owner has left for better climates or is not as friendly as when you started the process where this could become necessary.***

#### 6.0 **RIGHT OF ASSIGNMENT**

The assignment and lending provisions in section 7 of the Purchase Agreement shall apply equally to this agreement as if set out in full herein.

#### 7.0 **SECTION HEADINGS**

The headings of paragraphs, sections and other subdivisions of this agreement are for convenient reference only. They shall not be used in any way to govern, limit, modify, construe this agreement or any part or provision hereof or otherwise be given any legal effect.

#### 8.0 **ENTIRE AGREEMENT**

This agreement, including and incorporating the Purchase Agreement attached hereto, contains the full and complete understanding and agreement between the parties hereto with respect to the within subject

matters and supersedes all other agreements between the parties hereto, whether written or oral, relating hereto, and may not be modified or amended except by written instrument executed by both parties hereto.

9.0 **AGENCY CLAUSE**

The Producer shall pay all monies due to the Owner under this agreement to MY AMAZING AGENTS, Main Street, Toronto, Ontario who is hereby empowered to act on behalf of the Owner in all matters arising out of the present agreement, and whose receipt shall be a good and valid discharge of the Producer's obligation.

***This allows the agent to monitor the payments and take their “cut” or percentage fee. In this case the agent is also authorized to act on behalf of the writer.***

**IN WITNESS WHEREOF** the parties hereto have executed this agreement as of the day and year first above written.

**MY DEVELOPMENT COMPANY LTD.**

**By:**

\_\_\_\_\_

**555555 MANITOBA LTD.**

**By:**

\_\_\_\_\_

**For valuable consideration, the undersigned hereby guarantees the obligations of 555555 MANITOBA LTD.**

\_\_\_\_\_  
**FAMOUS AUTHOR**

***Sometimes there are very elaborate guarantees or the writer specifies what he is willing to guarantee. The representations and warranties are important since the writer is the one with direct knowledge.***

SCHEDULE "A"

**PURCHASE AGREEMENT**

THIS AGREEMENT made as of the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

BETWEEN:                   **MY DEVELOPMENT COMPANY LTD.**  
a corporation incorporated under the laws  
of the Province of Manitoba  
(hereinafter referred to as "Producer"),

- and -

**55555 MANITOBA LTD.**  
a corporation incorporated under the laws of the  
Province of Manitoba  
(hereinafter referred to as "Owner")

- and -

**FAMOUS AUTHOR**  
(hereinafter referred to as "Author")

**WHEREAS** Owner is the sole owner throughout the world of all motion picture, television and ancillary rights in and to the original literary work described as follows:

**Title:** "HOT NON-FICTION BOOK" being an original literary work;

**Written by:** Author (which original literary work, and the plots, themes, titles, characters and copyright(s) thereof, along with any arrangements, translations, dramatizations, and other adaptations or versions thereof now or hereafter created, are herein together referred to as the "Property") and published in Canada by Big, Green and Company (Canada) Limited;

**AND WHEREAS** Producer intends, but does not undertake, to produce or cause to be produce a motion picture based upon, suggested by or adapted from the Property;

**AND WHEREAS** Producer, relying upon Owner's and Author's warranties and representations, desires to acquire from Owner and Owner agrees to grant to Producer the exclusive option to purchase certain rights in and to the Property upon the terms and conditions hereinafter set forth;

**NOW THEREFORE THIS AGREEMENT WITNESSETH**, in consideration of these presents and the covenants, promises and agreements

hereinafter contained and on the part of the hereto respectively to be observed and performed, the parties hereto agree each with the other as follows:

## **1.0 GRANT OF RIGHTS**

1.1 Rights: The Owner hereby exclusively and irrevocably (except as provided herein) licenses to the Producer under copyright for the full term of copyright in the Property, in any and all languages, throughout the universe the following rights:

(a) Motion Picture: All motion picture rights including, but not limited to, the rights to produce, project, exhibit, broadcast and transmit an unlimited number of motion pictures including (subject to the provisions of Section 5 below) remake and sequel motion pictures, as said terms are commonly understood in the motion picture industry, theatrically, non-theatrically, on television, video on demand, by means of cassettes, discs and cartridges, and in all gauges and sizes. The term "motion picture" or words of similar import as used in this agreement, shall be deemed to mean and include any present or future kind of motion picture in any gauges, without or with sound recorded synchronously therewith whether the same is produced on film or magnetic or videotape or wire or any other substance or by any other method or means now or hereafter used for the production, exhibition or transmission of any kind of motion picture, and whether the same is produced initially for theatrical, non-theatrical or television exhibition or transmission or otherwise.

(b) Television: All television rights including, but not limited to, the rights to produce, project, exhibit, and transmit an unlimited number of television productions (including, subject to the provisions of Section 5 below, without limitation "series" and "specials", as such terms are commonly understood in the television industry), on television and in all other media now or hereafter known and in all gauges. The term "television production" or words of similar import, as used in this agreement, shall be deemed to mean and include any present or future kind of television production, live or recorded, interactive or not, with or without sound recorded synchronously therewith, whether the same is produced on film or magnetic or videotape or wire or any other substance or by any other method or means now or hereafter used for the production, exhibition or transmission of any kind of television production, in the making of motion pictures and television productions and/or as a part of or in conjunction with any such motion picture and television production;

(c) (i) Change Property: so that the Producer shall be able to exploit fully the motion picture and television rights described in subparagraphs (a) and (b) above, the Owner agrees that such rights shall include, without limitation, the rights to use, adapt, translate, subtract from, add to and change the Property and the title thereof, or any other title by which it (or any part thereof) has been or may at any time be known, in the making of motion pictures and television

productions and/or as a part of or in conjunction with any such motion picture and television production;

(ii) Combine: combine the Property in any manner with any other work or works in the making of motion pictures and television productions;

(iii) Character and Titles: use the Property and any part thereof, including without limitation the characters contained therein, and said titles and any similar titles, in conjunction with motion pictures and television productions based upon all or any part or parts of the Property and/or other literary, dramatic and/or dramatic-musical works, and/or in conjunction with musical compositions used for or in connection with such motion pictures and television productions, whether or not written for, or used in, or in connection with, or in any manner whatsoever apart from, any such motion pictures and television productions.

(iv) Used in Media: project, transmit, exhibit, broadcast, sell, rent or lend and otherwise reproduce the Property and any part or parts thereof pictorially and audibly by the art of cinematography or any process analogous thereto in any manner, including the right to project, transmit, reproduce and exhibit motion pictures and television productions and any part or parts thereof (including without limitation, by so-called "pay", "free", "free home", "closed circuit", "theatre", "toll", "cable TV" or "subscription television", pay per view, video on demand or near video on demand) and by the use of cartridges, cassettes, discs or digital storage media of all kinds or other devices similar or dissimilar, and by any other process of transmission now known or hereafter to be devised for public or non-public reproduction purposes.

(v) Publication & Novelization: subject to the Publisher's Release, publish, use, copyright and license others to publish, use, copyright and license, such motion pictures and television productions, and excerpts, synopses, scenarios and other versions of the Property, the latter excerpts, synopses and the like, to be limited to 3000 words for publicity and promotion of the productions based on the Property (except that novelizations and books describing the making of the Picture shall not be so limited). The reserved publication rights are specifically excluded.

(vi) Electronic Publishing: license, reproduce, use, adapt, distribute, display, perform or create derivative works based on the Picture or any portion thereof in photographic, audio, video, optical, digital or interactive form or in any other form or method of copying, recording, manipulation, transmission or use, whether now known or hereafter devised (the "Work"), the purpose of which is to allow the user to selectively display, manipulate or perform the Work, derivative material based on the Work or portions thereof, alone or in conjunction with other audio, video, photographic, digital, computer software, firmware, hardware or any other systems now known or hereafter devised including, but not limited to any interactive form and hiring or renting of such products to members of the public on platforms including CD-I, CD-ROM, Apple MacIntosh, Sony Playstation, Sega

Saturn, Nintendo, Snes and 64X, the internet and all future computer generated platforms such as virtual reality, game-on demand and on-line provided that not more than five (5) excerpts of the Property, each of which shall not be in excess of 1000 words, in photographic, audio, video, optical, digital or interactive form may be included.

(vi) Make, Add or Sell Music: copyright, use, sell or otherwise exploit in any manner or means (including mechanical and electrical means and any other means now known or hereafter developed), whether extracted from or based upon the Property or otherwise, and to interpolate other spoken words, dialogue, music and songs, record, reproduce and transmit sound, including spoken words, dialogue, music and songs, in or in connection with or as part of the production, reproduction, transmission, exhibition, performance or presentation of such motion pictures and television production, including the right to use the title of the Property and any similar titles in connection therewith;

(vii) Merchandising: arrange for any and all merchandising and commercial tie-ups of any sort and nature arising out of or connected with a motion picture, television or home video production based on the Property.

(viii) Remake and Reissue: subject to the provisions of Section 5 below, generally produce, reproduce, remake, reissue, transmit, exhibit and perform motion pictures and television productions of any and all kinds;

(ix) Rental and Lending Rights: Writer acknowledges that the compensation payable pursuant to this agreement includes adequate and equitable compensation for a full and complete buy out in perpetuity of so-called rental and lending Rights as understood by European Community directives. Writer hereby assigns the Rental and Lending Rights to Producer and hereby irrevocably and absolutely grants to Producer the sole and exclusive right to collect and retain for Producer's own account all amounts payable to Writer in respect of rental and lending Rights and hereby irrevocably directs any collecting societies or other persons or entities receiving such amounts to pay them to Producer.

"Rental and Lending Rights" means all rights of Writer to authorize, prohibit, control or receive money (except as provided in this agreement) from the rental, lending, fixation, reproduction of other exploitation of the materials, results and proceeds of Writer's services, or any motion picture, program or other production based thereon, by any media or means now known or hereafter devised as may be conferred upon Writer under applicable laws, regulations or directives, in any jurisdiction throughout the world, including any so-called rental and lending rights pursuant to the European Community directives or enabling or implementing legislation, laws or regulations enacted by member nations of the European Community.

***As you can see by their terms, the clauses regarding rental and lending rights are particular to the European Community. If you are acquiring a property from a Writer or Author that is a European Community member citizen or co-producing with a European Community member producer, this may be useful for chain of title.***

(d) Radio and Television: to broadcast or transmit by television, radio or any other media analogous thereto, excerpts of the Property not to exceed 3000 words for the purpose of advertising or publicizing the Picture or other productions based on or adapted from the Property.

The author here wanted limitations on the use of the original work forming part of the promotion of the project which is reasonable.

(e) Name Likeness and Biography: Solely for the purposes of advertising , and exploiting the rights granted to the Producer hereunder, the right to use and to license, cause or permit others to use, the Author's name, Author's portrait, picture or likeness, and biographical data, such use to be subject to the Owner's approval, except in connection with the credits and press kit.

1.2 Reserved rights: All rights in the Property which are not specifically granted herein to the Purchaser are hereby reserved to the Owner, including without limitation:

(i) Publication and audio rights: the right to publish and distribute published and audio versions of the Property owned or controlled by the Author or Owner in book form, (whether hardcover or softcover, and in magazine or other periodicals, whether in instalments or otherwise) or audio form;

This may well be a restriction contained in the agreement with the publisher.

(ii) Stage rights: the right to perform the Property or adaptations thereof on the spoken stage with actors appearing in person in the immediate presence of the audience, provided no broadcast, telecast, recording, photography or other reproduction of such performance is made, except excerpts of not more than 5 minutes for the purpose of promoting or advertising such stage performance;

(iii) Radio rights: the right to broadcast the Property by sound (as opposed to visually) by radio, subject to Producer's right at all times to the exercise of its radio rights provided in 1.1(d) for advertising and exploitation purposes.

(iv) Documentary rights: notwithstanding anything else in this agreement, all rights with respect to the production of a documentary based on or adapted from, suggested by the Property for motion picture, television, video or any other media. For greater certainty, the rights granted to the Property

pursuant to this agreement shall be with respect to dramatic adaptations of the Property only. Producer reserves the right to produce a documentary on "The Making of...≡ film or television show.

***Since this was a work of non-fiction, there may be documentary interest in the subject matter. If it is a current event or hot topic, this is not an unreasonable requirement.***

1.3 Production of an Author-written sequel Any Author-written sequel, to which Author or Owner holds the motion picture, television and ancillary rights (the "audio-visual rights") pursuant to a publishing agreement, shall first be submitted to Producer before it is submitted to any other person for the purpose of optioning or granting the audio-visual rights. Producer shall have 30 days to make an offer to option and/or purchase the audio-visual rights on terms to be negotiated in good faith by the parties hereto. Should the parties fail to agree within thirty (30) days from the date of receipt of Producer's offer, Author or Owner shall have the right to offer the literary work to other potential purchasers. Producer shall have the right to purchase the rights to such work by matching the best bona fide offer of any other potential purchaser which Author or Owner is prepared to accept, within ten (10) business days of receipt by Producer of written notice of such third party offer.

***A right like this would be particularly important if you were considering something like a series of detective MOWs eg. Columbo, based on a particular character where the author had or planned to write a number of books featuring that character.***

## **2.0 REPRESENTATIONS, WARRANTIES AND ACKNOWLEDGEMENTS:**

2.1 (a) Sole Owner/No Breach of Third Party Rights: Owner is the exclusive owner of all the rights granted herein and that the Property was first published in 1998 by Big Green and Company Limited, under the title "HOT NON-FICTION BOOK". Author is the sole writer of the Property and Author has not adapted the Property from any other literary, dramatic or other material of any kind, nature or description, nor, excepting for material which is in the public domain, has Author copied or used in the Property the scenes, sequence or story of any other literary, dramatic or other material. The Property does not infringe upon any common law or statutory rights in any other literary, dramatic, or other material and that no material in the Property is libellous or violates the right of privacy of any person and the full use of the rights in the Property which are covered by this Agreement would not violate any rights of any person, firm or corporation and that the Property is not in the public domain in any country in the world where copyright protection is available.

***These warranties and representations are essential for errors & omissions insurance and in satisfying yourself that the rights are clear, etc. It is also***

***important to review the source and inspirations for the writer's material with the writer.***

(b) Right to Enter Agreement: Author and Owner each have the right to enter into this agreement to perform the obligations contemplated hereby and to grant all rights herein granted and no provision for the use of Author's name, likeness or biography as herein contemplated does or will hereinafter violate, conflict with or infringe upon any rights whatsoever of any person, firm or corporation and neither Author nor Owner has made nor will hereafter make any commitment or agreement which will interfere with the full and complete rendition of its services hereunder.

(c) No Disability: Neither Author nor Owner is subject to any obligations or disability which will or might prevent or interfere with Owner fully keeping and performing all of the agreements, covenants and conditions to be kept or performed hereunder, and neither Author nor Owner has made nor will they make any agreement, commitment, grant or assignment and will not do, nor omit to do, any act or thing which could or might interfere or impair the complete enjoyment of the rights granted and the service to be rendered to the Producer.

2.2 Warranties Do Not Apply to Producer's Changes: Owner's and/or Author's representations and warranties herein contained as to material submitted to Producer by Owner shall apply only to such of the material as Author shall have contributed to the Picture, and shall not apply to any extraneous matter inserted in the material delivered or the Picture by Producer, its associates, successors, designers, licensees, assigns or others.

2.3 Producer's Right to Defend: Author and Owner hereby grant to Producer the free and unrestricted right, but at Producer's own cost and expense (subject to any rights of Producer to recover from Owner for any breach by Author or Owner, as the case may be, of any term, condition or warranty herein set forth), to institute in the name and on behalf of Author or Owner and Producer jointly, any and all suits and proceedings in law or in equity, to enjoin and restrain any infringements of the rights herein granted, and hereby assigns and sets over the Producer any and all causes of action arising or resulting by reason of or based upon any such infringement, and hereby assigns and sets over to Producer any and all recoveries obtained in any such action. Owner will not compromise, settle or in any manner interfere with such litigation if brought. Owner will and do hereby appoint Producer his irrevocable attorney-in-fact to establish and protect the validity of all rights herein granted if they are attacked or appropriated by others, and Producer may also sue or defend in the name of Owner, Producer or any combination thereof.

2.4 Citizenship: Author represents he is a Canadian citizen and a Manitoba resident.

***This is an essential representation and warranty for Canadian content determinations, although only some financing sources such as the Harold Greenberg Fund option monies and the CTF require or give extra recognition to citizenship of the author of the underlying work as opposed to the script.***

### **3.0 INDEMNITY**

3.1 Owner Indemnity of Producer: Owner will indemnify and hold harmless the Producer, its associates (including but not limited to any distributors of the Picture), successors, licensees, and assigns from any and all claims, demands, suits, losses, costs, expenses (including reasonable counsel fees), damages or recoveries (including any amount paid in settlement) which may be obtained against, imposed upon or suffered by Producer, its associates and other parties referred to above, by reason of the breach by Owner and/or Author of any of the representations, warranties or covenants herein contained. Producer agrees to notify the Owner of any situation in which Producer's rights under this Paragraph may apply, and Owner shall have the right to participate in such litigation.

3.2 Producer Indemnity of Owner: The Producer agrees to indemnify and hold harmless the Owner its successors and assigns, from any and all claims, demands, suits, losses, costs, expenses (including reasonable counsel fees), damages or recoveries (including any amounts paid in settlement) which may be obtained against, imposed upon or suffered by Owner, his successors and assigns arising out of any extraneous matter inserted in the Property or the Picture by Producer, its associates, successors, designees, licensees, assigns or others other than the Owner.

***The WGC IPA includes specific warranty and indemnity language that has been negotiated as part of that collective agreement. You can incorporate it by reference. However, as this underlying work is not a script, the provisions of the IPA do not apply.***

### **4.0 RIGHTS TO MAKE CHANGES**

4.1 Owner agrees that Producer shall have the unlimited right to vary, change, alter, modify, add to and/or delete from the Property, and to rearrange and/or transpose the Property and change the sequence thereof and the characters and descriptions of the characters contained in the Property, and to use a portion or portions of the Property or the characters, plots or theme thereof in conjunction with any other literary, dramatic or other material of any kind. Owner hereby waives the benefit of any provision of law known as "droit moral" or any similar law in any country of the world and agrees not to institute, support, maintain or permit any action or lawsuit on the grounds that any motion picture or television production or other version of the Property produced or exhibited by Producer, its assignees or licensees, in any way constitutes an infringement of

any of the author's droit moral or is in any way a defamation or mutilation of the Property or any part thereof or contains unauthorized variations, alterations, modifications, changes or translations.

***Here is the waiver of moral rights which will be required from you for distributors and broadcasters. You will need everyone who has contributed creatively to provide such a waiver.***

## **5.0 CONSIDERATION**

5.1 Consideration is all inclusive: The Producer and Owner agree that it is their intention that the consideration set out herein shall be all inclusive for the rights granted with respect to the Property.

