THE CROSS-BORDER CHALLENGE: Navigating American and Canadian Talent Guilds
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Given the geographic proximity between Hollywood North and Hollywood, Canadian producers are often faced with the challenge of navigating multiple guilds and unions on both sides of the border. Often, producers overlook the nuances in dealing with the Screen Actors Guild, for instance, when bringing a U.S.-based performer to Canada, or the Writers' Guild of America when engaging a United States-resident writer in development. To further complicate matters, additional issues may arise in instances where a producer engages "dual-card holders" (i.e. talent who are simultaneously members of both the applicable Canadian and American guild).

As Canadians continue to produce more and more content directly with their American counterparts, these issues become more prominent.

The purpose of this paper is to briefly highlight the issues that producers may face when dealing with multiple guilds and unions in Canada and the United States. While providing an exhaustive list of all the potential guild issues is beyond the scope of this paper, this paper highlights common pitfalls of which producers need to be wary when they engage three different categories of talent: writers, performers and directors. It also bears noting that guild collective agreements are periodically revised, and thus the analysis contained in this paper is necessarily only current to the date of writing.

WRITERS

Jurisdiction

Article 5 of the Writers Guild of America ("**WGA**") Minimum Basic Agreement (the "**WGA MBA**") sets out the geographical application of the WGA MBA. Such Article provides that (A) if the writer lives in the United States, or (B) if the writer is "present" in the United States at the time an acquisition deal is made, or (C) if the writer is a permanent resident of the United States but is temporarily abroad and the deal is made by his/her agent who is in the United States at the time the deal is made, then such deal shall be subject to the WGA MBA. The WGA's Code of Working Rules further states under Working Rule 8 that "No member shall accept employment with, nor option or sell literary material to, any person, firm or corporation who is not signatory to the applicable MBAs".[1]

Article A1 of the Writers Guild of Canada ("**WGC**") Independent Production Agreement (the "**WGC IPA**") simply states that the WGC is the exclusive bargaining agent for all writers, story editors and story consultants on all productions. When speaking of jurisdiction, the WGC IPA does not distinguish between residency of a writer or location of the 'deal' being made, nor does it address a writer's membership with other writers guilds.

> How does a Canadian producer reconcile the two agreements? Can a Canadian producer simply become a signatory to the WGA and hire a WGA writer? Can a Canadian producer hire a dual-card holder and proceed under WGC's jurisdiction – a guild with which they are familiar – without involvement of the WGA?

It is important to note that neither producers nor "dual-card holder" writers can elect whether the engagement will be governed by the WGC or the WGA; rather, the collective bargaining jurisdiction of the guilds is determined pursuant to the Charter (the "**Charter**") of the International Affiliation of Writers Guilds, to which both the WGC and the WGA are signatories. Pursuant to the Charter, the collective bargaining jurisdiction is ascertained according to the principal place of business of the contracting production company (i.e., the producer) as of the date of the writer's agreement. Accordingly, a producer which has its principal place of business in Canada would be subject to, and governed by, the WGC.

When engaging a WGA-member writer (whether a "dual-card holder" or otherwise), the Canadian producer must first become signatory to the WGC by signing the WGC Voluntary Recognition Agreement. The producer must then contact the WGA Canadian Side Letter Coordinator to obtain and sign the WGA side letter agreement (the "**Side Letter**"). The writer must then separately apply to the WGA for the waiver of WGA Working Rule 8 (the "**Waiver**").

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[1] http://www.wga.org/members/membership-information/constitution/working-rules, Working Rule 8

When engaging a dual-card holder who resides in the United States, even if a Canadian citizen, the writer's services would be contracted under a WGC agreement with a Waiver ("**Waiver Agreement**"). Although the WGA's position is that all of its members, regardless of the place of residency of the writer, must obtain a Waiver, the WGA has qualified this requirement by stating that in instances where a dual-card holder truly resides in Canada, does not live in or have a residence in the United States, and has his/her Canadian address registered with the WGA, it is unlikely that the WGA would pursue a Working Rule 8 violation if such writer was engaged under a straight-WGC deal.[2] The WGC's position is that in circumstances involving a dual-card holder residing in Canada, whose Canadian address is registered with the WGA, and has had a deal brokered by a Canadian agent, the WGC governs without the requirement for a Waiver. In exceptional circumstances, however, if such dual-card holder elects to be governed through a Waiver Agreement and the producer agrees, the WGC will generally not object and will not assert jurisdiction.

