

## Entertainment Law

March 23, 2017

### CAVCO Expands Eligible Platforms that Satisfy “Shown in Canada” Requirement; Online Platforms may now be CPTC Eligible

On March 6, 2017, the Canadian Audio Visual Certification Office (CAVCO) issued three public notices regarding eligibility for the Canadian Film or Video Production Tax Credit (CPTC), one of which is of particular interest to non-Canadian OTT service providers.

Public Notice 2017-01 (the “**Policy**”), titled *Platforms that can be used to meet the “shown in Canada” requirement of the Canadian Film or Video Production Tax Credit Program*, sets out the circumstances under which Canadian film and video productions shown in Canada exclusively via online platforms may now be CPTC eligible. The Policy allows for a more flexible interpretation by CAVCO of the “shown in Canada” requirement. It permits productions which are viewed exclusively online by Canadians to benefit from the CPTC program if certain prescribed criteria regarding their distribution and the online video service are satisfied.

#### “Shown in Canada” Requirement

The CPTC is available to qualified Canadian production companies (the “**Producers**”) and productions that meet specific criteria set out in section 125.4 of the *Income Tax Act* (the “**Act**”) and section 1106 of the *Income Tax Regulations* (the “**Regulations**”). Among many other requirements, to qualify for the CPTC the production must not be an “excluded production” as defined in subsection 1106(1) of the Regulations:

...

**excluded production** means a film or video production, of a particular corporation that is a prescribed taxable Canadian corporation,

(a) in respect of which

...

(iv) there is not an agreement in writing, for consideration at fair market value, to have the production shown in Canada within the 2-year period that begins at the earliest time after the production was completed that it is commercially exploitable,

(A) with a corporation that is a Canadian and is a distributor of film or video productions, or

(B) with a corporation that holds a broadcasting license issued by the Canadian Radio-television and Telecommunications Commission for television markets, or

(v) distribution is made in Canada within the 2-year period that begins at the earliest time after the production was completed that it is commercially exploitable by a person that is not a Canadian.

Therefore, for a production to qualify for the CPTC and avoid being an “excluded production,” the Producer of the production must enter into an agreement, for fair market value consideration, with either (a) a Canadian-controlled distributor or (b) a CRTC-licensed broadcaster, in either case which provides that the applicable production will be “shown in Canada” within the prescribed two-year period.

#### CAVCO Interpretation of “Shown in Canada”

Previously, CAVCO interpreted the phrase “shown in Canada” to mean a production which is broadcast on television (including via conventional, specialty, or pay television services and licensed VOD services), shown in a movie theatre or distributed on DVD in Canada.

# Goodmans<sup>LLP</sup> Update

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Under the Policy, CAVCO will now also consider a production which is exclusively shown via an online video service in Canada as being “shown in Canada” if the applicable online video service meets the following criteria:

1. the service is an online video service carrying other content pre-screened or pre-qualified by either (a) the online service or (b) the distributor, under an arrangement with the online service (i.e., a stand-alone website for a production would not qualify);
2. the service is readily accessible to Canadians in Canada; and
3. the service has Canada as part of its target audience (i.e., is a service where Canadians would likely look for linear audio-visual content, as opposed to a service primarily intended for foreign territories).

CAVCO will review online video services on a case-by-case basis to determine whether they satisfy the foregoing criteria. CAVCO also intends to compile a list of eligible online video services on an ongoing basis which it will post on its website and update from time to time.

## **Exhibition Agreement Between a Canadian-Controlled Distributor and the Eligible Online Video Service Still Required**

Notably, an agreement directly between the Producer of a production and an eligible video online service will still not be eligible for the CPTC. Pursuant to the definition of “excluded production” in section 1106 of the Regulations, the Producer must still have an agreement in writing with either a CRTC-licensed broadcaster or a Canadian-controlled distributor to have the production “shown in Canada.” Since many popular online video services which are accessed by Canadians (e.g. Netflix, Amazon Prime, YouTube Red) will neither be licensed by the CRTC as broadcasters nor Canadian-controlled, an agreement in writing between the Producer directly with such online video services would not satisfy the CPTC eligibility rules under the Act or the Regulations even if those services are eligible under the Policy.

Rather, to qualify for the CPTC, where a production will be shown in Canada during the prescribed

two-year period exclusively on an eligible online video service, the Producer must first enter into an agreement in writing with a Canadian-controlled distributor and the exhibition agreement (i.e., the agreement to have the production “shown in Canada”) must be directly between the Canadian-controlled distributor and the eligible online video service.

CAVCO confirmed in the Policy that the involvement of a non-Canadian sub-distributor between the Canadian-controlled distributor and the eligible online video service would render the production ineligible for the CPTC. This is because the definition of “excluded production” in the Regulations also excludes a production where a distribution of the production is made in Canada by a non-Canadian within the same prescribed two-year period in which the production must be “shown in Canada” (and according to the Policy, the non-Canadian sub-distributor is considered by CAVCO to be making such a distribution in Canada). Interestingly, CAVCO has apparently not been persuaded by (or perhaps not considered) the argument that if a non-Canadian eligible online video service is itself not “making a distribution in Canada” by making its service available to Canadians online, how can a distributor or sub-distributor which grants those very same rights to such an eligible online video service be “making a distribution in Canada”?

## **Coming-Into-Force Date**

The Policy is effective as of March 6, 2017, and applies to all new CPTC applications as well as any CPTC applications currently under review. The Policy applies only to the federal CPTC and not to any counterpart provincial “Canadian content” film tax credits, such as the Ontario Film and Television Tax Credit, which still do not recognize exclusive exhibition of productions on online video services as meeting “shown in Canada” type requirements.

If you have questions about the Policy, please contact any member of our Entertainment Law Group.