5.2 As full consideration for the rights herein sold, transferred and assigned by the Owner to the Producer and for all of the covenants, representations and warranties of the Owner herein, the Parties agree that the Owner will receive and accept the following:

(a) Fifty-thousand (\$50,000) dollars, hereinafter referred to as the Purchase Price, less amounts deductible pursuant to paragraph 1.4 of the annexed option agreement ("Option Agreement"), upon the exercise of the option in accordance with paragraph 1.1 of the Option Agreement provided same is not later than the first day of principal photography of the first production based on the Property (the "Picture"); and

***This provides for a flat purchase price from which is deducted the first option payment.***

(b) Five (5%) per cent of Producer's share of net profits from exploitation of the Picture. For the purpose of this clause "AProducer's share of net profits" shall mean gross revenues received by Producer from all distributors of the Picture, including those which form part of the production financing, less all production costs of the Picture and less all third party participations, residuals, royalties or similar costs including any other financier's participation or share of revenues provided that the method of calculating net profits with respect to the Owner's share of net profits shall be identical to the method of calculating net profits with respect to any other profit participant's share of net profits. If Producer is required to prepare audited production cost reports for any other party or purpose, it shall provide a copy of such audited report to Owner as part of its accounting and reporting obligations set out below.

***Net profit participations are not a “given”. Most people seem to know that net profits are wishful thinking for most productions but everyone hopes their project is “Forrest Gump.” It is useful to make profit participations a share of the producer’s share of net profits. If you have given away none of the ownership of the project to get it financed (congratulations) the producer’s share and 100% of net profits may be the same thing. However most producers have to give up pieces of net profits so that the producer’s share is less than 100%. If your financiers have 60% of the net profits and you give the director 5% of 100% of net profits – you have only 35% left. If you give him 5% of the producer’s share, he has 5% of 40% or 2% of the total and you have 38% left.***

- (c) In addition to the amounts payable pursuant to 5.2 (a) above, if Producer produces productions in addition to the Picture, based on the Property, Owner agrees to accept:
  - (i) For theatrical or television remakes, one half the full purchase price described in paragraph 5.2(a) payable upon commencement of principal photography of each such remake and five (5%) per cent of Producer’s share of net profits from the exploitation of each theatrical or television remake (net profits to be calculated as set out in paragraph 5.2(b));
  - (ii) For theatrical or television sequels (or prequel), other than one based on an Author-written sequel, one third of the full purchase price described in paragraph 5.2(a) payable upon commencement of principal photography of each such remake and five (5%) per cent of Producer’s share of net profits from the exploitation of each theatrical or television sequel, other than one based on an Author-written sequel (net profits to be calculated as set out in paragraph 5.2(b));
  - (iii) For a television series, the sum of \$1,000 for each new episode produced of thirty (30) minutes or less; the sum of \$1,250 for each new episode produced longer than thirty (30) minutes but not longer than sixty (60) minutes and for each new episode produced of more than sixty (60) minutes, the sum of \$1,750.
  - (iv) For a mini-series, the sum of \$7,500 per broadcast hour, such money to be payable within thirty (30) days after broadcast of each episode of the mini-series.
  - (v) Owner shall be entitled to a profit participation equal to 5% of 100% of the net profits to Producer from merchandising

connected with or related to the production(s), or any element thereof excluding music publishing.

***It is certainly possible to have a flat purchase price and not have additional amounts for every other possibility. For certain projects some of the ancillary or other rights may not make a lot of sense but who would have thought of a musical stage version of "Kiss of the Spider Woman". In other cases merchandising may be a ridiculous concept like the suggestion in "Waiting for Guffman" that there were "My Dinner with Andre" action figures!***

## **6.0 NO OBLIGATION TO PRODUCE/TURNAROUND**

6.1 Nothing herein or elsewhere contained shall obligate the Producer to produce motion picture or television production based upon the Property.

6.2 Reversion: If the Producer does not commence principal photography of the Picture within twenty five (25) years of its exercise of its option to acquire the Property in accordance with the terms and conditions hereof, then all rights of every kind which have been granted by Owner to Producer shall revert to Owner. Producer shall immediately execute and deliver to Owner any and all assignments and documentation required to effectuate such a reversion.

***Usually you as the producer would want to resist any kind of reversion of rights provision. This is only applicable if you have already exercised the option and paid the purchase price. As development usually takes years and certain projects may secure interest later than you originally planned, you want to hold on to the rights in which you have invested considerable time and energy. On the other hand you may appreciate that a writer may not wish to see his or her work languish on your shelf. You can negotiate turnaround provisions where the author or owner could re-purchase the rights to their work after a period of time had passed where nothing was happening eg. 10 years after the exercise of the option.***

## **7.0 ASSIGNMENT AND LENDING**

7.1 Producer may transfer or assign this agreement or all or any part of Producer's rights hereunder to any person, firm or corporation, and this agreement shall enure to Producer's benefit and to the benefit of Producer's successors and assigns. No such assignment shall relieve Producer of liability hereunder unless such assignment shall be made to an affiliate or subsidiary of Producer or unless Owner shall consent thereto. In any such event Producer shall be relieved of liability hereunder. Owner shall not assign, encumber or otherwise transfer this agreement or any rights hereunder, nor shall it delegate any duties hereunder. Any such purported or attempted assignment, hypothecation, transfer or delegation shall be absolutely null and void and of no force or effect whatsoever.

***You will want the right to assign since you may not be the company producing the project ultimately.***

## **8.0 CREDIT**

In the event the Picture or another production based on, adapted from or suggested by the Property is produced by the Producer, the Author shall be accorded credit substantially as follows:

- a) If the title of the Picture or related production is “HOT NON-FICTION BOOK”, the credit shall read as one of the following: “Inspired by the book by FAMOUS AUTHOR”, “Based on the work of FAMOUS AUTHOR in his book” or “Based in part on the book by FAMOUS AUTHOR”.
- b) If the title of the Picture or related production is not “HOT NON-FICTION BOOK”, the credit shall read as one of the following: “Inspired by HOT NON-FICTION BOOK by FAMOUS AUTHOR”, “Based on the work of FAMOUS AUTHOR in his book HOT NON-FICTION BOOK” or “Based in part on the book HOT NON-FICTION BOOK by FAMOUS AUTHOR”.

***As always, credits are some of the most contentious terms to negotiate although if you are basing the film or TV project on a book or series, this is usually quite straightforward.***

The credit will be accorded on screen in the main titles on a separate card, in a size and duration not less than that accorded to the screenwriter. Position of such credit shall be at Producer’s discretion.

The Producer shall make its best efforts to contractually bind any distributor of the Picture or related production to adhere to the terms of this credit provision, provided that no inadvertent failure of Producer or failure of any third party to accord the required credit will be deemed a default hereunder. Following notice of any failure to accord the required credit, Producer shall use its best efforts to remedy or cause to be remedied such failure and prospectively cure any breach of the same.

## **9.0 EFFECTIVE TERMINATION OR EXPIRATION/DAMAGES**

9.1 Neither the expiration, rescission nor any other termination of this agreement shall affect the ownership by Producer of the material written by Author hereunder and all other results and proceeds of the services rendered by Owner according to the terms and provisions of this agreement or any warranty or undertaking on the part of Owner in connection therewith, or otherwise alter or adversely affect any of the rights or privileges of Producer hereunder. No

expiration, rescission or other termination of this agreement shall entitle Owner to enjoin, rescind or revoke all or any of the rights herein granted or the exercise of those rights by Producer or Producer's licensees, successors or assigns, and in the event of any default by Producer of the terms of this agreement, Owner's sole remedy shall be an action at law for damages.

***Once you have paid for the rights, you can't afford to lose them - it would cause all subsequent agreements built on the Property to fall down.***

## **10.0 ACCOUNTING AND REPORTING**

10.1 Books and Records: Producer shall maintain in its office, at its address set forth above, books of account and records of the production and exploitation of the Picture, together with copies of all agreements and contracts relating thereto, all of which shall be available upon ten (10) business days prior written notice to Producer, at reasonable times during business hours to a duly authorized representative of Owner who may examine the same and make copies of or take excerpts from such books, agreements, and contracts all at the expense of the Owner. Such inspection shall take place not more often than once a year. The Owner agrees during such inspection not to unduly disrupt or interfere with the business of the Producer.

10.2 Statements and Payments: Producer shall deliver to Owner, at Owner's address above set forth, a written statement in respect of gross revenues for such period to which the statement pertains. Each such statement shall show reasonable details relating to the period to which it pertains, including, among other things, gross revenues and the sources thereof, description and breakdown or deductions there from, and moneys thereof to be paid to Owner, if any, together with any overall accumulation including all prior statements delivered to Owner hereunder. Producer shall accompany each such statement with a remittance to Owner or its designees of such sums as may be due to Owner under the terms of this Agreement. Producer shall commence reporting within six (6) months following release of the Picture., During the first two years, Producer shall account to Owner not later than the sixtieth (60th) day after the end of each June and December. During the next consecutive three years, Producer shall account to the Owner within sixty (60) days of the end of each year. Thereafter the Producer shall account to the Owner within sixty (60) days after the end of the calendar year provided there is at least \$1,000 of gross revenue received in the reporting period or since the last report.

***If there is no profit or other similar participation, there is no need for accounting provisions. This is worth considering when negotiating such agreements. Your obligation to report continues forever.***

## 11.0 NO INJUNCTION:

11.1 The rights and remedies of Owner and Author in the event of any breach of this agreement shall be limited to their rights, if any, to recover money damages in an action at law, and in no event shall they be entitled, by reason of any such breach to terminate this agreement, and they shall not be entitled, and both hereby waive the right in such event, to equitable or injunctive relief, or to enjoin, restrain or interfere with the distribution or exhibition of the Picture.

***The possibility of an injunction is so injurious when you are trying to complete or distribute or broadcast a production, then you need to be able to restrict the availability of such action.***

## 12.0 GENERAL

12.1 Manitoba Law Applies: This agreement shall be construed, interpreted and enforced in accordance with, and governed by, the laws of the Province of Manitoba applicable to agreements executed and to be wholly performed within said province.

12.2 Entire Agreement: This instrument constitutes the entire agreement between the parties and cannot be modified except by a written instrument signed by Owner and an authorized officer of Producer. No officer, employee or representative of Producer has any authority to make any representation or promise in connection with this agreement or the subject matter hereof which is not contained herein, and Owner agrees that it has not executed this agreement in reliance upon any such representation or promise.

12.3 Headings: The headings of the paragraphs hereof and any underlining are inserted only for the purpose of convenient reference, such headings shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning or intent of the provisions of this agreement or any part or portion thereof, nor shall they otherwise be given any legal effect.

12.4 Currency: Any references to payments herein shall be in Canadian currency unless otherwise specified.

12.5 Fees Exclusive of GST: All fees payable hereunder are exclusive of any goods and services tax payable thereon pursuant to the Excise Tax Act (Canada) as amended.

12.6 Enurement: This agreement shall be binding on and enure to the benefit of the parties, their respective successors, heirs and permitted assigns.

12.7 Partial Invalidity: If any term or provision of this agreement or the application thereof to any person or circumstances shall, to any extent, be invalid and unenforceable, the remainder of this agreement or the application of such

term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this agreement shall be valid and be enforceable to the fullest extent permitted by law. If any compensation shall be reduced while such limitation is in effect to the amount which is so permitted, then payment of such reduced compensation shall be deemed to constitute full performance by Producer of Producer's obligations hereunder with respect thereto.

12.8 No Waiver: No waiver of any breach of any covenant or condition of this Agreement by one party shall be deemed a waiver of any other breach (whether prior to or subsequent) of the same or any other covenant or condition of this Agreement.

12.9 Copy of the Picture: In the event that the Picture or another production based on, adapted from or suggested by the Property is produced by the Producer, Producer shall provide Owner with one (1) VHS copy of the Picture.

### **13.0 NOTICES**

13.1 All notices, accountings and payments ("notice") required or permitted hereunder shall be in writing and, if mailed by prepaid first class registered mail at any time other than during a discontinuance of postal services due to strike, lockout or otherwise, shall be deemed to have been given on the third business day after its posting and if delivered by courier or personally, on the day of such delivery.

Notices to the Producer shall be addressed to:

Street Address  
Suite Number  
Big city, Manitoba  
Postal Code

Notice to the Owner shall be addressed to:

55555 MANITOBA LTD  
c/o My Great Agent  
Main Street  
Toronto, Ontario

**14.0 AGENCY CLAUSE** The Producer shall pay all monies due to the Owner under this agreement to MY GREAT AGENT at the address noted for Owner who is hereby empowered to act on behalf of the Owner in all matters arising out of the present agreement, and whose receipt shall be a good and valid discharge of the Producer's obligation.

All materials to be written or provided by Owner hereunder shall be hand delivered. Any party hereto may change its address for the purposes of receiving any notice by giving written notice in the manner aforesaid to the other party or parties hereto. If the last date on which a notice required under this agreement shall fall on a Saturday, Sunday or a Statutory holiday, then (notwithstanding any other provision hereof), such last date shall be deemed postponed until the first day that shall not be a Saturday, Sunday or statutory holiday.

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the day and year first above written.

**MY DEVELOPMENT COMPANY LTD.**

**By:**

\_\_\_\_\_

**555555 MANITOBA LTD.**

**By:**

\_\_\_\_\_

**For valuable consideration, the undersigned hereby guarantees the obligations and makes the same representations and warranties as 555555 MANITOBA LTD.**

\_\_\_\_\_  
FAMOUS AUTHOR

## WRITING AGREEMENT

This Agreement dated as of January 15, 2000.

BETWEEN:

**MY DEVELOPMENT COMPANY LTD.** (“Producer”)  
[Address and contact information]  
- and -  
**GUY WRITER** (“Writer”)  
c/o Agent  
[Address and contact information]

A. Producer is developing a feature length motion picture currently entitled “Working Title” (the “Film”) based in part or inspired by the non-fiction literary work entitled “Hot Non-Fiction Book” written by Famous Author (the “Book”).

B. Producer wishes to engage Writer to provide writing services in connection with the Film.

FOR VALUE RECEIVED, the parties agree as follows:

### 1.0 – ENGAGEMENT

1.1 Producer hereby engages Writer to provide writing services in connection with the preparation of a draft screenplay (“First Draft”) and if requested by Producer, subsequent drafts or screenplay(s) and polish of a screenplay (all material together referred to as the “Screenplay”) and Writer hereby accepts such engagement. The Screenplay will be inspired by the Book and the outline provided by the Producer to Writer.

***This is a non-WGC agreement. For an example of a guild agreement you can check the first volume of Canadian Production Finance under Rights Agreements. There is no treatment contemplated by this agreement – the parties are going to first draft based on an outline. Some writers do not write treatments and prefer to go to first draft. You should ensure that you have at least a few pages of outline settled so that you know whether you and the writer are working toward the same goal.***

1.2 Writer shall render the writing services under the creative direction of Producer. Writer shall consult regularly with Producer’s representative and story editor, if required and incorporate into the First Draft their respective suggestions as mutually agreed between the Writer and the Producer.

***This language sets out part of the understanding of how the parties will work together. You usually do not want your writer to go away and come back with a draft a few months later that is a complete surprise. There should be discussions and input from the producer along the way.***

- 1.3 For the purposes of this Agreement, the terms “First Draft” and “Screenplay” will include all material prepared by Writer in connection with this Agreement and all component elements including, without limitation, plots, themes, stories, musical works, dramatic works, literary works, artistic works, materials, items, ideas, concepts, formats, characters, names and titles.

## 2.0- WRITING PERIODS AND PROCESS

- 2.1 First Draft Writing Period: Subject to Section 7 of this Agreement, Writer shall write a First Draft, commencing after a first meeting between Writer and Producer and deliver same within ten (10) weeks of such meeting. Following delivery to Producer, Producer shall review the material and meet with Writer to provide notes for revisions, if necessary, within two (2) weeks of delivery. Writer shall use his best efforts to incorporate the agreed notes and provide a revised First Draft in an additional two (2) weeks. Producer may provide additional notes for a polish of the First Draft within a week of delivery of the revised First Draft. Writer will polish the First Draft and deliver the polish within a week of receipt of the notes on the revised First Draft.

***This provision is more involved and spells out a process that is not unusual except that traditionally a writing agreement does not acknowledge that a draft is more than one pass or revision although a draft generally includes a polish of that draft. This exchange may occur between the writer and story editor whereby the producer may only get the last version. In any event it is worth discussing your expectations with the writer and arriving at an agreed process.***

***There is no fixed time for writing stages other than what is agreed.***

- 2.2 Second Draft Screenplay Writing Period If Producer requests Writer to write a second draft screenplay, commencing upon notice to do so, Writer shall prepare a second draft of the Screenplay (“Second Draft”), as discussed with Producer, and Writer agrees to deliver the second draft within eight (8) weeks of receipt of Producer’s notes.

***Again, you can spell out the entire process as in 2.1 for revisions and polish.***

- 2.3 Revision Writing Period If Producer requests a revision and Writer is available to proceed, Writer shall prepare a revision of the Screenplay, as discussed with Producer. Writer agrees to deliver the revision within 6 weeks after meeting with Producer and/or receiving Producer’s notes thereon.
- 2.4 Polish If Producer requests a Polish separate from a draft, Writer shall prepare a Polish of the Work, as discussed with Producer, and Writer agrees to deliver the Polish within 2 weeks after meeting with Producer and/or receiving Producer’s notes thereon.
- 2.5 Writer shall provide the writing services in a timely and expedient fashion in accordance with the development schedule set out by Producer. Delivery dates shall be changed only upon mutual agreement of the parties.

### 3.0 - GRANT OF RIGHTS

3.1 Writer hereby irrevocably grants to Producer all right, title and interest in the Screenplay including copyright and, without limitation, the right to:

- (a) produce, project, exhibit, broadcast, transmit and distribute and subject to the provisions set out in Section 4 hereof, all motion picture rights including, but not limited to, an unlimited number of motion pictures including sequels, prequels, remakes and miniseries of the motion picture, as said terms are commonly understood in the motion picture industry, theatrically, non-theatrically or in any other medium or delivery system; all television rights, including without but not limited to, all television motion picture, series, mini-series and serial rights whether for "free", cable, "specialty", "pay", "Pay per view" or any other form of television, whether now known or hereafter devised; all audio visual device rights including but not limited to disc, cassette or other devised whether now known or hereafter devised; all "video on demand" or similar rights, all computer assisted media rights including but not limited to CD-ROM, CD-I, CI-I and/or similar or dissimilar systems in whatever form, whether now known or hereafter devised; all interactive media rights (in whatever form, whether now known or hereafter devised; all radio rights, and all other media, now or hereafter known, and in all gauges and sizes. The term "motion picture" or words of similar import as used in this agreement, shall be deemed to mean and include any present or future kind of motion picture in any gauges, without or with sound recorded synchronously therewith whether the same is produced on film or magnetic or videotape or wire or any other substance or by any other method or means now or hereafter used for the production, exhibition or transmission of any kind of motion picture, and whether the same is produced initially for theatrical, non-theatrical, home video, television exhibition or transmission or otherwise; the right to develop, produce or create other versions of the Screenplay in any and all other media, whether now known or hereafter devised.
- (b) all allied, ancillary, subsidiary and incidental rights with respect to any and all of the foregoing, including but not limited to publish the Screenplay and "making of" book publishing rights, music publishing rights, soundtrack record rights and all merchandising (including but not limited to video or computer game and other game or interactive or merchandising rights), licensing or commercial tie-up rights and promotional and advertising rights relating to the foregoing. Included in the grant of rights are the rights to exploit all productions and other products produced under this agreement by means of any and all devices or media, whether now known or hereafter devised, in any and all markets whatsoever, whether now known or hereafter developed.