Implications of a Waiver Agreement

The Side Letter sets out the interplay between the WGC and the WGA, including, without limitation, with respect to fees, fringes, residuals, and separated rights, all of which are discussed briefly below.

Fees

Waiver Agreements essentially provide the writer with the 'best of both worlds' in that the writer will receive the greater of the entitlements and benefits accorded to members under each of the WGC IPA and the WGA MBA, whichever is most beneficial to the writer. Accordingly, this generally entitles the writer to be paid not less than WGA minimums (in United States currency) for story & teleplay (which are usually greater than the WGC script fees), not less than the WGC Production Fee (which usually exceeds the WGA script fee), and not less than WGA residuals (which generally exceed the WGC distribution royalty). While the conditions of the Waiver stipulate that no less than WGA residuals (see "Residuals" below) shall be paid to the writer, the amount by which the WGC Production Fee exceeds the WGA minimum script fee may be applied as an advance against both WGA residuals and the WGA script publication fee.

It is important to note that while the script fees set out in the WGC IPA are determined strictly on the basis of the 'type' of production (e.g., feature film, television movie, mini-series, etc.) without regard for budget,[3] (the budget is only taken into account if the film proceeds to production, as the budget becomes the basis for determining the WGC Production Fee payable to the writer), the WGA MBA determines script fees on the basis of both the specific method of exploitation of the production (e.g., other than network prime time), as well as the budget of such production (e.g., based on the current minimums, high budget is at least $215,000 for 30 minutes of other than network prime time, or at least $100,000 for 30 minutes in the case of non-prime time network films). The WGA additionally regards high budget theatrical productions as feature films with budgets in excess of $5,000,000, and stipulates corresponding script fees which are considerably higher than their low-budget counterparts.

Fringes

As a condition of granting the Waiver, the WGA requires that the producer submit documentation under Article 17 (Pension and Health) of the WGA MBA. In doing so, the producer agrees to pay the WGA fringes (including pension, health and welfare contributions) for the benefit of the writer as such writer would otherwise have received under a straight-WGA agreement (i.e., engagements which do not involve the WGC and no Waiver Agreement is entered into). Article A14 of the WGC IPA acknowledges that in the case of a Waiver Agreement, such 'fringe' benefits paid to the WGA on behalf of the WGA-member writer shall be in lieu of the insurance and retirement contributions to which a writer engaged under a WGC contract would otherwise be entitled. In addition to such WGA contributions, however, the WGC-signatory producer is still obligated to (A) pay the administration

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[2] While jurisdiction in such a scenario may be determined on a case-by-case basis; residency, as determined by location of income tax filings and registered address with the WGA, will generally be taken into consideration, rather than the location in which the writer is rendering writing services.

[3] Budget is a consideration, however, inasmuch as the production budget is less than $60,000, in which case almost all script fees are negotiable between the writer and the producer.

fee due under Article A12 of the WGC IPA, and (B) deduct and remit the WGC dues per Article A1304 of the WGC IPA (2% of gross fees for a WGC member or dual-card holder, 5% if non-member). In the context of a Waiver Agreement, such WGC dues are payable in lieu of WGA dues which would otherwise be owing to the guild by the writer.

Due to the reciprocity between the writers guilds, a WGA member in good standing is automatically eligible to join the WGC, and the initiation fee is waived when joining the WGC for the first time. Some writers will choose to become members to lower their dues on a Waiver Agreement from 5% to 2%. The Charter seems to impute a positive obligation on a WGA member to join the WGC when hired on a Waiver deal,[4] though in practice, the choice is that of the WGA member and neither writers' guild mandates membership.

Showrunning Services

While showrunning services are not governed by the WGC, the WGA MBA regulates showrunning services, executive producing services and the like, as such services are captured under Article 14K: "Writers Also Employed in Additional Capacities (Television)". Accordingly, the WGA MBA stipulates the minimum compensation owing to showrunners on a weekly basis, with the highest rates payable to those employed for a guaranteed term of 9 weeks or less, and such rates gradually decrease for longer guaranteed terms of employment. In instances where the negotiated fee payable to such WGA-member showrunner is in excess of the WGA weekly minimums, producers may allocate from such total fee the minimum rate towards the requirement under Article 14K, and would only be required to pay fringes on the minimum amount, rather than on the overscale fees. The Side Letter stipulates, however, that if a writer is also engaged as a story editor, than fringes are payable on the entire weekly compensation, even if such compensation exceeds the WGA minimums.

