

Entertainment Law

April 21, 2011

First or Second Lead Performer must be Canadian for Production to be certified by CAVCO as a Canadian film or video production

Background

Tricon Television²⁹ Inc. (Tricon) applied for judicial review of a decision made by the Canadian Audio-Visual Certification Office (CAVCO) denying Tricon's application for certification of its production "Beautiful People" as "Canadian" pursuant to section 125.4 of the *Income Tax Act* and section 1106 of the *Income Tax Regulations*.

Tricon's application was made primarily on the basis that "Beautiful People" was a documentary production and the two most prominently featured individuals in the production, Greg Hodge (a British subject) and Robert Hintze (a Danish citizen), should not be considered "Lead Performers" based on CAVCO's definition of "Lead Performers" as set out in its Canadian Film or Video Production Tax Credit (CPTC) guidelines.

Decision

On April 7, 2011, the Ontario Federal Court concluded that there is no basis upon which to set aside CAVCO's decision denying Tricon's application for certification of "Beautiful People" as "Canadian". Based on its review of the relevant legislation and submissions, and having regard to the screen time, billing and remuneration paid to Hodge and Hintze, the Court ultimately determined that Hodge and Hintze were the first and second "Lead

Performers" in the production, and since neither one of them is Canadian, "Beautiful People" was ineligible for certification as a "Canadian" production.

Highlights of the Decision

The case is instructive for 4 reasons:

- (1) apparently, Tricon did not engage in any discussions with CAVCO to confirm that the "Beautiful People" production was eligible for the CPTC certification before the application for certification was filed;
- (2) it was not considered relevant to determine whether or not the production "Beautiful People" was a reality program or documentary since, in either case, Hodge and Hintze were classified as non-Canadian "Lead Performers" causing the production to be ineligible for certification by CAVCO as a "Canadian" production;
- (3) neither CAVCO nor the Ontario Federal Court was persuaded by the fact that the Canadian Radio-television Telecommunications Commission (CRTC) made an exemption for "Beautiful People" from its requirement that the production must include a Canadian lead performer; and
- (4) Tricon was not able to avail itself of subsection 1106(9) of the *Income Tax Regulations* which provide:

(9) A documentary production that is not an excluded production, and that is allotted less than six points because one or more of the positions referred to in paragraph 5(a) is unoccupied, is a Canadian film or video production if all of the positions described in that paragraph that are occupied in respect of the production are occupied by individuals who are Canadians.

Confirm Eligibility Requirements

Film and television producers intending to apply for a Canadian film or video production certificate pursuant to section 125.4 of the *Income Tax Act* and section 1106

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of the *Income Tax Regulations* should always ensure (among other things) that their production is not considered an excluded genre and that they are able to meet the “points test” requirements for “Lead Performers” and other key creative personnel as set out in section 1106 of the *Income Tax Regulations*. If there is any doubt about eligibility, producers are advised to consult their production counsel and/or CAVCO directly for clarification of CAVCO’s guidelines and the applicable Regulations.

If you would like further information about CAVCO’s guidelines, the applicable *Income Tax Regulations* or have any questions with respect to the foregoing, please do not hesitate to contact any member of our Entertainment Law Group:

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