***The ancillary, subsidiary and other rights are not covered by the WGC IPA and if this was a WGC agreement, would be referenced either in a separate agreement or for separate consideration. In any event it's advisable to provide separate consideration for such rights, even if it's specified as a dollar.***

- (c) Without limiting the Rights granted, the Rights shall also include the right: to use, and in so using, to adapt, translate, subtract from, add to and change, the title of the Screenplay or any title by which or any part thereof has been or may at any time be known; as vis-à-vis Writer is concerned, the exclusive right to use the title of the Screenplay; to make any and all changes in, deletions from and additions to the Property and combine the Property in any manner or use the Property in connection with any other work or works, including but not limited to, any ancillary or allied rights in a film or production based thereon or incorporating the Screenplay, including but not limited to commercial tie-ups, merchandising, novelizations, interactive works and soundtrack albums.

and the right to license others to do any of the foregoing (collectively, the “Rights”).

3.2 Writer hereby grants to Producer the following additional rights, which are included in the Rights:

- (a) the right to use and display Writer’s name, voice, approved likeness and photographs, and approved biographical material for the purpose of promoting, producing, exploiting, merchandising, advertising and promoting the Screenplay, the Film or any products derived therefrom or based thereon (“Other Products”), Producer and its licensees and assigns (including, without limitation, the production, exhibition, advertising and exploitation of documentaries, featurettes, promotional films and so-called “behind the scenes” programming and interviews) in all media now known or developed in future, provided that no such name, likenesses, photographs, voice or biographical material will be used to endorse any product or service (other than the Film, other products derived therefrom or based thereon without Writer’s prior consent;
- (b) subject to Section 7 of this Agreement, the right to engage a writer or writers other than Writer to modify or re-write the Screenplay from the Book or not to incorporate the literary material provided by Writer pursuant to this Agreement;

***The right to engage another writer is key if this is not a script original to the writer or you are not completely certain this writer will deliver exactly what you want. Even if the writer is very experienced, he or she may not be the right one for your project or may only be able to do first drafts or rewrite others.***

3.3 Subject to Writer’s right to receive credit in accordance with this agreement, Writer hereby waives all moral rights in and to the Screenplay, the Film or Other Products.

#### **4.0 - COMPENSATION**

- 4.1 Subject to Section 7, Producer shall pay Writer:
- (a) For the First Draft, a script fee equal to \$15,000 (the "First Draft Script Fee") payable in accordance with section 5.1;
  - (b) For the second draft, if requested by Producer, a script fee equal to \$10,000 (the "Second Draft Script Fee"), payable in accordance with section 5.1;
  - (c) For a rewrite, if requested by Producer, a script fee equal to \$10,000 (the "Second Draft Script Fee"), payable in accordance with section 5.1;
  - (d) For a polish, independent of a draft, a fee equal to \$2,000 (the "Polish Fee") payable in accordance with section 5.1;

***These rates are substantially less than WGC rates.***

- (e) If the Film is substantially based on the Screenplay, and there are no other credited writers of the Film, a payment equal to 2% of the production budget less the amounts paid pursuant to 4.1(a) to (d) above; or
- (f) If the Film is substantially based on the Screenplay, but there is one or more other credited writers of the Film, a payment equal to 2% of the production budget divided by the number of credited writers (writers working as a team shall constitute one writer), less the amounts paid pursuant to 4.1(a) to (d) above.
- (g) If the Producer has not proceeded with the Writer beyond First Draft, but the First Draft is an integral part of the Screenplay on which the Film is based, a payment on first day of principal photography of the Film of 1% of the production budget less the amount paid for First Draft Script Fee.

***For a non-guild agreement, it is possible to have no payments beyond a script fee. However even on a non-WGC production, you might like to pay a smaller script fee and additional fee if the project goes into production. The payments provided above, due on first day of principal photography are set up like a "production fee" under the IPA but do not reflect the rates in that agreement or the exact terms on which the payments are made. Production Fees are governed by credits which, if in issue, are determined by credit arbitration under the WGC agreement.***

- 4.2 Writer acknowledges and agrees that the compensation set out in section 4.1(a) to (d) is full and sufficient consideration for all the rights set out in Section 3.1 (b) to (d) and Section 3.2 and all other rights and benefits of Producer under this Agreement. Writer further acknowledges and agrees that, except as set out in this Agreement, Writer will not be entitled to any further compensation in connection with the Screenplay, Film, Other Products or their distribution and exploitation.

#### **5.0 – PAYMENT**

- 5.1 Subject to Section 7, Producer shall pay to Writer the Script Fees payable pursuant to 4.1(a) to (d) as follows: 25% upon notice to commence a stage and 75% upon delivery of the stage and for 4.1(e) to (g) upon first day of principal photography of the Film.

***The payment of 25% on commencement and 75% on delivery is similar to the IPA payment schedule for a single stage. It is different than the payment schedule for a full script.***

- 5.2 Producer shall remit to Writer any GST due on payments made by Producer to Writer, if applicable.

## **6.0 - REPRESENTATIONS, WARRANTIES AND COVENANTS**

- 6.1 Writer represents, warrants and covenants that:
- (a) Writer is and will remain until the completion of the Film a Canadian citizen or permanent resident of Canada under the provisions of the *Immigration Act*;
  - (b) Writer shall sign the Declaration of Canadian Citizenship or Permanent Residence required by the Canadian Audio-Visual Certification Office and/or any similar documentation and the appropriate provincial tax credit residency certificate required by the Provincial Agency;

***You will eventually need this for your tax credit applications and possibly other funders as well.***

- (c) Writer is fully entitled to enter into this Agreement and there is no obligation or disability that would in any way prevent or restrict Writer from fully performing this Agreement;
- (d) Writer solely owns and controls all right, title and interest of every kind and nature in and to the results and proceeds of the services rendered under this Agreement and is fully entitled to grant such right, title and interest to Producer;
- (e) the materials provided by Writer, other than those based on the Book, under this Agreement:
  - (i) are original and do not infringe the copyright of any other person or entity;
  - (ii) do not defame any person or entity; and
  - (iii) do not invade the privacy or infringe upon the publicity rights or any other rights of any person or entity.

The foregoing warranty does not apply to material supplied to Writer by Producer or to any claim or action that arises from any changes made at Producer's direction or by a third party in the materials delivered by Writer to Producer after such delivery.

- 6.2 Producer represents, warrants and covenants that any materials supplied to Writer for Writer to incorporate in the materials to be provided by Writer under this Agreement:
- (a) do not infringe the copyright of any other person or entity;
  - (b) do not defame any person or entity;
  - (c) do not invade the privacy or infringe upon the publicity rights or any other rights of any person or entity,

and that no literary material supplied by Writer to Producer will be used by, or with the approval of, Producer in such a manner as to defame any person or to invade the privacy of any person or to violate the provisions of the Criminal Code of Canada in respect to pornography or obscenity.

- 6.3 Writer Indemnity of Producer: Writer will indemnify and hold harmless the Producer, its associates (including but not limited to any distributors of the Picture), successors, licensees, and assigns from any and all claims, demands, suits, losses, costs, expenses (including reasonable counsel fees), damages or recoveries (including any amount paid in settlement) which may be obtained against, imposed upon or suffered by Producer, its associates and other parties referred to above, by reason of the breach by Writer of any of the representations, warranties or covenants herein contained. Producer agrees to notify the Writer of any situation in which Producer's rights under this Paragraph may apply, and Writer shall have the right to participate in such litigation.
- 6.4 Producer Indemnity of Writer: The Producer agrees to indemnify and hold harmless the Writer its successors and assigns, from any and all claims, demands, suits, losses, costs, expenses (including reasonable counsel fees), damages or recoveries (including any amounts paid in settlement) which may be obtained against, imposed upon or suffered by Writer, his successors and assigns arising out of any extraneous matter inserted in the Screenplay or the Film by Producer, its associates, successors, designees, licensees, assigns or others other than the Writer.

## 7.0 - TERMINATION

- 7.1 Notwithstanding anything else in this Agreement, Producer will have the right to terminate Writer's obligation to write any drafts or material after the First Draft or if Writer has not delivered the First Draft within the time prescribed above.
- 7.2 In the event of such termination, Producer shall:
- (a) have no obligation to make any further payment to Writer pursuant to Section 4.1, other than pursuant to (e)- (g) to which Writer may be entitled, if applicable; and
  - (b) own all the Rights with respect to the materials prepared by Writer in connection with the Screenplay to the date of such termination.
- 7.3 Producer will have the right, upon payment of \$1.00 (the receipt of which is hereby acknowledged) to engage another writer or writers other than Writer to prepare a new draft, after any termination set out in Section 7.1 and/or to revise, adapt, translate or prepare a rewrite or revision of the Screenplay after delivery by Writer.

***This reiterates the Producer's right to end the engagement after any stage, or before delivery if delivery is late, to hire another writer and to use the material delivered to that date.***

## **SECTION 8 - CREDIT**

8.1 The Writer hereby acknowledges that Writer's credit on the Film will be determined by the Producer in accordance with Writer's contribution to the Screenplay on which the Film is based. If the Writer is the only writer of the Screenplay, Writer shall be entitled to a "Screenplay by" or "Written by" single card credit immediately preceding or immediately following the director's credit [or such other placement as you may wish to provide] (depending whether the main titles are at the opening or closing of the Film. If the Screenplay on which the Film is based makes substantial use of material written by Writer hereunder but there are other contributing writers, Writer shall be entitled to a shared writing credit.

***It is simpler to just reference the WGC credit provisions but since they do not apply here, I have had to be somewhat more elaborate.***

8.2 If Producer does not accord Writer a credit or Writer is dissatisfied with a shared credit, Writer may request an arbitration. Writer shall immediately notify Producer of his intention to arbitrate and within 10 days of being advised of the proposed credit, shall appoint a screenwriter with at least 3 writing credits and Producer may appoint a screenwriter or producer with at least 3 credits as such on produced productions within the same period. Neither appointee shall have any personal or professional connection with the party appointing them. The two appointed parties shall appoint a third writer or producer. The three arbitrators shall review each draft of the Screenplay in light of the shooting Screenplay and determine whether Writer is entitled to a credit and whether that credit should be sole credit or shared credit with other contributing writers. The costs of the arbitrators shall be borne equally by the parties hereto and the majority decision of the arbitrators shall be final.

***This arbitration provision is entirely concocted to give the writer some protection against an arbitrary decision of the producer and possibly limit the otherwise huge costs and delays of a court case. However, the costs of an arbitration would deter frivolous claims or actions on either side. You would probably want more details on how the arbitration worked including time lines.***

8.3 Producer shall make commercially reasonable efforts to inform third parties of the credit specified in this Section, but no inadvertent failure or the failure of any party other than Producer to provide the credit specified in Section 8.1 or 8.2 will constitute a breach of this Agreement. Upon receipt of written notice of any such failure, Producer will make commercially reasonable efforts to correct such failures on a prospective basis.

## **9.0 - NOTICE**

9.1 Any demand, notice or other communication (a "Communication") required or permitted to be given in connection with this Agreement will be given in writing and may be given by personal delivery, by registered mail or by facsimile, to the address noted on the first page of this Agreement, or such other address as may be designated by notice by any party to the other in accordance with this Agreement.

- 9.2 Any Communication given by personal delivery will be conclusively deemed to have been given on the day of its delivery provided it is received during regular business hours on a business day or otherwise on the next business day and, if given by registered mail, on the fifth day following in its deposit in the mail and, if given by facsimile, on the day of its transmittal provided it is received during regular business hours on a business day or otherwise on the next business day.

## 10.0 GENERAL

- 10.1 There will be no reversion of any rights in and to the Screenplay unless specifically agreed in writing between the parties.

***Under the WGC IPA, unless you provide otherwise in the agreement, if the project has not been produced within seven years from the signing of the contract, the rights automatically revert to the writer. Similarly, whether you provide otherwise or not, if the producer goes bankrupt prior to production, the rights are said to revert automatically to the writer. This latter provision may not stand up in bankruptcy court against other creditors. Considering the length of development on some projects, seven years is not that long. Even if you are not under the IPA, it is a safety precaution to provide the rights do not revert.***

- 10.2 This Agreement is confidential between the parties and may be shown only to the parties' respective legal and financial advisors and to financiers of the Film. Writer shall not circulate, publish or otherwise disseminate, by any means whatsoever, the Screenplay or any information, photographs or news stories or other publicity regarding the Screenplay, Film, Other Productions or Creative Product, or Producer or its related companies, without first obtaining written consent from Producer.
- 10.3 Producer will have the right to assign this Agreement in its entirety or all or any part of its rights hereunder to any person, firm or corporation, provided that such entity assumes all of Producer's obligations under this Agreement. Writer shall not at any time assign this Agreement or any rights, obligations or liabilities under this Agreement without the express prior written consent of Producer.
- 10.4 This Agreement constitutes the entire agreement between the parties, supersedes all previous agreements, deal memos and negotiations between the parties and their representatives, and may not be modified except by written agreement of all the parties.
- 10.5 This Agreement will be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.
- 10.6 Writer shall perform any act and execute and deliver any document required by Producer in its sole discretion to carry out the terms of this Agreement in accordance with its true intent and meaning within ten (10) days of written request by Producer, failing which Writer hereby appoints any officer or director of Producer to be Writer's attorney-in-fact with full power of substitution to execute such documents or take such actions on Writer's behalf. Such appointment will be irrevocable and will be deemed a power coupled with an interest.
- 10.7 The sole remedy of Writer for any breach or alleged breach of this Agreement by Producer will be limited to the right, if any, to the recovery of money damages, and Writer will have no right by reason of any such breach or alleged breach to rescind this Agreement or to any equitable or injunctive relief and shall not seek

such relief, and the rights and waivers granted by Writer under this Agreement will not terminate by reason of such breach. All remedies of Producer will be cumulative and the pursuit of one remedy will not be deemed a waiver of any other remedy.

- 10.8 The failure at any time to require performance of any provision of this Agreement will not affect the full right to require such performance at any later time. The waiver of a breach of any provision will not constitute a waiver of the provision or of any succeeding breach of the provision.
- 10.9 Nothing contained in this Agreement will in any way obligate Producer to produce, exhibit, advertise, sell, distribute or otherwise exploit any of the Screenplay, Film or Other Product.
- 10.10 Should any provision of this Agreement be held to be invalid, the remainder of this Agreement will be effective as though such invalid provision had not been contained in this Agreement.
- 10.11 This Agreement will be governed by the laws of Ontario and the applicable laws of Canada and the parties irrevocably attorn to the jurisdiction of the courts of Province.

The parties have executed this Agreement.

**MY DEVELOPMENT CO. LTD.**

by: \_\_\_\_\_

\_\_\_\_\_  
**WRITER**

## **ACKNOWLEDGEMENT AND ASSIGNMENT**

For the sum of Ten (\$10.00) Dollars and other good and valuable consideration, the sufficiency and receipt whereof are hereby expressly acknowledged, **My Development Co. Ltd.** ("Assignor") hereby sells, grants, assigns and sets over absolutely unto **My Canadian Production Co. Ltd.** ("Assignee") its successors, licensees and assigns, all right, title and interest in and to the original screenplay ("Screenplay") currently entitled "Trendy Film" previously entitled "Working Title" based on the original literary work "Hot Non-Fiction Book" (the "Property"), subject to the assumption by Assignor of any and all executory obligations or encumbrances as outlined in any of the documents listed below. The Property shall include but is not limited to the plots, themes, titles, characters and copyright(s) thereof, along with any rewrites, additional drafts, revisions, polishes thereof, and any translations, novelizations, dramatizations, sequels and other adaptations or versions thereof now or hereafter created.

***You want the assignee to agree to take on not just the benefits, but the obligations attached to the various agreements such as obligations to pay the writer, give credits or to repay loans in accordance with their terms. Most development loan agreements call for repayment on any transfer but when you are transferring to a related company, most funders will allow the assignment if the assignee assumes the obligations under the loan agreement. This must be discussed and settled up front or you may find your loan has become due.***

The rights and obligations are set out in the following documents:

- Option/Purchase Agreement between Famous Author and Assignor whereby Assignor has the exclusive option to acquire the film and television rights to the Property dated January 1, 2000, as extended by Assignor by notice dated December 31, 2000 and as extended by notice dated December 31, 2001.
- Writing Agreement dated January 15, 2000 between Guy Writer as writer and Assignor to write a first draft, second draft, rewrite and polish of the Screenplay.
- Development loan agreement between Assignor and The Harold Greenberg Fund Assignor dated March 10, 2001 for \$Dollars
- Development loan agreement between Canadian Film Development Corporation and Assignor dated April 25, 2001 for \$Dollars

DATED at Winnipeg, Manitoba this 15th day of June, 2002.

**MY DEVELOPMENT CO. LTD.  
CO. LTD.**

**MY CANADIAN PRODUCTION**

**BY:\_\_\_\_\_**

**BY:\_\_\_\_\_**

**LETTERHEAD OF COMPANY**

DATE

Story Editor  
Story Editor's company, if applicable  
Address

Dear Story Editor:

**Re: *Title of picture/project* – Story Editing services**

When signed by both parties, this letter shall constitute an agreement between ABC Pictures Ltd. ("Producer") and Story Editor's Company ("SC") for the services of Story Editor ("Story Editor") with respect to story editing services for the film project tentatively entitled "Title" ("the "Project").