Separated Rights

Under the WGC regime, the writer retains copyright in and to the script material. In this context, payment of the script fee accords the producer an exclusive and perpetual license to produce a single production based on the script material. Payment of the WGC Production Fee[5] additionally entitles the producer to exploit such production based on the script material, subject to payment of continuing Distribution Royalties.[6]

Under the WGA regime, the producer acquires copyright in the script material, subject to "separated rights" that are retained by of writers of "original material" (not based on a book or other underlying source material). In the case of an episodic series, writers who are accorded a "Created by" credit (the determination of such credit is subject to criteria outlined in the WGA MBA), are entitled to "separated rights". If a writer is entitled to "separated rights", the writer retains the following "reserved rights": Dramatic Stage Rights, Theatrical Rights (i.e. Motion picture), Publication Rights (of the script, or a book based on the material), Merchandising Rights, Radio Rights, Live Television Rights, Interactive Rights, and all other rights. While the writer reserves these rights for himself/herself, the producer may negotiate with the writer to acquire some or all of the reserved rights, in compliance with the WGA minimums for certain reserved rights at the time that the producer wishes to exploit such rights (e.g., in the case of merchandising rights, the producer shall pay no less than 6% of absolute gross, as derived from licensing and merchandizing rights). However, despite obtaining the rights, if the producer does not exploit any of these rights within 4 years from the delivery of the literary material, or 3 years from the exhibition of the original project, those rights revert to the writer, subject to the producer's limited right of first negotiation.

Due to the fact that a Waiver Agreement is ultimately governed by WGC jurisdiction, the producer in such case obtains an exclusive license to the script material, and the writer retains copyright. Whereas under a straight-WGC agreement (i.e., engagements which do not involve the WGA and no Waiver Agreement is entered into),

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[4] Article III.E. of the Charter states "a member of any Member Guild working in the exclusive collective bargaining jurisdiction of one of the other Member Guilds shall join that Guild, pay basic and other dues as required and be subject to the rules and regulations of that Guild. The writer may continue as a member of his or her original guild"

[5] WGC IPA – Article C10

[6] WGC IPA – Article C11

many of the rights protected under the WGA banner of "separated rights"[7] may be acquired for even the sum of one dollar, that is not the case in the context of a Waiver Agreement. Pursuant to the Side Letter, separated rights are upheld and accorded to individuals who would otherwise be entitled to separated rights under the WGA MBA.

In straight-WGA agreements, the producer has the option of essentially buying out the WGA writer's reserved rights at the outset, by paying such writer an initial compensation in an amount equal to, or in excess of, the "upset price". The upset price is an amount of money significantly in excess of the WGA minimums, and in paying such amount, the producer and the writer may negotiate freely for the producer to acquire all or some of the reserved rights outright. This must be done, however, in a separate negotiation, separate agreement and for separate consideration than the initial script fee. While the Side Letter is not entirely clear on the topic, the WGA has confirmed that Waiver Agreements do not recognize the concept of the "upset price" and reserved rights cannot be pre-negotiated or acquired.

In addition, if the writer receives the "Created By" credit (typically, if the WGA writer wrote the pilot), the WGA writer is additionally entitled to an episodic royalty on each episode produced (other than the pilot episode), regardless of whether he/she is the writer of such subsequent episode.

Residuals

Broadly speaking, both the WGC and the WGA acknowledge that payment of the script fee (and in the case of the WGC, payment of the Production Fee as well) entitles the producer to a limited use of a writer's material. Further, both guilds recognize the concept of 'residuals' (known as a "Distribution Royalty" under the WGC IPA), as compensation paid for the *reuse* of a credited-writer's work beyond such initial 'covered' use.

Pursuant to the Side Letter, WGA residuals are due on Waiver Agreements. WGA residuals are determined on the basis of the market for which the material was originally written (e.g., the "Declared Use"), and are calculated in one of two ways, depending on such Declared Use: (1) Revenue Based (e.g., made-for-theatrical productions) – as a percentage of the producer's receipts; or (2) Fixed/Run-Based (e.g., for projects made for basic cable or made for "other than network prime time") – as a set amount due for each exhibition on television.[8]

By way of example, the WGA considers Canadian Free TV to be "Other Than Network Prime Time" and the residuals are typically determined based on the number of times the production is broadcast (i.e., based on a "run-based" formula known as the "Sanchez Formula"), with the first run being free, 50% of the applicable minimum script fee owing for the second run, and a decreasing percentage owing for each run thereafter.