1. Producer owns or controls all necessary rights in and to the literary material for the Project. Producer wishes to engage SC to provide the story editing services of Story Editor for a rewrite of the Project.
2. The term of this agreement will commence upon \_\_\_\_\_, 2002 and run until completion of the rewrite but not later than \_\_\_\_\_, 2002. Producer acknowledges that the progress is largely dependent upon the writer's ability and expertise and that it is Producer's responsibility to provide the necessary drafts in a timely fashion.
3. It is understood that a phase may consist of more than one draft or installment. Story Editor will provide approximately \_\_\_\_\_ sessions and various phone consultations to writer as needed. For the purposes of this agreement, a "session" means a face to face meeting between the Story Editor and writer and producer (at producer's election) of not more than a half day.
4. In consideration of the services and the rights granted herein, Producer will pay SC the fees set out below (plus applicable GST) as follows:
  1. Following execution of this agreement but not later than \_\_\_\_\_, 2002 the sum of \$ \_\_\_\_\_
  2. Upon completion of rewrite but not later than \_\_\_\_\_, 2002, the sum of \$ \_\_\_\_\_
5. SC and Story Editor acknowledge that any rights, including copyright, in and to the results of any of Story Editor's services hereunder for Producer are assigned and retained by Producer, so that Producer may exploit the Project and all allied and ancillary rights in all media throughout the world in perpetuity. Story Editor hereby waives any moral rights he/she may have in his/her work or performance hereunder.
6. Story Editor and SC hereby represent and warrant with respect to any contributions by Story Editor that all of such material will be wholly original with him/her and not copied in whole or in part from any work other than the material provided to SC or Story Editor by



***This sample agreement is appropriate for a feature or a television movie or longer form drama.***

***Depending on your relationship with your story editor, they may provide more or less input. You may want to insist that the story editor provide you with written notes on a draft, particularly if most of the interaction is directly between the writer and the story editor and you, the producer, are not present for meetings.***

***As mentioned in the main section on development, a reasonable story editor recognizes that a “stage” is not one draft and one set of notes but more likely a full draft, some meetings, notes, revisions, more notes and a polish.***

**APPENDIX A**

(July 2000)

**Feature Film Fund - Ontario Region  
Budget for Development Financing**

Phase Applied For: Second Draft  
 Budget Date: day/month/year  
 Budget Prepared by: KAJ  
 Current title of project: The Next Best Thing



BUDGET	Treatment	%	1st. Draft	%	2nd Draft	%	Cdn costs	GRAND TOTAL	%	
<b>1 RIGHTS</b>										
1.01 Option		0,00%	0,00%		5000	17,86%		5000	17,86%	1.01 Options on rights to literary work, two years minimum plus renewal, as per contract
<b>2 SCRIPT</b>										
2.01 Scriptwriter -rewrite			0,00%		10000	35,71%	15 000	10000	35,71%	2.01 Writer's fee, as per contract
Research									0,00%	
2,2 Story Editor/Consultant(s)		0,00%	0,00%					0	0,00%	
2.05 Scriptwriting workshops			0,00%					0	0,00%	
5,01 Director		0,00%	0,00%					0	0,00%	
2.90 Fringe benefits		0,00%	0,00%			0,00%		0	0,00%	2.90 Writers Guild only
71,1 Legal		0,00%	0,00%		2500	8,93%	2 500	2500	8,93%	
<b>3 DEVELOPMENT</b>										
3.01 Budget breakdown			0,00%		0	0,00%	-	0	0,00%	
3.25 Office (co-productions only)					0	0,00%	-	0	0,00%	3.25 Extraordinary phone/fax/courier;
3.4 Pre-Production Casting					0	0,00%		0	0,00%	
3.5 Pre-Production Scouting						0,00%		0	0,00%	
3.6 Travel					2500	8,93%	2 500	2500	8,93%	
3.65 Accommodation						0,00%		0	0,00%	
<b>SUBTOTAL - DIRECT COSTS</b>		0 0,00%	0 0,00%		20000	71,43%	20 000	20000	71,43%	
72.01 Overhead		0 0,00%	0 0,00%		4000	14,29%	4 000	4000	14,29%	72.01 Max. 20% of direct costs
4.00 Producer		0 0,00%	0 0,00%		4000	14,29%	4 000	4000	14,29%	4.00 Max. 20% of direct costs
<b>TOTAL:</b>		0 0,00%	0 0,00%		28000	100,00%	28 000	28000	100,00%	

APPENDIX A  
 Feature Film Fund - Ontario Region  
 Budget for Development Financing



Current title of project: The Next Best Thing

FINANCIAL STRUCTURE	Treatment	%	1st Draft	%	2nd Draft	%	GRAND TOTAL	%
Telefilm Canada 1		0,00%	0,00%		16560	59,14%	16560	59,14%
						0,00%		
		0,00%	0,00%			0,00%	0	0,00%
		0,00%	0,00%			0,00%	0	0,00%
Producer	0	0,00%	0	0,00%	11440	40,86%	11440	40,86%
						0,00%		
<b>TOTAL</b>	<b>0</b>	<b>0,00%</b>	<b>0</b>	<b>0,00%</b>	<b>28000</b>	<b>100,00%</b>	<b>28000</b>	<b>100,00%</b>

1. TFC contribution:  
 Maximum 60% of each phase of the Canadian portion.  
 TFC Average Participation:  
 Treatment: \$15,000  
 1st Draft: \$20,000  
 2nd Draft and subsequent drafts that include writing: \$15,000  
 Additional, "exceptional", phases are to be determined on a case by case basis.
2. Written confirmation is required

FINANCIAL STRUCTURE CO-PRODUCTION	Treatment	%	1st Draft	%	2nd Draft	%	GRAND TOTAL	%	%
<b>CANADIAN PORTION</b>								Canadian budget	total budget
Telefilm Canada 1		0,00%	0,00%		16560	0,00%	16560	59,14%	0,00%
						0,00%			
		0,00%	0,00%			0,00%	0	0,00%	0,00%
		0,00%	0,00%			0,00%	0	0,00%	0,00%
Producer	0	0,00%	0	0,00%	11440	0,00%	11440	40,86%	0,00%
						0,00%			
<b>TOTAL CANADIAN PORTION</b>		<b>0,00%</b>	<b>0,00%</b>		<b>28000</b>	<b>0,00%</b>	<b>28000</b>	<b>100,00%</b>	<b>0,00%</b>
<b>FOREIGN PORTION</b>									
		0,00%	0,00%				0		0,00%
<b>TOTAL</b>	<b>0</b>	<b>0,00%</b>	<b>0</b>	<b>0,00%</b>		<b>0,00%</b>	<b>0</b>		<b>0,00%</b>

**TELEFILM DEVELOPMENT COST REPORT**

**Feature Film Rewrite  
Cost Report  
File no. 999 0001 999**

<b>Rewrite</b>	<b>Budget</b>	<b>Paid to date</b>	<b>To be paid</b>	<b>Est. to comp</b>	<b>Total</b>	<b>Variance</b>
Travel costs of writer to Toronto in April 2001						
Per diem (\$45 a day without accommodation)	1435	1260	0	0	1260	175
Airfare writer - Nice Country - Toronto	600	620	0	0	620	-20
Other Writer expenses -	205	0	205	0	205	0
Writing fees	10000	6500	3500	0	10000	0
Legals	3500	3500	0	0	3500	0
<b><i>No accommodation charged as writer housed with the co-Writer/director</i></b>						
Travel						
Director/writer to Nice country - July 2001						
Director/writer airfare		683				
Per diem (\$100 x 7 days)		700				
Car rental		670				
Hotel, parking, long distance, copying		694				
	2800	2747	0	0	2747	53
<b><i>Extensive travel results from developing a co-production with two writers from different countries</i></b>						
Producer + Director Film Mkt Regist (150 @ 1.8)		270				
Cdn producer to Nice Country - July 2001						
Producer airfare		1392				
Per diem (100 x 7)		700				
Hotels, entertainment, parking, thank yous		1160				
Subtotal	4500	3252	0	0	3252	1248
<b><i>This was travel for early packaging</i></b>						
Canadian producer to New York - October 2001	0					
Airfare (US \$189 @ 1.527)			289			
Per diem (\$100 x 5 days)			500			
Accommodation	0	0	750	0	1539	-1539
<b><i>This trip was not initially budgeted</i></b>						
Long distance, copying, couriers, readers reports	500	535			500	-35
<b><i>Often Telefilm wants to see this in overhead but in co-production these costs are more substantial</i></b>						
<b>Total</b>	<b>23540</b>	<b>24683</b>	<b>5244</b>	<b>0</b>	<b>23623</b>	<b>-118</b>

## **B. PRODUCERS, EXECUTIVE PRODUCERS AND CO-PRODUCERS - RELATIONSHIPS**

### **I. THE PRODUCER AND THE PROCESS**

William Goldman, among others, said producers may be the least understood figures in the industry.<sup>2</sup> Part of this is due to the plethora of credits that have “producer” included on a given production.

The reason there are so many titles connected to producer is that producing encompasses a large array of skills and responsibilities – creative, business, financial, administrative, interpersonal – that it is difficult to find all of these in one individual. There is also so much to do, it is very difficult for one person to do it all. The producer is “the catalyst who brings together the financial, creative and technical elements of the production” – the person “who guides the production from inception to completion”.<sup>3</sup> This is not to say that everyone with a producer credit actually makes a substantial contribution. Credits are frequently a reflection of negotiating power.

Perhaps one of the most basic definitions of a producer came from Larry Gordon (*Die Hard, Tomb Raider, K-Pax*) who said a producer is someone with something [I think we can infer an “element”] in his hand that someone else wants. Having that element in itself is a huge accomplishment, but not anywhere near even a tenth of the picture.

The first step in the process is the story, the concept, the idea. It may be the producer’s idea or it may come to him or her from a writer or a director or his or her cousin. The producer is the person who decides to make it a film and begins to try and realize the film. If you plan on being the producer, you need to own or at least have a claim on the right to make a film or TV production from the story, concept, treatment, play, life story or whatever. Securing the rights is referenced in the Development chapter.

As the producer, you are the first person on the project and the last person off – if you can ever get off. The responsibilities extend long after the film or tape is in the can. Producing is a huge juggling act – juggling time, people, money, talent and other scarce resources - trying to keep enough balls in the air long enough that all the balls you need are in the loop at the same time. Realizing a project is a very long process and a challenging one. To paraphrase Pauline Kael “The film and television business is the only place you can die of encouragement.”

Fortunately or unfortunately, there is no particular producer school or diploma course you can, or have to take to say “I’m now a qualified producer”. It’s a rather open door but there are numerous difficult often unseen hurdles to navigate to actually get from “I have a great idea” to “come see my movie, it’s in a theatre near you” or “it’s on television next Tuesday at 9”.

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<sup>2</sup> William Goldman “Adventures in the Screen Trade”, Warner Books, p.60

<sup>3</sup> Garth Drabinsky, “Motion Pictures and the Arts in Canada: The Business and The Law”, McGraw Hill Ryerson, p. 2

The issue that faces most producers in the early stages of their independent production career is how to get by while producing. There is no simple solution to this. Producing is a business. It may also be a calling and a passion, but if you don't approach it as a business, it will never be more than a hobby - an expensive hobby. A producer once said "Producing is a great way to make money, but a lousy way to make a living". Frankly, for most, even the first part of the statement does not represent their experience.

Even though producing happens project by project, you need a slate of projects at different stages of development and production to begin to build a "going concern" ie. a production company. Projects have life cycles with slow periods for the producer when the writer is off writing or the project is under consideration with financiers, when you have to focus on different matters – usually other projects. Some projects will hit the wall and never advance to production. The development period is generally quite long and if you had to start at the beginning after your first production you would only be in production every several years. Considering that the revenue generated for the producer is primarily producer fees, and rarely enough to carry you for several years, this is a dicey proposition.

For the first year or three you will need other sources of income unless you have managed to capitalize your company or are independently wealthy. If you are really well set up, you may not have to put your own money out for development but development is unlikely to be a source of revenue for anyone other than the writer.

## **II. THE CHICKEN AND EGG DEBATE**

A key question for young or not-so-young but newer producers or newly-independent producers is how to get the experience most financiers are looking for without having the experience in the first place. This is not a challenge exclusive to producers but not having a particular producer school or established apprenticeship system means you have to find your own way.

Depending on what kind of experience you do have, you will want to find someone or a small contingent of people that can complement you and provide the skills and experience you do not have.

There are many routes into producing. Some of the more popular routes are from production management or line producing, law or production executive within a larger organization. Some provide better preparation for different aspects of the job than others. Take a frank assessment of your skills and experience. Key to the job is a passion for your material or projects, and persistence. Those traits in themselves are not enough, but they are essential requirements. If you are short on the creative end, you can shore yourself up with a more senior producer known for strong creative sense, a story editor, an experienced director and the like. If you are short on the business and finance end, find an experienced executive producer, an entertainment lawyer, a person with a finance background who has strengths in these areas. This is a creative business, but make no mistake, this is a business and you need to conduct yourself in a businesslike manner in order to survive.

As a newer producer, assuming you have some related experience, you can usually start a project or two in development but may find that you are stopped a short way down the road with financiers by the lack of a track record. Financiers (and in this context I include broadcasters, distributors, funders and anyone who might advance money or risk something on your production) do not insist on dealing with experienced producers as an annoyance or frivolous requirement. You are handling a great deal of other people's money and a very complex process with many people and relationships to supervise. The number of hiccoughs and things that can go wrong or off the track are numerous and ever changing. And you don't know what you don't know. Frequently if you did know, you wouldn't undertake producing in the first place.

### **III. THE CHICKEN AND THE PIG QUANDARY**

Exactly what the relationship is between the newer producer and a more senior producer or advisor is a matter to be worked out between you. If you are a real neophyte, you will need an experienced producer to take responsibility for the project. If you have some producing experience but are stepping up to a bigger project, or you've been an in-house producer with a broadcaster and have not worked as an independent, you may need a co-producer or an executive producer-mentor in an advisory capacity. You will want to know you can call on them to discuss issues and sit down with them at critical points along the journey to get their feedback, input and recommendations. You may require them to assist with relationships – to help open doors, make introductions, attend meetings. The role and responsibility they undertake is somewhere along a continuum from very hands-off, check-in-once-in-a-while-for-bits-of-advice to very hands-on, introducing-you-to-their-suppliers, involvement in all the bigger decisions, attending meetings, giving notes on budget, personnel, creative and finance. The latter end of the continuum might include ownership. If the financiers are looking to the more experienced producer as the party responsible for the project because you are too green, such a party would likely be seeking commensurate control. If financiers are just looking for assurance that there is an experienced hand guiding you and available for consultation, they will not be expecting that party to take such responsibility.

Most individual executive producers will not require ownership (although they will be looking for fees) and would seek to have their participation somewhere in the middle of the continuum. Larger production companies that are acting as the executive producer of a project and providing you with the weight of their goodwill and access to some of their expertise such as business affairs, legal, accounting personnel, may require an ownership position. You can also expect they will require compensation from the budget for executive producer services as well as business affairs, legals, etc.

The real issues you have to grapple with are control and responsibility. Control should follow responsibility. It doesn't always follow and that leads to problems. Someone with lots of responsibility but without authority is in a very difficult position. As the producer with responsibility and accountability to your financiers, broadcaster, distributor, talent, crew, bonder, etc., you must be committed to seeing the project through to the end. Someone you engage as an advisor does not have to be so committed. The matter is best illustrated by the relationship of a chicken and a pig to the production of eggs and bacon – while the chicken is involved, the pig is committed.

Unless you are handing your project over to someone else to run with, and you don't really care about learning anything, you will have to do the bulk of the work. If you are seeking a co-producer from whom you hope to learn the ropes, expect to do most of the grunt work of producing. As with any apprenticeship, much of the attraction of working with a keen new producer for the more senior producer is the fact that someone else will be handling that, under his or her guidance.

Before you approach someone to act as your mentor or advisor or especially co-producer – check them out. Find out what kind of a reputation they have with people and organizations they have dealt with in the past, or that you expect to be dealing with. Having heard of someone is not a guarantee that they are well-regarded, and in the film and television industry, reputation is very important. You want to know as well if they will be available to you (what other commitments do they have) and how seriously they would take the obligation. Most producers take the role of advisor or executive producer quite seriously. If they have their name attached to your project, they are putting their reputation on the line. Individuals who are not experienced producers but hold some other senior position in the industry may also serve in an executive or advisor role but you should be clear as to what role you are asking them to play and ensure that such a role accords with their strengths.

One other matter to consider with someone you are considering in a producer role on your production is his or her nationality and residency. If you are seeking to qualify as Canadian content for Canadian financing sources and tax credits the role I have described for executive producers would require the individual was a Canadian citizen or permanent resident. If they are not a Canadian citizen he or she would have to swear an affidavit for a courtesy credit which virtually says you did none of the things that were outlined above although advice with the producer maintaining all approvals may be acceptable. Courtesy credits are primarily for representatives of companies that have provided or arranged financing or distribution for the production. This form and other CAVCO related forms and information can be found on line at [http://www.pch.qc.ca/culture/cult\\_ind/cavco-bcpac/cavpro\\_e.htm](http://www.pch.qc.ca/culture/cult_ind/cavco-bcpac/cavpro_e.htm).

A sample Executive Producer services agreement with commentary follows the text of this chapter.

#### **IV. CO-PRODUCTIONS**

It is possible to have a co-production between two producers or two production companies that are really partners in the sense of sharing responsibilities and control. Each brings certain strengths or contributions to the project or group of projects. There is also a marriage or partnership of convenience where a producer or production company seeks out an equal or possibly less established production company in another jurisdiction primarily to access additional funding not otherwise available to the first producer. On the international scene, co-productions have been facilitated by international treaties. Domestically, as certain provinces terminated equity funding and other provinces introduced it, interprovincial co-productions have become increasingly more common, allowing partners to leverage additional sources of financing.

In any successful relationship, the parties' expectations and responsibilities are openly discussed and understood, and communication is frequent and frank. Most of us know

how difficult this is to achieve. Having an agreement which sets out your understanding or at least requires you to focus on the various concerns, is essential. A sample Interprovincial Co-Production Agreement with commentary follows the text of this chapter. A co-production agreement will also be an important element in the chain of title documentation as they transfer a part of the ownership.

For interprovincial co-productions, it is useful to know the requirements of the provincial funding you are accessing (or the Canadian end of the production if it's an international co-production). Most provincial agencies that provide equity investments in film and/or television require that the local resident producer own at least 50% of the copyright in the production (although Nova Scotia only requires 25% ownership) and that the producers have an equitable partnership in terms of creative and financial control. The provincial agency is also looking for benefit to the province so the agency may insist that the project or most of it is shot in their province. A number of provincial agencies do not make creative assessments of projects (such as Nova Scotia and Manitoba) but examine applications based on benefit to the province.

Where the provincial agency is not contributing equity funding, there may be some lesser requirements to qualify for tax credits in that jurisdiction. In Ontario, 20% of your Ontario share of the production must be spent on Ontarians or for Ontario goods and services. In Manitoba, 25% of salaries must be paid to Manitoba residents in that year. Nova Scotia does not require minimum expenditure. If you engage a Nova Scotian you are eligible for tax credits.

As in international co-productions, there may be different production protocols or business cultures in other jurisdictions than you are used to including such things as provincial sales tax, arrangements with local guilds or unions and very significantly, the availability of certain resources – particular crew, talent, equipment and facilities.

As adding co-producers/co-production companies also add complications and costs, you will have to weigh the value of what that other party brings against the corresponding costs. You will have to budget more producer fees or will be splitting the producer fees and overheads already budgeted, and you may be having to transport people and equipment which significantly adds to your living and transportation costs. You will also have some additional legal costs in preparing agreements between you and your partner. Your communication bills – long distance, courier and fax, will all be significantly higher than for a local shoot. You may discover the net gain is not significant enough to warrant a co-production.

There are two other matters for consideration vis-à-vis Telefilm and interprovincial co-productions – (1) allocations for the purpose of the performance envelopes (which only applies to feature films) and (2) which office you apply to. In determining which Telefilm office to apply to for an interprovincial co-production the determining factors are – who initiated the project (and if one party has been developing it with Telefilm, that is obviously indicative); the percentages of ownership of the production and the spirit and intent around control including how the back end (net profits) are divided or reserved rights, for instance to future episodes of a series and who is everyone dealing with. The relevance of the Telefilm office you deal with may matter less as decisions are now being made more on a national basis than office-by-office basis but there is always value in having a relationship with the people you hope are championing your project.

Under Telefilm's Canadian Feature Film Fund, monies that are part of the performance-based envelopes are allocated to the producers and distributors of the best performing Canadian films (in accordance with various criteria). When more than one company owns the production company (as is the case in an interprovincial co-production), the envelope is allocated in accordance with copyright ownership unless the agreement or all the parties agree to a different allocation.

Considering that many interprovincial co-productions may have ownership that reflects provincial funding requirements rather than the actual split of responsibility for the project, this matter should be properly addressed in the co-production agreement. It is a fine balancing act to satisfy yourself, if you feel you should have the majority of such an allocation, and to satisfy a provincial funding agency from another province when they are looking to see there is a real partnership with the producer from that province.