For projects made for basic cable, residuals are generally calculated as a fixed/run-based formula pursuant to the Sanchez Formula noted above, which is the default formula. In some instances, however, the producer and the contracted writer may agree in the original writer agreement to a different "fixed" residual formula known as the "Hitchcock Formula". Under the Hitchcock Formula, upon payment of a certain residual amount,[9] the producer is entitled to 12 basic cable runs over the course of a 5 year period. If the program is exploited beyond such 12 runs and/or beyond the 5 year period, then an additional residual payment of 2% of the producer's receipts is due.[10] This formula is rarely used because there are typically more than 12 runs and the additional fees are cost prohibitive.

Due to the fact that a run-based residual formula is unconventional in the Canadian market (see the "Final Thoughts" section of this paper), the WGA generally considers waiver requests from Canadian producers who wish to pay residuals based on different formulae than those set out in the WGA MBA. When requesting such a waiver, the producer must submit a letter that states the residuals are cost prohibitive, the name of broadcaster, the amount of the license fee, the number of runs, and any other pertinent details of the license agreement. The waiver committee meets once a month to consider requests. In instances where there is an American broadcaster

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7 See WGC IPA – A714

8 WGA Residuals Survival Guide: http://www.wga.org/members/finances/residuals/residuals-survival-guide

9 Currently, the residual payment for dramatic programs is 120% of the difference between the applicable Network Prime Time minimum and the Other than Network Prime Time minimum, and for all other productions the residual payment is 84% of the applicable minimum.

10 WGA MBA 2014, Appendix C, Paragraph 2.b.

as well as a Canadian free television broadcaster, for example, the WGA waiver committee will typically approve a waiver of the run-based residual formula, and will permit the producer to provide a one-time payment of 4% of the Canadian free television license fee, as a 'buy-out' of Canadian free television exhibitions. Other one-time payments (in varying percentages) are also frequently approved for cable/specialty uses and for combined licenses.

PERFORMERS

Jurisdiction

As of May, 2002, the Screen Actors Guild ("**SAG**") – the predecessor of SAG-AFTRA (as defined below) – expanded its protections globally by implementing a membership rule that currently reads as follows: "No member shall render any services or make an agreement to perform services for any employer who has not executed a basic minimum agreement with the Union, which is in full force and effect, in any jurisdiction in which there is a SAG-AFTRA national collective bargaining agreement in place. This provision applies worldwide."[11] The purpose of this rule, known as "**Global Rule One**", is to ensure that regardless of where services are rendered, a United States-resident SAG member will be governed and protected by the rules of the relevant SAG collective agreement. Following the merger with the American Federation of Television and Radio Artists ("**AFTRA**" and collectively with SAG, "**SAG-AFTRA**"), Global Rule One remains in place and is ardently enforced by the guild. SAG-AFTRA exempts from Global Rule One its members who are foreign nationals and who do not reside in the United States; however, most marquee performers who are Canadian citizens reside – even if on a part-time basis – in the United States, and are therefore subject Global Rule One.

On the other hand, Article A1 of the Alliance of Canadian Cinema, Television and Radio Artists ("**ACTRA**") Independent Production Agreement ("**ACTRA IPA**") stipulates that ACTRA has exclusive jurisdiction over all productions in Canada,[12] and that the minimum rates and working conditions apply to performers engaged on productions in Canada or on location outside Canada.

Consider the common scenario in which a feature film is being produced in Canada. The Canadian producer would presumably be signatory to the ACTRA IPA (or the British Columbia equivalent, the UBCP Agreement) and would be bound by the terms and conditions of such collective agreement. If the producer wishes to engage a United States-resident SAG-AFTRA member on this production, Global Rule One mandates that such performer only accept the engagement if the producer becomes signatory to, and be bound by, the SAG-AFTRA agreement. If the producer does not agree, the performer cannot accept the engagement or will be in violation of Global Rule One. If the producer does agree, other issues arise, as ACTRA has jurisdiction over all performers (presumably even SAG-AFTRA members) on such production.

How does the producer reconcile the competing jurisdiction of the guilds?