## EXECUTIVE PRODUCER DEAL MEMO – GREAT SPECIAL

**LUCKY PROGRAMS INC.**  
**(“Producer”)**

Street Address  
City, Province

and

**MISTER EXECUTIVE PROGRAMS**  
**INC. (“Exec”)**

Street Address  
City, Province

This DEAL MEMO, when signed by both parties, will confirm the engagement of Exec for the services of Mister (“Mister”) on the one hour television special entitled "Great Special" (the "Program") written by I.M. Writer, to be directed by U.R. Director.

1. Engagement: Producer hereby engages Exec for the services of Mister as executive producer as that term may be customarily understood in the film and television industry. Exec’s services shall generally include but are not limited to advising with respect to the production financing plan, assisting in securing financing of the Program in conjunction with Producer, including making introductions to Canadian and foreign broadcasters, distributor, financing organization and bank; attending meetings with Producer with respect to financiers, key suppliers and completion bond company; providing input on the budget; advice and input on negotiations with distributor, broadcasters and financiers and generally advising Producer with respect to business, financing, distribution and marketing matters with respect to the Program.

***As there is no commonly understood definition or description of an executive producer’s role, the expectations or concepts of what the executive producer is going to do in connection with the project should be laid out. This is a fairly wide-ranging example.***

2. Term: The term of engagement shall be from script development through to first delivery, on a non-exclusive basis.
3. Compensation: In consideration of the rights granted and the services rendered pursuant to this Agreement, Producer shall pay Exec the sum of \$xxxxx (“Fee”), payable in accordance with the cash flow dated mm/dd/yyyy, or if required by Producer to satisfy the financing requirements of the Program, Exec shall postpone a portion of such Fee (a) in favour of the production financier, or (b) if required in lieu of a completion bond, pending completion of the Program, which postponed payment shall be payable no later than any other postponed payee, in accordance with a schedule agreed between Producer and Exec. If requested by Producer and agreed to by production financier, Exec may be paid the postponed portion and immediately lend same back to the

company such loan to be repayable immediately following payment in full of the production financier.

***Here the Executive Producer is agreeing to roll with the requirements of the financing for at least part of his or her fee. This may not be the case. It is quite a favour to ask an executive producer to assist you and then postpone his or her fee. Usually the producer is the last to get paid and often has to forego part of their fee as a result of overages, particularly in items like interim financing costs.***

4. Profits: Exec shall also be entitled to receive 5% of Producer's share of net profits. Net Profits shall be defined no less favourably than for any other participant, including Producer. Exec shall be entitled to receive reports and accounting no less frequently than any financier of the Program.

***It is worth remembering that when you grant anyone ongoing participation, you will have to report to them indefinitely.***

5. Credit: Provided Exec substantially performs the services contemplated herein, Mister shall be entitled to a credit as executive producer in the main titles of the Program to be shared with not more than one other individual, on screen and in the billing block. Any casual or inadvertent breach by Producer of these requirements shall not be actionable by Producer but Producer shall seek to rectify such breach prospectively if it can be done in a commercially reasonable way.

Depending on their role and their interest in the picture, the Executive Producer may want a corporate credit as well.

6. Assignment: Producer shall own and is granted by Exec in perpetuity and throughout the universe all right, title, and interest, including copyright, in and to the results and proceeds of Exec's and Mister's services hereunder ("Services"), including the exclusive right to exploit such results and proceeds and the Program in all manner and media of communication now known or in the future developed. Mister and Exec hereby waive any moral rights in and to the Services or proceeds thereof. Exec and Mister hereby grant to Producer the right to use the name, photograph and other likeness, and approved biographic material of Exec with respect to the promotion and publicity of the Program.

***This is really just a safety measure to ensure that any contribution of any party by way of notes or suggestions are covered.***

7. Exec and Mister each represent and warrant that:

(a) Exec and its employees, are permanent resident(s)/ citizen(s) of Canada as that term is defined in the Immigration Act and residents of Ontario on December 31, 2002. Exec warrants that it is a registered taxable Canadian controlled company within the meaning of the Income Tax Act and all of the individuals providing services for Exec are also Canadian citizens and Ontario residents. Company agrees to provide any additional documentation that Producer requires to satisfy the conditions for the federal and provincial tax credits.

(b) Exec solely owns and controls all right, title, and interest of every kind and nature in and to the results and proceeds of the Services and is fully entitled to grant such right, title and interest to Producer;

(c) None of the results and proceeds of the Services shall defame any person or infringe upon the copyright, moral rights, publicity rights or any other right of any person.

***The first representation is for tax credits. The Exec or individual will have to sign an affidavit or declaration regarding citizenship as well. You could attach it to the agreement. The other warranties are boilerplate with respect to any contributions.***

8. Exec hereby agrees to be solely responsible and to indemnify Producer for all taxes or remittances otherwise payable in connection with Exec's services in connection with the Program.

9. The parties agree to indemnify and hold harmless each other and their respective officers, directors, employees, agents, successors, licensees and assigns from and against all claims, demands, costs, expenses, including without limitation, reasonable legal expenses arising or incurred, directly or indirectly from the breach of their respective representations, warranties and covenants.

There are numerous additional provisions you could include such as assignment right, undertaking to sign further documents, remedies limited to right to sue for damages, governing law, etc.



Dated as of the 15<sup>th</sup> day of June, 2002

Mary G  
G Films Ltd.  
Ocean Blvd.  
Halifax, Nova Scotia

Dear Mary:

## **THE NEXT BEST THING – CO-PRODUCTION AGREEMENT**

This letter outlines the principal terms of an agreement (“Agreement”) upon which B Communications Inc. (the “B”) will co-finance, co-produce and arrange for the exploitation of a feature film entitled “The Next Best Thing” (the “Film”) based on the novel of the same name by Famous Author with G Films Ltd. (“G”) as a BC-Nova Scotia interprovincial co-production. Together B and G shall be referred to as the “Co-Producers”.

1. **Co-production** The Film will be produced as an interprovincial co-production by B as the BC co-producer and by G as the Nova Scotia co-producer. The copyright ownership retained by the producers shall be shared equally although the proportions of the respective expenditures shall be approximately 30% BC, 70% Nova Scotia. The Film will be based on I. M. Writer’s script dated April 1, 2001 subject to any changes required by U. R. Director as director, or by the star performers. The parties will do all reasonable and necessary acts and execute all documents necessary to ensure this Film qualifies as Canadian content and meets the eligibility requirements for their respective province’s tax credit and equity funding.

***This sets out the intention of the parties as well as the copyright ownership and estimated split of expenditures which is not the same as the copyright ownership.***

2. **Underlying Rights** B owns or controls all necessary underlying rights to the novel and the screenplay in order to make a film based thereon and hereby assigns an undivided 50% interest therein to G, subject to re-assignment if the Film has not been financed and/or principal photography has not commenced within 12 months of the date of this agreement. B has provided chain of title for G’s review and approval. The ownership of all ancillary and subsidiary rights to the Film shall also be shared equally by B and G.

***In this case the BC company developed the property and if the project doesn’t proceed, it will want the rights back.***

3. **Budget** The budget for the Film is approximately \$3.5 million (the "Budget").
  
4. **Producers** The approved individual producer for B will be Jane B and Roger That with Jane B having the authority to represent, speak for or sign for B. B has caused to be incorporated a single purpose production company, Next BC Thing Productions Inc., wholly owned by B, to be the BC production company. The approved individual producer for G will be Mary G who will have the authority to represent, speak and sign for G. G will incorporate a single purpose production company as the Nova Scotia production company. B shall be entitled to name a representative as executive producer and B may name a third party candidate providing financing (assuming such person is Canadian, or subject to the approval of CAVCO) as executive producer as well. The line producer's fees will form part of the producer fees in the budget. The total fees and overhead for B including any executive producers, total fees and overhead for G, the line producer and any other individual or company in a producer role together is \$xxxxxx or if available, 20% of Section B plus C categories of the Budget, whichever is greater, which shall be split 60% to B and 40% to G. B shall bear the cost of their appointed executive producers. G shall bear the cost of the line Producer. For the purposes of any performance based envelope based on the Film, the allocation shall be 60% to B and 40% to G.

***This lays out who the responsible individuals are for production and the split on fees and overhead. At this juncture you may already know who all the individuals in producer roles are or you may not. The split of fees and overhead is more heavily in favour of one company than another and is not equally divided as the ownership is. B is more of the lead producer, responsible for reporting and accounting and the representative of that company is the primary producer on set. It is possible that one or more parties have fixed fees rather than percentages.***

5. **Creative** It is intended that U.R. Director will direct the Film. The current leads being pursued are A Star and D Actor. The parties will develop a list of agreed potential performers for the roles of Tom and Dick to submit to distributor and funder for approval. Following approvals, B will liaise with casting director to secure leads as soon as possible.
  
6. **Location** Shooting shall take place in and around Halifax for 4 weeks and in and around Vancouver for 1 week. G's representative will work closely with Jane B to coordinate and organize the respective shoots as well as the post-production activities to be carried out in Vancouver. It is intended that official pre-production will commence September 1, 2002 and principal photography will commence October 2, 2002 with delivery currently planned for April 2003, but such an intention confers no

obligations on the parties and alternative dates if required will be discussed in good faith.

7. **Financing** The financing plan for the film is as follows:

Telefilm Canada – equity investment	\$1,000,000
CTF contribution (20% of budget)	700,000
Nova Scotia Film Development – equity investment	200,000
BC Film - equity investment	200,000
Pay TV - equity investment	200,000
Canadian distribution (supported by \$250,000 tv sales)	225,000
Foreign presale	485,000
BC Tax credit	60,000
NS Tax credit	250,000
Federal Tax credit	<u>180,000</u>
Total	\$3,500,000

The parties acknowledge that the financing plan is a plan and the parties will use their best efforts to secure commitments from the various sources of equity funding and the foreign pre-sale. The parties will have approval of the principal terms of financing agreements. If any equity investments or the foreign presale are not confirmed, the parties shall use their best efforts to replace such financing.

***This financing scenario is entirely fictional based on some reasonable assumptions.***

8. **Interim Financing and cash flow** The parties acknowledge that certain elements of the financing will require interim financing to meet the cash flow requirements of the production. The parties will establish an agreed cash flow schedule, taking into consideration the draw down schedules negotiated with the third party financiers. G acknowledges that B has advanced significant development and pre-production monies to date which sums are reflected in the Budget and more particularly set out in the attached Schedule. Most of these funds are repayable to third parties on first day of principal photography. G has advanced \$xxxx in pre-production monies to date. All funds advanced by the parties hereto which are not otherwise payable to third parties, shall be repaid to the parties as soon as practical following bank closing. All costs of interim financing will be provided in the Budget. The parties acknowledge that the cash flow requirements of the Film may require that the payment of some portion or all of their respective fees and overheads be postponed until the production bank has been repaid. The parties will use their best efforts to

avoid or limit any such postponements to the minimum. Any such postponement shall be pro rata and pari passu between the parties.

***With a budget of \$3.5 million, you will require a bank to assist with the cash flow and you will likely have to postpone at least a portion of the producer fees until the bank is repaid.***

9. **Overages and Underages** (a) If the Film is over budget, then, subject to the provisions of the completion guarantee, the parties shall contribute equally ie. in accordance with their respective share of ownership of the Film. Any such overage shall be applied first against producer's fees pro rata.
- (b) If the Film is under budget, then 50% of any such underage shall be paid to the parties hereto divided equally and the remaining 50% shall be paid to the financiers.

***Although you hope there are no overages, you may find you have eaten up your contingency and still require some additional costs. Making provision for how overspending and underspending will be handled is good to do before it happens.***

10. **Mutual decisions** Key creative decisions pertaining to the Film shall be made jointly by the parties. Without limiting the generality of the foregoing, the Co-Producers shall mutually approve all matters relating to the Film:
- (a) the Budget and cashflow schedule. The budget dated June 1, 2002 is hereby approved. Any changes to the budget shall require the approval of the Co-Producers;
  - (b) the Production Schedule;
  - (c) the running time of the Film;
  - (d) the completion guarantor and related agreements;
  - (e) the script. The script dated April 1, 2001 written by I. M. Writer is hereby pre-approved and any substantive changes or alterations require G's further approval;
  - (f) the principal cast;
  - (g) the Director (U. R. Director is hereby pre-approved);
  - (h) the key crew;
  - (i) the line producer;

- (j) the production accountant;
- (k) production counsel;
- (l) the publicist and any press releases or publicity material for the Film;
- (m) gross and net profit participations;
- (n) the principal terms of any agreement relating to the provision of finance for the making of the Film;
- (o) production bank accounts and respective signing authorities for same;

Other production personnel and daily production matters shall be determined by Jane B as producer.

The parties acknowledge that all due speed is required in securing the other partner's approval and that if the party required to approve an element provided above has not set out their objections to the party seeking approval within (a) 48 hours with respect to individuals to be approved or (b) 5 business days for documents to be approved, that party shall be deemed to have approved such element.

***This is not an exhaustive list and there may be more or fewer items that you want to have jointly determined. Having as much agreed up front as possible is useful.***

11. **Reporting and accounting** The parties will be responsible for relations and reporting to their respective provincial agencies and for provincial tax credits and B shall have primary responsibility for overseeing production accounting and reporting to other financiers and the production banker. The production accountant shall be engaged by B, subject to approval of G and the budget shall provide a part time post production accounting allowance until audit and final tax credit applications are projected to be complete. Each party will have free and full access to the other party's books and records with respect to the Film upon 24 hours notice during regular business hours.

***Although this may be understood by the parties, or because of their respective skills, one of the partners needs to be in charge and responsible for the reporting and clean up of the production vis-a-vis all the financiers. You will want to make provision for this in the budget.***

12. **Credits** The Co-Producers shall each be entitled to a corporate credit, following any approved presentation credit granted to a third party "A B

Communications /G Films Ltd. production". B shall be entitled to up to two executive producer credits including one for B employee or director and one for a financier or distributor that B secures. Jane B and Mary G shall have the shared "Produced by" credit. B will be entitled to name one co-producer and an associate producer. G will be entitled to nominate a co-producer or an associate producer. G may credit the line producer as such. All other credits will require the mutual approval of the parties.

13. **Agreements for the benefit of the Film** All rights, property or other benefits acquired pursuant to any contract entered into by either of the parties in connection with the Film shall be held by that contracting party for the sole benefit of the Film. Each party to this Agreement hereby assigns to the other party to this Agreement such right, title and interest in any rights acquired pursuant to any agreement signed by either of them individually as is required to enable each of them to fulfil their obligations hereunder.
14. **Term** Subject to the provisions of this Agreement, all applicable licences, financing, distribution and investment agreements relating to the Film, the term of this Agreement shall commence upon the date of execution of this Agreement and shall end upon the earlier of:
  - (a) the date of completion of all exploitation of the Film as mutually agreed upon by the parties hereto;
  - (b) the date which is mutually agreed upon by the parties hereto; or
  - (c) the date of termination of this Agreement pursuant to paragraph 15.
15. **Termination** This Agreement shall terminate at the election of a party to this agreement upon the occurrence of any of the following events:
  - (a) **Uncured Breach:** The uncured breach by either party of any material term or condition of this Agreement, provided that: (i) the non-offending party provides written notice of the existence and nature of such a breach and the said breach is not cured by the offending party within fourteen (14) days of receipt of that written notice from the non-offending party;
  - (b) **Bankruptcy:** either party ceases to carry on business, makes an assignment for the benefit of its creditors, becomes insolvent or commits an act of bankruptcy; or any action is taken to have either party declared bankrupt, or wound up, or a receiver is appointed over any part of either party; or any judgement or order is rendered against either party and is not discharged or stayed within thirty (30)

days of the making of such judgement or order the bankruptcy or insolvency of the other party.

- (c) The Film has not commenced, (and once commenced continued), principal photography within 12 months of the date hereof.

***There are many events of default or situations in which you may want to terminate an agreement. It is very complicated the further along in the process you are but it is worth providing for to know how you to proceed if it happens.***

- 16. **Replacing a party** Subject to the prior approval of any third party investors and subject to the contractual rights of third parties, upon termination in accordance with 15 above:
  - (a) If the party electing to terminate (the “Terminating Party”) retains the underlying rights to the screenplay, the Terminating Party may abandon or postpone the production of the Film or continue or resume the production of the Film and substitute another entity to render the services of the other party;
  - (b) the Terminating Party shall pay to the other party sufficient funds to cover any costs and expenses that the other may have incurred in good faith, pursuant to this Agreement or prior to this Agreement and prior to the date of termination, provided however, that the reimbursement of such costs and expenses do not exceed those provided in the mutually approved Budget.
- 17. **Execution in counterparts** This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, but this Agreement shall be constituted only by all such counterparts together. The parties hereto agree that the delivery of this Agreement executed by either party to the other party by means of facsimile or other similar electronic transmission and the communication by such means will be legal and binding on all parties.
- 18. **Notice** Any notice or other communication pursuant to this Agreement required or permitted to be given in connection with this Agreement shall be given in writing and may be given by personal delivery, by courier, by registered mail or by fax addressed to the recipient at the address noted on the first page of this Agreement, or such other address as may be designated by notice by any party to the others in accordance with this paragraph. Any notice given by personal delivery or courier shall be conclusively deemed to have been given on the day of its delivery and, if given by registered mail, on the fifth day following its deposit in the mail and, if given by fax, on the day of its transmittal.

19. **Assignment** – Except as specifically provided above under termination provisions, neither party shall be entitled to replace itself with a third party, in whole or in part, whether that third party is of the same nationality or not, nor can it assign its obligations to a third party without obtaining the express written agreement from the other party. This Agreement shall be binding upon and enure to the benefit of the parties and their respective heirs, legal personal representatives, successors and permitted assigns.
20. **Further Assurances** - Either party hereto shall, at the request of the other, execute any documents or perform any act which is reasonably necessary to carry out the provisions of this Agreement.
21. **Waiver** - No waiver by either party any of their respective rights under the provisions of this Agreement or of the breach of this Agreement shall constitute a waiver of any other such right or of the Agreement as a whole.
22. **Entire Agreement** - This Agreement, including the schedules attached hereto, constitutes the entire agreement between the parties. No amendment to the Agreement shall be valid unless in writing and signed by both parties.
23. **Indemnification** - The parties hereby agree to indemnify and hold each other harmless from and against any costs, claims or damages, including reasonable legal fees, arising, directly or indirectly from the production of the Film, the distribution of the Film, or from a breach or alleged breach by either party of any provision of this Agreement.
24. **Arbitration** - In the event of any dispute, claim, question or difference arising out of or relating to this Agreement or breach thereof, the parties shall use their best efforts to settle such disputes, claims, questions or differences. To this effect, they shall consult and negotiate with each other, in good faith and understanding of their mutual interests, to reach a just and equitable solution satisfactory to all parties promptly upon notice by any party specifying full particulars of the dispute and, if they do not reach such solution within thirty (30) days thereafter, then either party may deliver written notice to the other party requiring resolution, at the choice of the party bringing the complaint, either by independent arbitration or through the judicial process, and thereafter refer the dispute, claim, question or difference in issue to arbitration for final settlement binding on all parties in accordance with the provisions of the commercial arbitration legislation applicable in the venue in which the party instituting legal proceedings is resident.