When a Canadian producer wishes to engage a US-resident SAG-AFTRA member on a production being filmed in Canada, the producer must complete and remit a SAG-AFTRA preliminary information sheet, which identifies, among other things, the filming location for the production. Once submitted, the project will be assigned to a SAG-AFTRA representative who will provide the producer with the Global Rule One signatory package, which includes a cast list and a Global Rule One Memorandum Agreement (the "**GR1 Memorandum**"). The GR1 Memorandum mandates that any producer signing such instrument must be or become a signatory to ACTRA, and further, the GR1 Memorandum acknowledges that due to the fact that principal photography of the production is taking place in Canada, the production will be subject to the jurisdiction of ACTRA. Notwithstanding the jurisdiction of ACTRA, pursuant to the GR1 Memorandum, the terms and conditions of the SAG-AFTRA Agreement (including, without limitation, work rules, residual payments, fringe benefits) will apply to SAG-AFTRA member performers engaged on the production.

While it is not memorialized in any instrument (including in the GR1 Memorandum), in practice, SAG-AFTRA does not require the GR1 Memorandum signatory producer to submit all of the items which would otherwise be due by

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[11] SAG-AFTRA Membership Rules – Rule 1: https://www.sagaftra.org/files/2015_0110_sag-aftra_membership_rules.pdf

[12] A101 of the ACTRA IPA explicitly carves out French-language productions from the scope of ACTRA's jurisdiction.

an American-based SAG-AFTRA signatory, as set out in the Theatrical/Television Production Checklist.[13] While an American SAG-AFTRA signatory is generally required to post a residual reserve and to provide other financial assurances for a project, in the context of Canadian productions, SAG-AFTRA has typically relied on the security taken by ACTRA without requiring the producer to make any further payments. Despite this common practice, due to the lack of codification, there is a risk to Canadian producers that such practice could change in the future. In recent years, for instance, SAG-AFTRA has not afforded the same leniency to service productions produced in Canada, where copyright is owned by, and funding is ultimately provided by, an American producing partner. In such instances, SAG-AFTRA has required that the producer provide all or most items set out in the Theatrical/Television Production Checklist (including, without limitation, posting a residual reserve and/or paying a security deposit). It is important to note that complications and issues may arise on a GR1 Memorandum-production if any services (e.g., second unit days, even ADR services in some cases) are to be rendered in the United States by SAG-AFTRA performers, which issues should be canvassed with the guild at the outset.[14]

There are distinctions to be mindful of when engaging a SAG-AFTRA member versus an ACTRA member, some of which are briefly discussed below.

Implications of a hiring a SAG-AFTRA Member on a Canadian Production

Fees

While the daily and weekly fees payable under SAG-AFTRA are only marginally higher than the fees payable under ACTRA, one of the most material differences between the guilds is the ability under ACTRA to credit overscale payments. Under ACTRA, A401 of the ACTRA IPA allows above-scale fees to be applied against additional or supplementary fees, including, without limitation, overtime payments, residuals, and penalty provisions. In contrast, the SAG-AFTRA agreement stipulates an outright prohibition against crediting overscale payments against overtime, penalties or any other compensation otherwise due to the performer.[15]

Under the SAG-AFTRA regime, concepts of “money breaks” and “schedule breaks” exist whereby the more money that a producer pays to a performer, above a certain threshold or “break” point, the more entitlements the producer has. For instance, based on the current SAG-AFTRA Agreement, a “day player” (Schedule A) is entitled to overtime payments after 8 hours, a weekly player (Schedule C) is entitled to overtime payments after 10 hours, while a theatrical contract performer earning a guaranteed salary of not less than $65,000 (Schedule F) is not entitled to overtime payments at all. It is also important to note that there is a distinction between theatrical and television productions in that while a television performer is technically engaged under a Schedule F contract if he/she has a guaranteed salary of $32,000 per episode, such Schedule F performer is nevertheless entitled to overtime payments after 10 hours, as the television overtime money break is $40,000 per episode (after which threshold, overtime is deemed to be included in the fee).

Producers should also be mindful of the different provisions concerning pilot/series options as contained in the SAG-AFTRA agreement versus the ACTRA IPA. While the SAG-AFTRA agreement does not stipulate minimum cumulative increases for each successive year for which an option is exercised, as is provided under the ACTRA IPA,[16] the SAG-AFTRA agreement is far more restrictive in the exclusivity provisions and the method and timing of exercising such option(s), as compared to its Canadian counterpart.

Residuals

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13 A sample of such checklist may be found here: https://www.sagaftra.org/production-checklist-theatrical-television-5

14 SAG-AFTRA generally issues a side letter agreement to continue the jurisdiction of the GR1 Memorandum to the United States and to allow for their member performers to render second unit services in the U.S. In recent years, however, and in the context of service productions, specifically, the guild has recently demonstrated an inconsistent approach in permitting the side letter to govern in lieu of requiring the producer to become full signatory to the SAG-AFTRA basic agreement.