The parties have indicated their agreement to the terms set out above as evidenced by their signatures hereto.

**B COMMUNICATIONS INC.**

**G FILMS LTD.**

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## **C. LOW BUDGET PRODUCTION**

Low budget production is where most people start out. We have all heard of somebody doing their first production for the proceeds of a “rent” party and what they could charge on their sister’s credit card. I’m not referring to that, which I would call no-budget. No-budget production does not really require a lot of guidance. It requires blind faith and some great breaks. Low budget production requires that most participants and your suppliers get paid something, but generally less than they might usually work for or provide goods. Some people work in low budget production for their whole career. They prefer it. Most people do one or two low budget productions and then move on because they’ve used up all their goodwill capital. It is always pleasantly surprising how willing the production community is to assist new filmmakers by generously contributing time, energy and talent. You cannot afford to squander this kind of capital. You also cannot return to this bank repeatedly.

This section seeks to address certain areas related to the business of production that may be particular to low budget production. These areas or concerns may come up on other productions as well but they almost always arise on low budgets.

### **I. RELATIONSHIP OF THE DIRECTOR AND PRODUCER**

Frequently on low budget productions, the director has a more instrumental role than on other productions. The director is not hired or engaged for the gig, he or she is a partner or may very well be the driving force behind the production. This is certainly the case on a great many documentaries. Telefilm’s “Low Budget Independent Feature Film Assistance Program” is specifically targeted at director-driven projects. The director is the applicant and “although [the director] may hire and work with a producer” the director must have “100% of creative and editorial rights.” That does not necessarily mean copyright ownership. Although Telefilm expects the director to be an owner of the film, it does not require that the director be the only, or even the majority owner of the film.

A production is like a small (or during production, a mid size) business. There are some directors who are terrific producers. Most directors however are not great producers. The jobs of producing and directing generally require different skill sets and a director’s energies are better employed on the directing front. Whether the producer is hired as a producer or the producer and the director work in partnership, the producer’s role is essential. The ideal partnership between a producer and director is the same as any other partnership – the parties recognize and respect each other’s strengths and areas of responsibility and trust each other in their respective spheres. As in any partnership, the greatest

amount of paper will not make a dysfunctional relationship work. The process of addressing a contract may however require the parties to examine and communicate the expectations and assumptions that may otherwise go unspoken and give rise to conflicts later.

Discussions should include at least outlining your respective areas of responsibility from development through financing and pre-production, production, post-production, delivery, marketing, reporting and administration. Outlining your areas of responsibility and where you expect to have input on the other party's areas will also help give you a better idea of what kind of money in fees, ownership, profits, you might each want, need, expect, demand. At this point you should discuss the great likelihood (as in most low-budget production) the principals or partners almost always must defer or postpone some or all of their fees until it is determined whether there is money left at the end. What happens if and/or when you don't have money to pay. Are there expectations that either of you will personally contribute in addition to or deferring or foregoing your fees?

If you get nothing settled out of the discussion besides a process to deal with issues as they arise, you will have saved yourselves a lot of grief.

An agreement between a producer and director who are partners would look similar to the Interprovincial Co-production Agreement (in the Producer chapter) without the interprovincial references and expenditure aspects and with a slightly different set of responsibilities or approvals outlined.

If you are incorporating a company that you will both own, the agreement between you would often take the shape of a shareholders agreement that outlines how the corporation is to be operated and makes provision for a buy out of the shares of the other party in the event of a dispute, default or one party wishing to bow out. Usually the shares would have little or no value at least until the film or TV program is completed and even then, the share value is likely to be small. You might consider having some kind of "kill" or termination fee in the event of a dispute, that lets one party, perhaps the initiator of the project, eject the other party, upon payment of a certain amount that is enough to make the party terminating the agreement pause and consider carefully, but not so large as to freeze or stall the project indefinitely. You could provide that the party leaving the project may still have some entitlement to a fee and/or credit from the production budget when and if the project proceeds. Even if you do not get around to a shareholders agreement in full, it is worthwhile addressing at least the issues of your respective responsibilities and what happens if you disagree on how to proceed. Review the section of this book on Co-productions as many of the same considerations apply.

Where the producer is engaging the director or vice versa rather than a partnership or co-ownership scenario, you can review the agreements following. I have set out both a sort of standard director's engagement agreement and a

producer engagement deal memo which may apply on a documentary or a director driven low budget production. You may also want to refer to the example Executive Producer Services Agreement in the Producer section of the book.

## II. BUDGETING

Budgeting for low budget production is an art unto itself. Or perhaps, budgeting itself is not as challenging as getting people to work or provide goods and services for what you can afford to pay.

Often in low budget production, to get people working for less than what they can otherwise command, you are upgrading them from more junior positions. From a business perspective, it may be a false economy to have junior people in certain positions. You need an experienced production manager and accountant, especially if they are experienced in low budget production. These people, particularly the pm, can keep you on track or cost you a fortune in overages. The accountant will help you to know if you are on track. Eating into your contingency significantly during production or a delay in cost reporting is usually indicative of trouble.

Other areas that you may want to pay close attention to include those items that aren't on the screen – overhead-related items, e & o insurance, post-production and deliverables, financing costs and producer fees. When you are looking to reduce the budget, many of these items seem to be the easiest to chop. Those choices will come back to haunt you later. The last two items are referenced in the Cash Flow and Interim Financing section.

Overhead and related costs: Overhead (your phone, fax, stationary, postage, bookkeeper, etc.) your office, an assistant and post-production accounting are costs that you will have to incur beyond principal photography and wrap. Unless you are doing everything yourself out of your house or apartment (which means you won't be working on your next project), finishing, delivering, marketing, reporting and accounting all continue long after the production personnel have moved on to other projects.

Post-production: The time for post-production on film projects (not necessarily low budget) is often underestimated. In low budget production you are often required to edit and post in off-hours or between the facility's other better-paying clients. This may lengthen the time it takes and (as we'll see in the discussion on interim financing), time means money. Less experienced personnel, including your director and editor, will also often mean more changes will be required on the film.

Deliverables: Delivery items, particularly with respect to film (vs. television) are expensive. If you are producing a film without a distributor on board, you will not be certain what your delivery items will be. However, there are a number of

standard delivery items you need to budget. You may limit the saleability of your production if you do not have some important delivery items, both physical elements and documents. There is a detailed list and review of delivery items for film and television in *Canadian Production Finance: A Producer's Handbook*. Telefilm no longer requires a second language version to be budgeted unless it is a requirement of a distributor or financier. If Telefilm is an investor, the film budget is \$1 million or more and the film is delivered on 35mm, you will have to budget for two 35 mm prints for Telefilm – one of which goes to the National Archives for storage and the other for archival “access”. For all films, you must deliver a digital master, a ½ inch VHS and/or DVD.

BC requires that deliverables for a theatrical release be budgeted or the project will be deemed a TV movie (and now ineligible for BC Film equity support).

Insurance: Insurance rates have risen dramatically, partly due to September 11<sup>th</sup> but for other reasons as well. You may be lucky and be able to slide by without proper production insurance but like all insurance, for those cases where you do need it, you will be grateful to have obtained it. There are so many things that can go wrong on a production – a faulty camera or film stock, a scratched negative, a production vehicle accident - that can ultimately cost tens of thousands of dollars or can cost you your production, that insurance is a necessary expenditure. It is also a requirement of most financiers. You can shop around for insurance but make sure you review your needs with your agent or broker carefully. It may ultimately save you a lot of money. If you are regularly in production – doing sponsored or corporate as well as small entertainment production (such as life-style or magazine format programming), you may be best off with an annual policy.

Errors and omissions insurance is a cost that most people want to put off as long as possible. It used to be standard practice to obtain e & o insurance just before you delivered or were going to air. However, claims can arise as soon as there is any publicity about your production. I was involved in a production that had a nice catch-phrase type title. A few lines appeared in *Variety* about the project, months prior to production. We received a letter from a rather prolific novelist asking us to cease and desist using the title since a book of his had the same title. When we discovered that several million copies of the book by that title had been sold, we changed the title. In that case it was early enough that we didn't have much invested in the title (although the new title was terrible). Having to do that when you have prints and artwork prepared is a much more costly exercise. Another project that had errors and omissions insurance in place, was about to air on a large US pay TV broadcaster. An individual claiming to have contributed to the script (that indeed had had some relationship with the writer-director) came forward with a claim. To preserve the pay TV license, we (or the insurers) were forced to settle quickly. That individual received more money than the credited writer-director. But having the insurance meant we were able to settle the matter and save the license.

In another instance, a client had done a spoof of wise guy pictures and only considered errors and omissions after they had completed the film. We were unable to insure the picture because the insurer felt some of the parody was too close to the original (usually the sign of good parody). The sales potential of the picture was extremely limited after that. Very few broadcasters or distributors will acquire a picture without errors & omissions insurance. Most financiers require that e & o insurance be in place at the beginning of principal photography and certain broadcasters are requiring longer terms for errors and omissions coverage. Telefilm only requires e & o be in place prior to delivery unless they perceive there may be a risk of legal action in connection with the subject matter, in which case they will want it at the start of principal photography, Check the terms of your deliverables.

Audit: Most Canadian funding agencies and tax credit programs require audited production costs. For low budget productions (usually \$500,000 or less although this cut off may be different from one funder to another), the funder will allow a Review Engagement Report provided by an accountant (as defined in sections 8100 and 8200 of the CICA Handbook) and for productions under \$100,000 a CAVCO approved affidavit attesting to the costs of production from the producer, rather than an audit. Telefilm allows a detailed cost report with a statement of final costs and list of related party transactions for productions under \$250,000. The provinces generally follow the requirements (with under \$500,000 and \$100,000 budget levels) as well. There is a significant cost difference between an audit and the other requirements. If your budget is not much more than half a million you might want to investigate if your financiers will accept a Review Engagement Report.

### **III. BROADCAST LICENSES AND DISTRIBUTION**

For newer producers or producers with little track record it may be more challenging to obtain market support for your project. In Canada, there are many more options in television than for feature films. The most difficult television programming to secure licensing for, is series television, or more particularly expensive series television. Broadcasters are usually looking for producers with substantial track records since they need to be assured the producer will be delivering on time and on budget over a sustained period.

Determining when to try and secure distribution may be a tricky question. You may be looking to have a distributor help you find some of the production financing. This is quite challenging for low budget production without saleable elements and a track record. You may want to attend some markets yourself and get a feel for the marketplace and even see how different distributors work. Usually you will be looking at distributors after you have obtained some market interest through broadcast sales.

Traditionally, Canadian producers approach Canadian broadcasters directly to secure one (or several) broadcast licenses. Broadcasters are used to dealing directly with producers in the country and they make themselves reasonably accessible. This is equally true for feature films. In Canada (as in some other countries like the UK), broadcasters are the largest source of market money (ie revenue from buyers) for feature films in Canada – primarily pay TV and specialty channels - although Citytv and A-Channel have been quite active in licensing features for free TV.

The terms of payment of license fees depend on the broadcaster, its window and whether it is essentially a partner in the production (mostly this occurs in the case of a series where the broadcaster is a primary or funder). In the last case, the broadcaster may pay its license fees over the course of production. Mostly, license fees are payable sometime between the time of delivery to the broadcaster and the end of their window ie. after production is complete. (“Window” here refers to the term of the license eg. From January 1, 2004 until December 31, 2006 or a 12 month window three months following the theatrical and video release of the picture.)

For feature films in Canada you often require a distributor. Being a Canadian distributor is a difficult job. There is an enormous list of those that have been there, done that and died trying. Many producers are resentful of having to secure the broadcast licenses themselves and having done so, turning them over to a distributor (assigning them) who will often give them less than the face value of the total licenses as a minimum guarantee. And the distributor will then charge a distribution fee on the licenses the producer obtained! The reason for this is not that complicated. Canadian distributors are usually required to guarantee the theatrical release of a picture before they have seen it, ie. before production. The history of theatrical release of feature films in this country would not lead one to expect that the chances of the film making money at the box office, in excess of the prints and advertising costs (even if supported by Telefilm), are good. In fact, you could count the successes on a few fingers. (Telefilm is seeking to turn that around with the new Canadian Feature Film Fund policies but that will require more some bigger budgets and more marketing and advertising expenditure. Those don't really apply to low budget production in any event.). The home video market, which used to be a major source of revenue for films, has not been so for many years but to have any kind of video sales or rentals you need a theatrical release and some advertising. Essentially, until you get to pay television in Canada, there is unlikely to be any net revenue to the distributor. All the distributor is doing is trying to recover expenditures. Unlike the broadcaster, the distributor may pay some of its minimum guarantee or distribution advance during production and usually most of it by complete delivery. The distributor is unlikely to see income until a few years after delivery when the broadcast licenses are payable. You will see in the next section, the distributor is in fact “banking” or financing your broadcast licenses.

Television distributors may leave Canada out of the territories they are acquiring or they may only take Canada after the existing licenses have expired. In this country, there is not a real tradition of television distributors paying guarantees for international distribution of TV programming. There is usually a benefit to the producer (in addition to having some money in hand) of a distributor paying some kind of guarantee because the distributor is seeking to earn back its own money and will be motivated to sell your program. Even a commitment of promotional funds is valuable in this regard.

A review of television and feature film distribution agreements may be found in the Distribution chapter in "*Canadian Production Finance: A Producer's Handbook*".

#### **IV. FINANCING, INTERIM FINANCING AND CASH FLOW**

There is a discussion of financing plans in *Canadian Production Finance: A Producer's Handbook* as well as some examples of them. Low budget production is not necessarily easier to finance than bigger budget fare because some financing sources are geared toward budget level or amount. There is no necessary correlation between the production budget and the eventual revenue value of a production, the same way virtually nothing (not even an "A" list star) will guarantee you success. However, some distribution agreements, broadcast licenses and Telefilm equity are based, at least in part, on either percentages of budget or are somehow tied to budget levels. Provincial agency equity and private funds may have some relation to the budget (often they will not exceed a certain percentage of budget) but the total amounts of investment are relatively limited so it is not difficult to reach the maximum, even on lower budget productions. Telefilm's Low Budget contributions are limited to 65% of the budget, capped at \$200,000 per project and the entire fund is \$1.7 million. Most provinces that have equity funding, other than Quebec, have similarly limited amounts at their disposal. However, when your budget is half a million dollars, contributions of a hundred thousand dollars make a big impact.

It is possible to finance a lower budget project entirely out of Canada through a combination of public and private funds, broadcast licenses and tax credits. You may be among the very fortunate few in being able to access private financing. If you do the latter, I'd strongly recommend you get experienced legal assistance because you can easily run afoul of tax credit requirements and securities law. (There are extensive requirements and restrictions on offering securities to the public which you may well be doing by offering shares or interests in a production.) For low budget features, there is a slim chance you can secure a distribution commitment but the chances of getting an actual distribution advance that exceeds or even matches your broadcast pre-sales are unlikely.

It is a requirement of most production financiers that you have some market trigger or involvement ie. a buyer such as a broadcaster or distributor who has

committed to the project. This is not necessarily the case for low budget features although the financing may dictate that you secure sales. Telefilm's Low Budget program does not require a distributor at all, and for features under \$1 million, Telefilm only expects one to be attached before delivery of the film. However, in the Low Budget program, Telefilm will not fund more than 65% of the budget to a maximum of \$200,000 so you will have to finance the balance of the budget from other sources.

Assuming you have managed to secure commitments that represent 100% of your budgeted production costs, you still have a big challenge ahead, that is turning the commitments into cash that allow you to pay for your production as you go. Cash flow - having the money you need to pay expenses when they are due - is a challenge on all productions. Production finance – pre-sales, distribution advances, broadcast license fees, grants, the License Fee Program contributions, tax credits and even equity investments - are not paid when you sign a contract. They are usually paid sometime later on or over the course of production. The various types of financing are discussed following the text of this section with payment schedules you may expect. Unfortunately production costs tend to fall most heavily in the early stages and over principal photography. All of your costs will have been incurred by the time you have completed and delivered your production but certain production financing is not payable until delivery or later. This is where banks or other interim lenders come in. Their role in relation to production is primarily to help bridge the timing issue with payments.

Banks are not risk takers – they are not investors in your production. What a bank looks for when considering a production loan is set out following this chapter. The risk a bank or interim lender may assume is limited to someone not making good on their commitment to pay or estimates or perhaps paying later than originally estimated. (In the case of tax credits, the bank will also reduce the estimated credit for possible reductions in labour or other.) The time value of money is represented by interest, or possibly by discounting the amount due. The bank hedges this risk by taking an assignment of more than the amount they will lend you. For instance with tax credits, the lender will first discount the tax credit because it will not be received for 12 to 18 months (or more) following production. There is also some chance that the tax credit you ultimately receive will be less than you initially estimate so they lend you 75 or 80% of the tax credits discounted for time. So even though on paper you have 100% of your budget covered by commitments, you may not have the necessary cash to cover all production costs as and when they should be paid. A lender will help you cover your cash shortfall. However, considering there is a risk with certain of the amounts payable, the amount of the loan will not be 100% of the amounts payable. A basic illustration of cash receipts and shortfalls over the course of production follows the text of this chapter.

Say between the amount payable over the course of production and what the lender will give you on the other contracts, you can access 90% of the financing before delivery and audit. How do you cover the other 10% of expenses you will

have incurred to that point? Remember the discussion of producers' fees in the Executive Producer section and agreement? Typically the last people to get paid on a production are the producers. Your producer fees and possibly your overhead are often not sufficient to cover this shortfall. You will require that other parties or suppliers also delay some of their payments. Again, you are juggling. Another possibility is that you are over-financed such that when everything is discounted, you still have all the production costs. We all know such a scenario is very rare.

Delayed payments bring about another set of challenges. In order to claim tax credits on your labour, you have to have paid for the labour within 60 days of the production company's year-end. There is often a little procedure that everyone agrees to in production financing where the producer's fees are paid (with the consent of the bank), and then producer lends the money back to the production to be repaid on receipt of the tax credits. The one problem with this is that the producer now has income that he or she must pay income tax on, without the benefit of the money. The money will likely only come in the following year (or possibly the year after that). If the money is paid to the producer's company, you may have more flexibility in recognizing the income. However, you may also reduce the amount of the tax credit due on the payment if not supportable by payouts to the individual producer.

Interim financing and cash flow is particularly challenging on small or low budget productions because the dollars are not significant enough for a bank to consider a production loan. The bank's work is largely the same on smaller or larger productions (particularly if all the financing sources are Canadian) so the fees for the work (due diligence, set up and legals) would be about the same but the costs relative to the budget size or the loan amount are totally out of whack and consequently it makes little sense to go that route. What are your alternatives?

You can either negotiate better payment schedules with the companies that make up your production financing (this is difficult, as most of them are not particularly negotiable), juggle your payables or borrow money against some other security your bank will find acceptable, like your house. You have to be pretty comfortable with the reliability of the sources of financing you are banking and your ability to complete the production on time and on budget to risk your house. Sometimes you are doing a combination of some or all of these things. There are very few organizations that entertain loans to smaller productions – one of which is Rogers Telefund. Telefund charges less than bank interest and has no set up fee although you still have to pay their legal costs. They no longer finance tax credits.

More and more we are seeing producers with one or more low budget productions, financing the production personally. They have established an ongoing relationship with their bank and they arrange a line of credit that can get them through the troughs and peaks of cash flow on production. The bank is not involved in any production loan and you incur no bank legals or real set up costs,

only the interest on the balance you are carrying. It is frequently the least expensive way to proceed but it does require that established relationship with your bank and some assets to support the line.

## V. ENSURING COMPLETION

The biggest risk investors and financiers face (after trusting you to make something watchable) is actually completing and delivering the production to whomever has agreed to buy or distribute it. Until the project is completed there is only theoretical value to your project. To allay this risk, financiers usually insist on having a completion guarantee in place with the financiers named as beneficiaries. The completion bond or guarantee guarantees delivery of the production (by way of an agreed list of deliverables) to named buyers or distributors, provided all the financing has been made available to the production. There is a more detailed discussion of completion bonds in *Canadian Production Finance: A Producer's Handbook*.

The completion guarantee business in Canada has gone through some significant changes in the last while. There were only ever a few completion guarantors to speak to but the players have been changing and there are now fewer companies. Additionally, like insurance, the rates for completion bonds, after dropping dramatically for a decade through competition, have risen substantially. Generally, low budget or smaller productions like most documentaries cannot afford completion guarantees. In those cases, Telefilm and many other financiers may accept other arrangements that require the producer to put their fees in escrow or delay payment of their fees until the production is complete or the financier has approved final costs. Your fees are acting as the completion funds in the event there are cost overruns. This is another reason that producers are the last to be paid on a production.

Examples of an escrow agreement or a deferral of fees agreement can be found in the Completion Guarantees Chapter of *Canadian Production Finance: A Producer's Handbook*.

**PRODUCER DEAL MEMO – “Director’s Picture”**

***This is done in the form of the crew deal memo but could equally be done with greater detail like the executive producer services agreement or the director agreement.***

**Director Driven Productions Inc. (“DDP”)**

Street Address

City, Province

This DEAL MEMO, when signed by both parties, will confirm your engagement on the feature film entitled "Director’s Picture" (the "Picture") created by You, Me and Ours.

NAME: Producers Loan Out Company Inc. (“Producer”) for the services of Aspiring Producer (“You”)

ADDRESS: 123 Avenue, City, Province

**POSITION ON PICTURE: Producer**

SCREEN CREDIT: same as Position on Picture, provided you faithfully provide services contemplated. Producer shall be entitled to a shared corporate credit after any presentation credit " A Producers Loan Out Company/DDP Production" on screen and in the billing block. Any casual or inadvertent breach by DDP of these requirements shall not be actionable by Producer but DDP shall seek to rectify such breach prospectively if same can be done in a commercially reasonable way.

***A producer, other than perhaps a line producer hired for prep and production only, will probably want a corporate credit if he/she is seeking to establish a corporate identity.***

EST. START DATE: On execution

EST. COMPLETION DATE: Upon receipt of any tax credits applied for, if applicable or if not applicable, upon complete delivery to any buyers.

***This term is obviously rather elastic. Although the producer is contracted until the receipt of tax credits (which is way after production and a considerable time after delivery), you might specify they are not exclusive after production. In fact they likely not be rendering services exclusively before or during production since payment is usually too slight to allow giving up one’s day job.***

Producer shall provide its services to DDP until DDP advises Producer that DDP no longer require such services in connection with the Picture or the Picture is

completed.

***It is unlikely that a producer being engaged would agree to be committed at the whim of the director.***

Producer's services shall generally include but are not limited to responsibility for the financing of the Picture in conjunction with DDP, including the application for tax credits, if applicable; the supervision and overseeing of line producer, the conclusion of necessary service and goods arrangements; preparation of the budget with the approval of DDP; overseeing the production expenditures in accordance with the agreed production budget; overseeing the production of the Picture from the commencement of pre-production to and including the completion of all photography as that role is generally understood in the film business. Thereafter Producer agrees to oversee the co-ordination of post-production and complete delivery of the Picture to buyers, festivals and distributors. Included in the responsibilities will be ongoing accounting to funders with respect to progress and cost reports.

***The final responsibilities of ongoing accounting and reporting would mean the producer's services are not over when the picture is completed or even when the tax credits are received. This responsibility may fall to DDP.***

#### COMPENSATION:

- A. A fee of \$x payable on or before delivery. If necessary, you may be required to defer this fee in favour of the production financier.
- B. In addition you shall be entitled to any deferrals, representing deferrals of the following amounts: development costs, overheads, servicing and delivery costs and fees in a first tier recoupment, payable from first dollar revenues after deduction of Telefilm's entitlement, if applicable and distribution fees and expenses from all unencumbered territories.
- C. Producer will be entitled to a           % share of DDP's share of profits.

***This recognizes the producer is likely going to have to hold off being paid until the end or close to it. The producer in this instance was advancing expenses and agreed to recoup them from revenues rather than the budget. Profits should be defined.***

Producer acknowledges that DDP retains ownership of all rights in and to the Picture including copyright and all editorial and creative control resides with DDP. However Producer will be meaningfully consulted on all major creative decisions.

***This is a reference to the Telefilm Low Budget program requirements. In this case director controlled the production company and retained creative and editorial control. It is unclear from the actual wording of the Telefilm requirements whether the director must own and/or control the production entity. However, the applicant for the low budget program is the director and the wording of the guidelines is the director may hire or work with a producer. Telefilm representatives have stated***

***they expect the director to be an owner, although not necessarily the sole owner. Most often the producer and director will incorporate the production company and both own it.***

While Producer is responsible for the preparation of the budget and the expenditure of monies in accordance therewith, Producer will notify DDP of any potential overages. DDP will be consulted and will have mutual approval of the budget, subject to third party approvals, if applicable.

***The director may want to have more or less say in the expenditure of the budget. It is not necessarily director's area of expertise but in a director driven project, the director not having approval of the budget would be very unusual.***

The overhead allowance in the budget will be payable to Producer.

***This could be split and should have some relationship to who is bearing the costs of running the office before and after completion.***

Producer hereby agrees to be solely responsible and to indemnify DDP for all taxes, fringes or remuneration otherwise payable in connection with Producer's services in connection with the Picture and for any and all costs and damages incurred by DDP, relating to acts or omissions of Producer in connection with such services. You and the Company hereby irrevocably assign to DDP the benefit of such services provided.

***This is a very condensed warranty and indemnity. You might want to review provisions in the longer form agreements.***

Producer warrants that Producer and its employees, are permanent resident(s)/ citizen(s) of Canada as that term is defined in the Immigration Act and residents of Ontario on December 31, 2002. Company warrants that it is a registered taxable Canadian controlled company within the meaning of the Income Tax Act and all of the individuals providing services for the Company are also Canadian citizens and Ontario residents. Company agrees to provide any additional documentation that Producer requires to satisfy the conditions for the federal and provincial tax credits.

DATED at Toronto this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

**DIRECTOR DRIVEN PRODUCTIONS INC.**

By: \_\_\_\_\_

**PRODUCER LOAN OUT COMPANY INC.**

By: \_\_\_\_\_

***You might consider requiring the Producer to give a personal guarantee at least regarding the warranties although he or she will be required to provide the appropriate paperwork for tax credits.***

**BIG TIME PRODUCTIONS LTD.  
Main Street  
City, Province POS TAL**

**Phone (123) 555-1800  
Fax (123) 555-3600**

**June 15, 2002**

Agents name

**Agency**

Address

FAX (123) 555-0101

Dear Agent:

**Re: Big Time – Director Agreement**

***This is not specifically a low budget directors services agreement but it is a non-union agreement. It can be adapted for low budget as noted below.***

This letter will confirm the terms of agreement between BIG TIME PRODUCTIONS LTD. ("Producer") and Promised Land ("Director") for his services as director of the feature film currently entitled "Big Time" (the "Picture").

1. Commencing on or about July 1, 2002, Director will be available non-exclusively for pre-pre-production. Commencing August 1, 2002 for pre-production and continuing during principal photography until director's cut, Producer hereby retains your exclusive services as director upon the terms set out hereunder. Director's services shall be rendered on a non-exclusive basis, during editing, subsequent to Director's delivery of the director's cut.

***Generally on a feature, the director will want to be closely involved in post-production. You or the director may want to specify the director will direct ADR (looping) and supervise the mix and timing. You may also have provisions regarding viewing of each cut and attendance at screenings.***

2. Pre-production shall commence on or about August 1, 2002 for approximately four (4) consecutive weeks. Principal photography shall commence the week of August 26, 2002 for five (5) consecutive weeks. The shooting schedule is to be mutually approved by the Producer and Director and may consist of 6 consecutive days/week to meet production requirements. Director shall have up to four (4) weeks following editor's assembly to deliver a director's cut. If Director's cut is not then complete and Producer does not have the latitude, as Producer shall determine in its discretion, to allow Director the time

required to complete his cut, Producer shall be free to proceed with post-production as it sees fit.

***As mentioned, the director may be closely involved in the entire edit and post production process. Usually there is a provision for a director's cut. The time lines for delivery may be pressing and the post production period also affects the budget.***

3. Director will render all services usually and customarily rendered and reasonably required of directors employed in the film industry, including without limitation, assisting in preparation of final shooting script, assisting with casting, assisting and working with performers, maximizing production values and effecting economies in the production of the Picture; consulting with the Producer and other departments and preparing, directing, completing and delivering the Picture as Producer may reasonably require or instruct. Director agrees to use his best efforts to shoot the script of the Picture as delivered by Producer and will make no material changes in the script (other than those required for proper audio-visual presentation, or shooting schedule, or other minor on set changes) without the express prior consent of Producer. Director acknowledges the importance of timely and economic delivery of a first class production and agrees such delivery is of the essence of this agreement and will use his best efforts to accomplish same.

#### **COMPENSATION**

4. In consideration of Director's services, Director shall be entitled to receive a fee of \$yyyyy subject to the provisions of paragraphs 11 and 12, payable to Agent in trust for Director as follows:
  - (a) \$xxxx upon commencement of official pre-production ;
  - (b) \$xxxx in 5 consecutive weekly instalments commencing on completion of the first week of principal photography;
  - (c) \$xxxx upon completion of Director's Cut.

***This schedule and the lack of "buy out" does not reflect guild agreements (which this is not) and may not make sense with your cash flow. if the director is closely tied to the project, he or she may have to postpone some of the payments to accommodate cash flow.***

5. Director shall be entitled to receive contingent compensation of five (5%) of Producer's Adjusted Gross Receipts (as defined below) in excess of Breakeven (as defined below).

"Breakeven" means the point at which Producers Adjusted Gross Receipts exceeds \$3 million.

"Producers Adjusted Gross Receipts" means all proceeds derived from exploitation of the Picture in any and all media worldwide, less foreign agent's commissions and expenses, distributor's direct distribution fees and distribution

costs, contingent amounts payable to talent such as ACTRA royalties, music use fees and bonuses such as director's theatrical performance bonus above.

Director's participation herein is no less favourable than that of any of the producers and the definitions of "Breakeven" and "Producers Adjusted Gross Receipts" shall be no less favourable than the definitions used to calculate the participation(s) of any other person or entity rendering services in connection with the Picture.

***This is one of many possible profit participation provisions . There may be other bonuses such as for completing the production without spending the contingency or most of it, performance bonuses based on revenues or box office grosses, etc.***

6. The compensation payable pursuant hereto includes payment for all services in relation to the Picture and shall include a buy out of all rights and interests in and to the Picture including copyright. Producer shall have the right to exploit any or all of the rights and interests in any manner in order that Producer may exploit the Picture and all allied and ancillary rights in all media throughout the world in perpetuity. Director hereby waives any moral rights he may have in or to his services hereunder or the proceeds thereof. Director hereby acknowledges that the consideration expressed to be payable to Director includes all equitable consideration for those rights described above.
7. Director shall have mutual approval with Producer on the engagement of all key creative personnel including the DOP, 1<sup>st</sup> AD, Production Designer, Editor, and Music Composer, subject to the budget parameters and distributor or broadcaster requirements.

***You may have an override provision in the event you cannot agree such as "the Producer's determination is final" or the Producer may agree at the outset that he will accommodate one or two people the director insists be part of the team.***

8. Provided Director substantially performs his obligations hereunder he shall receive a "Directed by" single card credit on screen in last position of the main titles, if the main titles are at the beginning of the film or first after the Picture if the main credits are at the end of the film, and no less favourable in terms of size, prominence and duration than that of any other individual accorded credit on screen, and in paid ads in the credit block, excepting only a) group or list advertising ie. where more than one production is advertised or listed and where no other director is mentioned; b) congratulatory or award advertising relating only to the lauded individual; c) trailer or teaser advertising where no cast member is mentioned.

The size of the credit will be no less than 75% of the on screen title, 25% of the title in the credit block and 15% of artwork title.

***This is more detailed than many credit provisions and usually is the type negotiated with an agent for an established director. The artwork title is the big name splashed across the poster. The title in the credit block is small and usually about the same size as the list of credits in the block.***

Producer will advise all licensees or assignees of the above-noted credit

obligations and contractually require such licensees to abide by the credit requirements. No casual or inadvertent failure of Producer to comply and no failure of a licensee or assignee which has been duly advised of such credit obligations, to comply with such credit obligations shall be deemed a breach of this agreement.

9. Producer shall have the right to use Director's name, approved likeness and approved biography in connection with the promotion of the Picture.
  - (i) Biography: Director shall supply Producer with an approved biography for use by Producer in connection with the advertising, promotion and exploitation of the Picture. If Director does not provide a biography, and if Producer creates one, such biography will be deemed approved if not disapproved within five (5) business days of Director's receipt thereof, provided that the approval period may be reduced to 48 hours if production or distribution exigencies so require.
  - (ii) Promotional Appearances: Director agrees to make a reasonable number of promotional appearances and to perform reasonable publicity services in connection with the theatrical distribution and exploitation of the Picture, subject to Director's professional availability, and which shall be planned and implemented with the full involvement of Director's publicist, and subject to payment of reasonable transportation and living expenses.

***With a non-low budget production, if the director is from out of town, there are extensive travel and living provisions and perqs which take up most of the negotiating time. They have not been included here.***

10. Director warrants that any material prepared or submitted by Director hereunder or otherwise in connection with the Picture shall be wholly original with Director and shall not be copied in whole or in part from any other work except that submitted to Director by Producer as a basis therefore. Director further warrants that, to the best of his knowledge, said material will not violate the right of privacy nor constitute a libel or slander against or violate the copyright or other rights of any person, firm or corporation. Director hereby indemnifies Producer from and against all damages, loss or costs suffered or incurred by reason of the breach of any of the foregoing warranties. Producer indemnifies Director as to any and all claims brought by third parties with respect to the Picture or any elements thereof, except to the extent Director is required hereunder to indemnify Producer.

***This is a standard provision regarding director's contributions.***

#### Suspension, Termination and Default

11. Producer may suspend and extend or terminate this agreement upon written notice in case during production, Director is unable to render his services to the Picture, other than as a result of Director's material default (as defined below), for seven (7) consecutive days or fourteen (14) days in the aggregate, or in the event production of the Picture is prevented or interrupted because of force majeure events (i.e. any labour dispute other than one under a guild or union of which Director is a member, fire, war, governmental action or any other

unexpected or disruptive event sufficient to excuse performance of this agreement as a matter of law), or the death, illness or incapacity of any principal member of the cast. In the event of any such suspension, Producer may extend the term or dates herein for an equivalent period. If any suspension shall occur for force majeure, Director may render services for others during the continuance of such suspension, subject to immediate recall except where such recall would conflict with prior commitments of which Producer is notified, on the termination of such suspension. Except in case of Director's default, upon termination Director shall be entitled to immediately receive the fees payable pursuant to paragraph 4 above pro-rated for the term of his actual engagement, and the parties shall have no further obligations to one another. In the event of a suspension or termination for force majeure, Producer shall not be entitled to terminate or suspend Director if all other relevant parties are not also suspended or terminated. If force majeure conditions delay production for more than 30 days, Director shall be entitled to terminate this agreement and the parties shall have no further obligations to one another. If the Production is recommenced within one (1) year of the suspension or termination for force majeure, subject to Director's availability, Director shall have the right to be reinstated.

***There are a variety of termination and suspension possibilities. This is just one example.***

"Director's default" shall mean, if Director fails, refuses or neglects other than because of incapacity as above, to perform Director's services hereunder, which failure, refusal or neglect is not cured within 48 hours of written notice thereof, or if the Picture is in jeopardy of not being shot on time or on budget, Producer shall have the right to terminate this agreement and Director's services hereunder at its option by giving Director one business day's notice. In the event of such termination, Producer shall be released from all further obligations to Director and the compensation which has accrued to and been earned by Director shall be payment in full to Director.

***It is useful to determine on what basis you may be able to terminate the director. Termination is a serious and generally costly event because you can't just drop someone in to start the next day. It may not be the director's fault that the picture is over budget so you may want to outline in what way the picture may be over budget or behind schedule.***

12. Notwithstanding any other provisions of this agreement, Producer upon demand of the Completion Guarantor may:
  - (a) Terminate this Agreement by giving Director written notice, but Director shall have the right to be paid and retain all compensation as has been paid to him at the time of termination unless Director is in material default hereunder.
  - (b) Suspend the operation of this Agreement during a period of disability or non-performance and during such period of suspension no compensation shall be paid to Director;

(c) During either of the events set out in (a) or (b) Producer may hire the services of another Director for the duration of the disability or for completion of the Picture, in which event the determination of Director credits shall be decided solely by applicable guild or arbitration procedures.

(d) It is agreed that any failure to adhere to the schedule and budget plus 10% shall constitute cause for producer or guarantor to exercise their right of termination or suspension. In the event producer or guarantor exercise such rights, Director agrees that he/she will cooperate in every way possible with such action and will not make public or guild complaint or interference, legal or otherwise, therewith.

***This provision is inserted as a requirement of the completion guarantor and may be preferable to the one above. The completion guarantor does not allow contracts that do not allow a party to be terminated for cause. Even pay or play contracts can be terminated for cause.***

13. Producer may secure life, health, accident, cast or other insurance covering Director, or Director and others, and Director will have no right, title or interest in or to such insurance. Director will timely submit to usual and customary medical examinations for Producer's insurance purposes (including without limitation self-insurance and essential elements insurance), and will sign such insurance applications or other related documents as may be reasonably required by Producer. Director may have Director's own physician present at any such examination at Director's own expense. In the event any such examination establishes a substantial doubt as to Director's physical ability to complete Director's services hereunder, or in the event cast insurance covering Director cannot be obtained for normal premiums and without materials exclusions, Producer may terminate the Agreement with no further obligation to Director; provided, however, that if insurance covering Director can be obtained without material exclusions by paying an above premium or deductible, Director shall have the option of paying the excess premium and/or deductible.

***The director is one of the key individuals insured under your production insurance.***

14. Director warrants he is a permanent resident/ citizen of Canada as that term is defined in the Immigration Act and resident of Province of X on December 31, 2001. Director agrees to provide any additional documentation that Producer requires to satisfy the conditions for the federal and provincial tax credits.