15 SAG-AFTRA Basic Agreement - Section 20

16 E.g., Currently 115% of the previous year’s contracted fee per A2901(c) of the ACTRA IPA

Both ACTRA and SAG-AFTRA acknowledge and agree that payment of the initial/minimum compensation entitles the producer to exploit the production in a 'Declared Use'; and that for any exploitation in a supplemental market or beyond the Declared Use period,[17] the performer is entitled to additional 'residual' payments.

While the ACTRA IPA does permit a producer to pay residuals for discrete and specific uses, calculated on a per-use basis,[18] given the cost-prohibitive nature of such residual payments, producers generally opt to pay for supplemental uses in the form of a "Use" payment system, which entitles the producer to broader and unrestricted uses. ACTRA "Use Fees" are calculated as a percentage of distributors' gross revenue ("**DGR**") and are payable both at the time of contracting the performer and on a continuous basis as the production is exploited beyond its Declared Use.

If the producer elects to pay Use Fees (as opposed to Residual Payments), such producer has the option to pay to the performer, at the time of contracting, either (A) a prepayment of Use Fees (the "**Prepayment Option**") or (B) an advance against Use Fees (the "**Advance Option**").

The Prepayment Option entitles a producer to exploit a production in certain markets throughout the world on an unlimited basis, for a period of 4 years (the "**Buy-Out Period**"). If the producer elects the prepayment Option, the performer is entitled to 3.6% of DGR, but that entitlement only applies to DGR attributable to exploitation after such Buy-Out Period.

The Advance Option, which is equal to a percentage of "Net Fees"[19] earned by the performer (an "**Advance**"), also entitles a producer to exploit a production in certain markets on an unlimited basis, but there is no Buy-Out Period. The performer's share of DGR is determined by the corresponding Advance option selected by the producer. Each Advance is a non-refundable advance against the performer's entitlement to participate in DGR.

While the actual prepayment amount may differ depending on whether the production is theatrical or television, under the ACTRA IPA the residual/Use fee mechanism is applied in the same way, regardless of the type of production.

Under the SAG-AFTRA regime, there are different residual formulae depending on the Declared Use of the production and the supplemental market of exploitation. Each Declared Use corresponds to a specific SAG-AFTRA agreement which outlines the parameters of exploitation in supplemental markets. For instance, whereas theatrical productions entitle performers to a percentage of DGR, depending on the applicable supplemental market being exploited, made-for-television productions are generally payable on the basis of the number of broadcast runs or the duration of the exhibition window. While the details of the residual calculations are beyond the scope of this paper, it would be prudent for any producer engaging a SAG-AFTRA member to become familiar with the specifics of the applicable residual mechanism.

It is important to note that SAG-AFTRA does not allow for a Prepayment Option or an Advance Option, unlike under the ACTRA IPA. The ability to prepay residuals is permitted only on a very limited basis and only in the context of some television productions (and to note, it is *not* permitted for theatrical productions at all), provided that the performer's salary exceeds an enumerated threshold and provided further that such prepayment is only for residuals owing on account of reruns or foreign telecasts (i.e., not as a prepayment towards any DGR entitlement). Any permitted amounts advanced on account of residuals must be explicitly and separately listed on the performer agreement.

Much like the WGA, given the fact that the per-run residual formula is not common in Canada, SAG-AFTRA provides some leniency for Canadian producers and for a basic cable production no residuals are due for the "first sale" of the production in Canada.[20] Such first sale is limited to the first license agreement with a "Canadian

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17 ACTRA IPA, Article B3

18 ACTRA IPA, Article B4

19 Net Fees are defined in A427 of the ACTRA IPA

20 SAG-AFTRA Basic Cable (Live Action) Agreement, Paragraph 5

broadcast service",[21] provided that such license agreement shall not exceed 5 years without approval from SAG-AFTRA.

Work Rules

Pursuant to the GR1 Memorandum, SAG-AFTRA work rules apply to SAG-AFTRA members engaged on the Canadian production. It is important to remember; however, that the SAG-AFTRA work rules apply only insomuch as they are more beneficial to the performer than those provided under the ACTRA IPA. The 2 most common areas of difference relate to SAG-AFTRA "turnaround time" and to SAG-AFTRA minors engaged.

Turnaround Time

While there are some exceptions in the context of overnight locations, and locations outside of a studio zone,[22] broadly speaking, SAG-AFTRA mandates a 12-hour rest period for its performers, versus ACTRA's 11-hour turnaround time. This one hour difference is compounded by the fact that SAG-AFTRA generally calculates its rest periods from "portal-to-portal" (i.e., not including travel time to and from set); whereas ACTRA, conversely, calculates rest periods from "set-to-set" (i.e., from dismissal until next call). This distinction can prove to be challenging when a producer has different schedules for some performers than for others.

Minors

While both performers' guilds regulate issues pertaining to minor performers (i.e., individuals under the age of 18)[23] such as work hours, education, and trust accounts, SAG-AFTRA generally stipulates stricter obligations owing to minors than the provisions set out in the ACTRA IPA. Although SAG-AFTRA sets outs various terms and conditions of a minor's engagement on a production (most of which are to comply with the California Labor Code specifically), the SAG-AFTRA Agreement gives deference to any applicable child labour law or regulation in the event of inconsistency, to the extent that such law/regulation is more restrictive than that set out in the collective agreement. The SAG-AFTRA agreement additionally imputes an obligation on a producer to notify the guild of any engagement of a minor outside of California.

The laws of multiple jurisdictions must be carefully considered when engaging a U.S.-resident minor performer, including such minor's capacity to enter into a legally binding relationship in the first instance, which could have severe consequences for a producer. While a thorough discussion of jurisdictional considerations for engagement of a minor is beyond the scope of this paper,[24] state of residency of such performer is one determinative factor of which Canadian producers should be especially mindful.

In the states of California, New York, Louisiana and New Mexico, specifically, a mandated portion of a minor's gross wages must be remitted to a "Coogan Account" (i.e. trust accounts which are blocked from the performer until he/she attains the age of majority). The ACTRA IPA has a similar provision requiring a producer to remit 25% of a minor performer's gross remuneration[25] to the ACTRA Performers' Rights Society to be held in trust until the performer reaches the age of majority. It is important to note that under the ACTRA IPA, such obligation is not dependent on whether the minor performer is an ACTRA guild member. In order to reconcile the overlapping requirements, it is prudent for the producer to have open communication with the guilds regarding engagement of the minor and obligations owing in connection therewith.

DIRECTORS

Whereas the American performers' and writers' guilds tend to have reciprocity with their Canadian counterparts, the North American directors' guilds do not have a similar 'hybrid' arrangement when producing on Canadian soil.

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21 The SAG-AFTRA Basic Cable (Live Action) Agreement defines a 'Canadian broadcast service' to include free television, pay television, or basic cable service

22 For more information on the exceptions, see the "Rest Period" section of the relevant Schedule in the SAG Basic Agreement

23 The definition of "minor" is subject to enumerated exceptions under the SAG-AFTRA Agreement – Section 50.C.

24 For more information on engagement of minors, see: Bob Tarantino, Note, A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers, 29 Hastings Comm. & Ent. L.J. 45 (2006).

25 Such obligation is only triggered at such time that the minor's total lifetime remuneration reaches $5,000 –ACTRA IPA, A2716

Like SAG-AFTRA, the protections of the Directors Guild of America (the "**DGA**") extend beyond the United States' borders, and its members benefit from coverage under the collective agreement even when working abroad. The jurisdiction of the Directors Guild of Canada (the "**DGC**"), on the other hand, is limited to productions produced within the provinces and territories of Canada, with the district councils governing their respective geographic areas. While the DGC does have jurisdiction over Canadian productions, the guild explicitly acknowledges the global reach of the DGA as well as other labour organizations, as the DGC allows an individual who is a member in good standing of the DGA (among other guilds) to make an election to be governed by the collective agreement of such other labour organization, rather than by the terms and conditions of the DGC collective agreement (the "**DGC Agreement**"), provided that in the aggregate, the terms of such alternate engagement be no less than the minimums provided for under the DGC Agreement.[26] In the event of a director's election to be governed under the DGA Basic Agreement (the "**DGA Agreement**"), the producer must become signatory to the DGA Agreement. Notwithstanding the foregoing, any individual working within DGC's jurisdiction, even if not subject to the DGC Agreement, must first apply and obtain a permit from the DGC (and pay the requisite permit fees). The DGC also retains jurisdiction in dispute resolution and will adjudicate any dispute which arises with respect to the terms and conditions of engagement of any individual working on DGC soil.