**This is the tax credit provision.**

15. Producer will add Director to Producer's errors & omissions liability policy and employer's liability policy, if any.

**This doesn't cost you anything extra so you can agree to it.**

16. Director will be provided with a VHS and a DVD copy of the production when they become commercially available.

17. Producer shall have the right to assign or license to any third party any or all of Producer's rights hereunder provided that no such assignment shall relieve Producer of its obligations.
18. This agreement shall be construed and interpreted in accordance with the laws of the Province of X and the laws of Canada applicable therein. The parties agree to submit to the jurisdiction of any courts of competent jurisdiction within the province.
- 19 Director warrants that he is not a member of a directors guild or union and will not become one during production.

***As mentioned earlier, this contemplates the director is non-union.***

20                    Agreement: This instrument cannot be modified except by a written instrument signed by Director and an authorized officer of Producer. No officer, employee or representative of Producer has any authority to make any representation or promise in connection with this agreement or the subject matter hereof which is not contained herein, and Director agrees that he has not executed this agreement in reliance upon any such representation or promise.

21                    Headings: The headings of the paragraphs hereof and any underlining are inserted only for the purpose of convenient reference; such headings shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning or intent of the provisions of this agreement or any part or portion thereof; nor shall they otherwise be given any legal effect.

22                    Enurement This agreement shall be binding on and enure to the benefit of the parties, their respective successors, licensees and assigns.

23                    No Injunction: The rights and remedies of Director in the event of any breach of this agreement shall be limited to his rights, if any, to recover money damages in an action at law, and in no event shall he be entitled, by reason of any such breach to terminate this agreement, and he shall not be entitled, and he hereby waives the right in such event, to equitable or injunctive relief, or to enjoin, restrain or interfere with the distribution or exhibition of the Picture.

24                    Partial Invalidity: If any term or provision of this agreement or the application thereof to any person or circumstances shall, to any extent, be invalid and unenforceable, the remainder of this agreement or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this agreement shall be valid and be enforceable to the fullest extent permitted by law. If any compensation shall be reduced while such limitation is in effect to the amount which is so permitted, then payment of such reduced compensation shall be deemed to constitute full performance by Producer of Producer's obligations hereunder with respect thereto. Producer shall promptly remit the balance once limitation is lifted.

25 Neither party shall disclose any terms of this agreement except as they may be contractually or statutorily bound to do except to business representatives in ordinary course of business.

If the terms set out herein are agreeable to you, please sign and return one copy to the undersigned.

Yours truly,

BIG TIME PRODUCTIONS LTD.

By:

\_\_\_\_\_

Agreed and accepted this \_\_\_\_ day of \_\_\_\_\_ 200\_\_

\_\_\_\_\_

PROMISED LAND

## **INSURANCE COVERAGE OVERVIEW**

### **Production Insurance Packages:**

A Production Insurance Package (commonly referred to as an Entertainment Insurance Package) is designed to insure your property or the property of others that is under your care.

Whether you choose to insure your projects individually or on an annual basis the essential coverage elements will remain the same. We generally find that producers of Commercials, Training Films, Animated Films, Corporate or Music Videos prefer an annual blanket policy to reduce the premium cost and administration involved in arranging coverage for specific projects. Further, it minimizes the possibility that through an oversight the necessary coverages may not be arranged.

Briefly, the coverages provided by a Production Insurance Package are:

### **Cast Insurance:**

Under the Cast section of the policy you are required to specify the individuals that are to be insured. In the event that a Cast member is prevented from appearing or performing due to death, injury or sickness the policy will pay your loss for interruption in production or the cost for additional filming days.

Insured Cast members must undergo a short medical examination by a physician recognized by the Insurer. In certain cases coverage limitations may be imposed by the Insurance Company for pre-existing health conditions. Special consideration needs to be given when using children, elderly people or individuals with physical disabilities.

If your key Cast member is an animal, similar coverage can be arranged for Animal Mortality. All animals must be handled by qualified Wranglers and have valid Veterinarian Certificates.

### **Negative Film and Videotape (with Faulty Stock, Camera & Processing extension):**

This section of the policy is intended to pay any additional production costs you incur to complete your production following damage to negative film, videotape, raw film or tape stock, cels & artwork / drawings, computer software and related material used for generating computer images.

The Faulty Stock, Camera and Processing extension covers loss caused by:

- Ⓡ Fogging, use of faulty materials;

*Prepared by Creighton + Company Entertainment Insurance Services*  
[www.creighton-ins.com](http://www.creighton-ins.com)

Ⓡ Faulty cameras, videotape recordings or developing, editing or processing;

Ⓡ Faulty sound equipment or sound tracks;

### **Professional Film & Video Equipment:**

Your owned or rented equipment used in connection with your production is insured under this section of the policy. It is important to ensure that the policy provides a "Replacement Cost" valuation clause for both owned and rented equipment and that it will respond to any contractual obligations you may have with your rental company or the owner of the equipment.

### **Props, Sets & Wardrobes:**

The policy will pay you for loss or damage to Props, Sets, Scenery, Wardrobe, Costumes and other similar property which is owned by you or for which you are responsible.

Your policy may limit the maximum payable for antiques, art, furs, jewellery, precious or semi-precious stones or metals; therefore, additional limits may be required.

### **Property Damage Liability:**

When using real property owned by others which under your care, custody or control, such as studios or stages, private residences or commercial buildings, liability can be imposed by law or contract for property damage caused by you or your crew while in production.

*It is very important to know that "General Liability" policies exclude damage to property which is under your care, custody or control -- making Property Damage Liability crucial when you are assuming control or responsibility for any building, structure or facility.*

### **Office Equipment:**

Your owned or rented office equipment used in connection with your production offices is insured under this section of the policy. It is important to ensure that the policy provides a "Replacement Cost" valuation clause for both owned and rented equipment and that it will respond to any contractual obligations you may have with your rental company or the owner of the equipment.

### **Extra Expense:**

This section of the policy will pay additional costs you incur to complete your

production as a result of facilities or equipment being damaged through a cause insured by your policy, or theft of equipment being used in connection with your production.

### **Picture & Production Vehicles (Physical Damage):**

When using automobiles or trucks in connection with your production this coverage will pay for loss or damage to the vehicles while under your care. Generally, automobile rental companies will provide an option to purchase physical damage coverage directly from their company. As a means of cost control it is advisable to waive their coverage and arrange for the protection under your Production Insurance Package.

### **General Liability:**

The General Liability portion of your Program will respond to legal actions brought by third parties as a result of Bodily Injury or Property Damage caused by you during the course of filming.

When considering a Limit of Insurance you should confirm that your policy will pay Defense Costs, Legal Fees and other claims costs in addition to the Limit of Insurance. Some policies will include these Costs which can ultimately erode the amount available to pay a judgment or settlement. Also, consider the Currency of your Limit -- remember the currency exchange rates can significantly reduce your limit when filming outside of Canada.

In most situations where you are filming on public properties, those owned by Municipalities or government agencies, or obtaining Filming Permits through a local Liaison office, they will require a minimum limit of insurance of \$2,000,000.

Further, they may require that their interest be noted as an Additional Insured to ensure that any claim expenses incurred by them are paid under your policy.

Your General Liability policy should include the following extensions;

- Ⓡ Contractual Liability -- liability assumed by you through a contract;
- Ⓡ Employers' Liability -- coverage for legal actions brought by an employee, not covered by Workers' Compensation, for injuries occurring on set or location;
- Ⓡ Contingent Employers' Liability -- coverage for legal actions brought by an employee for which Workers' Compensation has been arranged, but their claim has been denied by the Workers' Compensation authority or Insurer;
- Ⓡ Employees and Freelancers as Additional Insureds -- will ensure that the actions of these individuals will be covered by your policy and that they will receive protection as an insured person;

Production Staff using their own vehicles, rented trucks or automobiles during the course of production presents a Non-Owned Automobile Liability exposure to your company. Non-Owned Automobile Liability coverage can be incorporated into your General Liability Program to cover third party actions for Bodily Injury or Property Damage claims which have resulted from the use or operation of vehicles not owned by your Company.

A careful review of automobile rental agreements is necessary as rental agencies vary the manner in which they handle Liability Insurance. The rental agency may require a "Primary Automobile Liability" policy. Should this be the case the Non-Owned Automobile coverage discussed in this section will not be sufficient to insure the exposure and a specific Automobile policy will need to be arranged for the rental period.

### **Producers' Liability (Errors & Omissions):**

Many Broadcast & Distribution agreements require that a Producer carry Producers' Liability Insurance.

Firstly, the term "Errors & Omissions" is somewhat of a misnomer. The format of most policies clearly stipulate the type of claims which will be covered by the policy -- these are:

- Ⓡ invasion or infringement of, or interference with, the right of privacy or publicity;
- Ⓡ infringement of copyright or trademark;
- Ⓡ libel, slander, defamation of character;
- Ⓡ plagiarism, piracy or unfair competition result from the unauthorized use of titles, formats, ideas, characters, plots, performances of artists or performers of other material;
- Ⓡ breach of implied contract resulting from the alleged submission, acquisition or use of program, musical or literary material used in the production.

In certain types of productions such as instructional videos, industrial, corporate or technical programs such as medical videos, inadvertent errors or omissions in information can result in claims for bodily injury or property damage being made against the Producer. Recent policy enhancements by some Insurance Companies have now extended coverage to include bodily injury or property damage arising from "errors & omissions" in content and this should be explored when purchasing coverage.

Many Producers' Liability policies are written on a "Claims-made" basis, meaning that the policy will only respond to those claims made while the policy is in force. For this reason, Producers Liability policies are often purchased with

a multi-year policy period (commonly 3 years) to expand the “window” of time in which a claim can be reported.

Alternatively, an “Occurrence” based policy can be purchased which will respond to an incident which occurred during the period of coverage, regardless of when the claim is brought against the Producer or reported to the Insurer.

In terms of limits of insurance, the most common limits required by Broadcasters & Distributors are: \$1,000,000 for each claim, a \$3,000,000 aggregate (the maximum that will be paid for all claims during the policy period) and a \$10,000 deductible. These limits should be viewed as minimums only as most policies include the Defense and Claims Costs within the limit of insurance; therefore, a claim which results in significant litigation or settlement time can quickly erode the amount available to pay a settlement or judgment. Any uninsured amount will remain your responsibility and may result in a major financial liability.

Insurance Companies require that the script, title and various production elements be properly cleared by a lawyer for use prior to the release or broadcast of your Production. Therefore, it is important to seek and employ the services of an Entertainment Lawyer to counsel you prior to completing principal photography.

Among other clearances, your lawyer will ensure that all copyrights and rights have been obtained for story, script and music and that proper releases and title reports are obtained.

The early involvement of a lawyer prior to filming may identify contentious issues or questionable, thereby avoiding costly, but necessary, changes later in production or post-production.

Generally, prior to granting final approval for coverage, Insurers will have their lawyer communicate directly with your lawyer to ensure that they are comfortable with the completed clearances.

### **Employee or Freelance Crew Injury:**

Recently, there have been a number of accidents on locations and sets which have resulted in death or injury to crew members. One of your most valuable assets on a production is your crew; therefore, you should consider arranging insurance for accidental injuries.

Union requirements often mandate that Workers’ Compensation insurance must be purchased for union-members. In Canada, Workers’ Compensation insurance is delivered through Provincial government-managed systems, whereas in the USA, coverage is provided by private Insurers.

When working with non-union crew, you may want to consider purchasing an

Occupational Accidental Death & Dismemberment policy to insure the crew members for death or disability. A variety of Programs are available which offer cost effective ways of providing this coverage.

### **The Fine Print:**

As is the case with all contracts, insurance policies contain terms and conditions which can exclude potential claims or limit the amounts paid by the policy. Although not exhaustive the following list may help bring some of the fine print in focus...

- Ⓡ most Entertainment Packages and General Liability policies provide coverage only while you are filming in Canada or the USA. International coverage should be arranged for productions outside of this territory.;
- Ⓡ Entertainment Packages and General Liability policies do not cover Aircraft, Watercraft or Automobiles used on your production and specific coverage must be arranged;
- Ⓡ When hiring Aircraft or Watercraft you are faced with a "Non-Owned" liability exposure and specific should be arranged;
- Ⓡ all cameras, lenses and related equipment must be tested prior to their use to ensure they are in good working order;
- Ⓡ equipment may not be covered for damage by short-circuit or electrical injury unless followed by a fire, and then coverage may only be available for the damage caused by the fire;
- Ⓡ equipment may not be covered for damage caused by mechanical or structural defect, wear & tear, changes in temperature, rain, sleet, snow or hail; or damage to equipment resulting from intentional acts by you or at your direction;
- Ⓡ all artwork, drawings, software or related material used to generate computer images must be kept until you have a protection print of your negative;
- Ⓡ unprocessed negative can not accumulate for more than a specified period of time (usually 5 shooting days or 7 consecutive days) -- use caution when filming in remote or foreign locations;
- Ⓡ Negative Film & Videotape coverage does not cover library stock, errors in judgment relating to exposure, lighting, sound recording or from the incorrect use of a camera, lens, raw film or tape stock;
- Ⓡ Negative Film may not be covered if accidentally exposed to light;

**The Fine Print (continued):**

- ① under the Cast Section, coverage may be restricted or excluded for:
  - Cast members involved in flying (other than as a passenger), stunts or special effects;
  - claims from allergies or facial herpes;
  - childhood illnesses such as chickenpox, measles, mumps, whooping cough;
  - claims from pregnancy, menstruation or child birth;
- ① Cast medicals must be performed immediately prior to beginning principal photography (usually no more than 21 days);
- ① during pre-production Cast members are covered only for the period stated in your insurance application -- additional coverage can be purchased if you plan to have an extended period of pre-production;
- ① premiums are generally considered to be deposits only and Insurers have the right to request the final production costs or budgets and make additional premium charges should your costs exceed the original estimates.

*in focus is intended to provide general information only and is not intended to override policy terms and conditions which vary among Insurance Companies. It is always recommended that reference be made to the policy wording to determine the extent of coverage*

## Financing Scenario for 1 Hour TV Program

### Production Z - Budget \$500,000

CTF-LFP	\$80,000	License fee top up	Paid partly during production (about 70%), partly after
Telefilm EIP	\$150,000	Equity	Paid over course of production to final audit
Broadcaster 1	\$70,000	License fee	Paid on delivery
Broadcaster 2	\$25,000	License fee	Paid on delivery
Broadcaster 3	\$10,000	License free	Paid on start of window
Provincial Fund	\$50,000	Equity	Paid over course of production to final audit
Private Fund	\$50,000	Equity	Paid over course of production to final audit
Federal Tax credit	\$30,000	Tax credit	Paid 1 to 2 years after production
Provincial Tax credit	\$35,000	Tax credit	Paid 1 to 2 years after production
Total	\$500,000		

From this brief summary we can see that only the equity amounts and half of the LFP will be paid over production. Even the equity investors will hold back percentages until delivery and/or final audit which may range from 5 to 25% of their contributions. A lender can help you bridge some of the chasm by allowing you to draw down against payments which will only otherwise be paid after you need them. Of course, you have to pay the lender a loan fee, their legal costs and interest. Unfortunately on a budget this size it is rarely worthwhile to get a bank loan – the bank’s legal costs and set up fees are not scaled to the size of the production budget which means they will be disproportionately high for a low budget project. Rogers Telefund and/or your own line of credit may be the only lender on a scenario like this

A more detailed example with a slightly largely budget, examined from a banker’s perspective, see the subsequent document.

For more information and description of the preparation of a cash flow statement and banking, please see *Canadian Production Finance: A Producer’s Handbook* section on Financing.

## How a Banker Evaluates a Production Loan

The criteria:

- Experienced Producer
- Fully Financed Budget
- Undoubted Sources of Repayment
- Completion Guarantee

You may qualify for a bank loan on a low budget production but still discover that the costs of the transaction are just too high with regard to the amount of the loan that it does not justify obtaining a loan.

The two risks the bank takes:

- Creditworthiness

Although this is not much of an issue in low budget production since it is difficult to qualify for a loan at all, dealing with a bank that knows the players, particularly where there is any foreign financing sources involved is very valuable.

- Completion and Delivery

The bank takes care of this risk by insisting on a completion guarantee.

*Original notes courtesy of Dan McMullen of HSBC*

### Sample Financing and Cash Flow Scenario C.(f)

DATE	CASH OUT			CASH IN						CASH (LOAN)	AGG INT
	PRODUCTION EXPENSES	INTEREST EXPENSE	TOTAL EXPENSES	CBC License	Telefilm (EIP)	CTF (LFP)	Tax Credits	Prod. Invest.	Total Receipts		
01-janv-02	-	-	-	260 000				127 341	387 341	387 341	-
08-janv-02	-	-	-						-	387 341	-
15-janv-02	100 000	-	100 000						-	287 341	-
22-janv-02	296 000	-	296 000		220 000				220 000	211 341	-
29-janv-02	196 000	-	196 000						-	15 341	-
05-févr-02	396 000	-	396 000	260 000	200 000				460 000	79 341	-
12-févr-02	296 000	-	296 000						-	(216 659)	-
19-févr-02	292 104	250	292 354						-	(509 013)	250
26-févr-02	245 329	587	245 916	70 000	120 000				190 000	(564 930)	837
05-mars-02	186 000	871	186 871	80 000	110 000				190 000	(561 801)	1 708
12-mars-02	91 897	867	92 764		110 000				110 000	(544 565)	2 576
19-mars-02	33 940	755	34 695						-	(579 260)	3 331
26-mars-02	85 292	668	85 960						-	(665 221)	3 999
02-avr-02	186 513	768	187 281	10 000					10 000	(842 501)	4 767
09-avr-02	27 292	984	28 276						-	(870 777)	5 751
16-avr-02	6 958	1 005	7 963						-	(878 740)	6 755
23-avr-02	4 958	1 014	5 972						-	(884 712)	7 769
30-avr-02	16 966	1 021	17 987						-	(902 698)	8 790
07-mai-02	-	1 042	1 042						-	(903 740)	9 832
14-mai-02	-	1 043	1 043						-	(904 783)	10 875
21-mai-02	-	1 044	1 044	70 000	55 000				125 000	(780 827)	11 919
28-mai-02	-	1 045	1 045						-	(781 872)	12 964
30-juin-02	-	3 909	3 909						-	(785 781)	16 873
31-juil-02	-	3 929	3 929						-	(789 710)	20 802
31-août-02	-	3 949	3 949						-	(793 659)	24 751
30-sept-02	-	3 968	3 968						-	(797 627)	28 719
31-oct-02	-	3 988	3 988		110 000	375 000			485 000	(316 615)	32 707
30-nov-02	-	4 008	4 008						-	(320 623)	36 715
31-déc-02	-	1 603	1 603						-	(322 226)	38 318
31-janv-03	-	1 611	1 611						-	(323 838)	39 929
28-févr-03	-	1 619	1 619						-	(325 457)	41 548
31-mars-03	-	1 627	1 627						-	(327 084)	43 176
30-avr-03	-	1 635	1 635						-	(328 719)	44 811
31-mai-03	-	1 644	1 644						-	-	46 455
	2 461 249	46 455	2 507 704	750 000	925 000	375 000	330 363	127 341	2 507 704		

PEAK LOAN

LOAN INTEREST

LOAN REPAYMENT