Under a previous agreement in place between the DGC and the DGA, a DGA/DGC dual-card holder performing service in Canada was entitled to choose under which collective agreement such individual would be governed. As of June 1, 2015, however, the DGA established a policy which affected dual-card holders working in Canada. The policy provides that absent an explicit waiver from the DGA (which is only granted in rare circumstances) all DGA members with a registered "Production Center"[27] or "Local Employment Address"[28] in the United States shall be subject to and governed by the terms and conditions of the applicable DGA Agreement, regardless of where services are rendered. In the event of violation of said policy, the DGA will automatically revoke the designated Production Center (i.e., New York or Los Angeles) and reassign such member to a Toronto or Vancouver Production Centre, as applicable, for the ensuing 12-month period. By revoking the designated Production Center, such individual is no longer eligible to work in the New York or Los Angeles (as applicable) as a "local hire", which thus creates a disincentive for producers to hire the individual as the producer would then be required to provide transportation, per diem, housing and other expenses to the individual that they would not otherwise have to provide to "local hires". The policy does acknowledge, however, that a dual-card holder who has a designated Production Center and a Local Employment Address in Canada, may elect to be engaged under the applicable DGC Agreement on any project produced in Canada.

While the previous two sections of this paper have highlighted differences between the Canadian and United States guilds and the interplay between the two, given the fact that a DGA director's engagement will generally be governed by the DGA Agreement in its totality, it is important that the producer become familiar with the terms and conditions of such agreement, as there are marked departures from the terms of the DGC Agreement.

It is important to note two things with respect to the DGA Agreement:

1. Section 17-201 of the DGA Agreement stipulates that if a producer travels a United States-resident director to render services outside of the United States, then a DGA First Assistant Director shall also be engaged and traveled to render applicable services on such foreign production, subject to enumerated exclusions (including, without limitation, due to applicable foreign labour restrictions). The DGC has taken the position that its jurisdiction over the Canadian production takes precedence over Section 17-201, and that a DGC-member First Assistant Director should be hired in lieu of a DGA member. The DGC sends a letter to the applicable DGA-signatory producer and the DGA setting out the guild's reasoning, which has not been contested to-date.

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[26] Section 7.11 of the DGC Core Agreement 2016-2018

[27] Under the DGA Agreement, its members are entitled to designate a "Production Center" (i.e., one of four (4) popular production areas: Los Angeles, New York, Toronto, or Vancouver) in which such director wishes to be engaged as a 'local hire' under the terms of the DGA Agreement.

[28] In the event that the DGA member does not reside within a Production Center, such DGA member may establish his/her primary residence as a local employment address, which enables such individual to be engaged as a 'local hire' in the area in which he/she resides. To note, DGA members who reside within a Production Center but designate a different location as his/her Production Center may not be engaged as 'local hire' within their residential area.

2. Whereas the DGC Agreement not only allows, but in some cases actually mandates (depending on budget tiers), a 'buy-outs' of rights in lieu of residuals, the DGA Agreement does not allow for the same. Other than in the specific instance of engagement on a free television production (and in such case, meeting specific enumerated criteria), the DGA does not permit a producer to 'buy-out' or prepay residuals. The DGA member is thus entitled to residuals of varying degrees depending on the details of the specific engagement and the platform of exhibition.

FINAL THOUGHTS

Whereas Canadian broadcast license agreements typically provide for an unlimited number of runs of the applicable production within the agreed license period, in American broadcast license agreements, the number of runs is generally specified. Due to this difference in practice, the Canadian and American guilds tend to approach residual payments in a different manner. While Canadian guilds allow (and in some cases mandate) a rights 'buy-out' in some manner, the American guilds focus on a pay-per-use formula for the payment of residuals, without the opportunity in many instances, to buy out or prepay such amounts.

It is important to recognize that each of the collective agreements discussed above, whether Canadian or American, stipulates that the terms denoted therein are simply minimums, and that each member shall be entitled to negotiate terms and conditions greater than the minimums provided in such agreement.[29] This concept is the basis for the interplay between the Canadian and American collective agreements discussed herein. The minimum terms of the indigenous agreement must always be met, the result being that the talent ultimately benefits from the "best of both worlds".

In closing, there are numerous complexities involved in navigating the various guilds and unions in any given production. While this may present a considerable challenge at times, most issues can be resolved with the proper analysis and expertise.

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[29] WGC IPA – Article A108; WGA MBA – Article 9; ACTRA IPA – A508; SAG Basic Agreement – Article 12; DGC Core Agreement – Section 12.05; and DGA Basic Agreement – Section 17-114.