

FOCUS ON ENTERTAINMENT/SPORTS

Entertainment lawyers go the distance when structuring reality TV deals

By Tara Parker



The tremendous popularity of format-based reality programming such as *Canadian Idol*, *Deal or No Deal Canada* and *Canada's Next Top Model* shows no signs of abating. Canadian broadcasters continue to capitalize on the reality show phenomenon by licensing Canadianized versions of proven foreign formats such as *Project Runway Canada* and *Are You Smarter than a Canadian Fifth Grader?*

Canadian entertainment lawyers who deal with format programs must tackle complex legal issues, expanding the scope of their traditional area of expertise.

For example, if a Canadian producer or broadcaster wishes to license format rights from a foreign underlying rights holder, counsel needs to negotiate, structure and document the deal between the licensee and format owner in such a way that the program will qualify, if possible, for Canadian tax incentives (note that reality television is currently considered an ineligible genre under the guidelines of the Canadian Audio-Visual Certification Office).

Counsel will also need to structure the deal as a Canadian program (as certified by the Canadian Radio-Television and Tele-Communications Commission) for Canadian broadcast quota purposes. Among other things, the licensee must bargain for, and

acquire, key creative elements comprising a typical reality show format. These include, for example, the right to use the program's title, logos, trademarks and other intellectual property; the overall structure and "look and feel" of a program, including the music and episodic themes; the right to merchandise, telecast and to exclusively distribute the program in various media; and the right to own copyright in the finished program.

In return, the licensor may negotiate for fees, royalties, credits and/or approval rights in connection with the program. In the case of any format fees or royalties payable to the licensor, counsel will also have to consider the possible application of Canadian withholding tax to such cross-border payments.

Since this type of television programming often incorporates a game, competition or contest, counsel may also be required to

draft or vet contest rules and regulations to ensure that they comply with applicable Canadian laws. These include the *Competition Act*, which contains minimum disclosure requirements (i.e. the approximate value of prizes, whether any purchase is required, chances of winning, the contest closing date, etc.), and the *Criminal Code*, which prohibits games of pure chance where there is an absence of any skill.

Even if legal counsel determines that the *Criminal Code* or *Competition Act* are not applicable to the game or competition in question, it is nevertheless prudent to ensure, at a minimum, that the game or competition element is conducted fairly, that prizes are actually and promptly paid or delivered to winners, and that television viewers are not misled.

Production counsel should keep in mind that the federal *Personal Information Protection and Electronic Documents Act* (or the equivalent provincial legislation) will apply to the collection, use or disclosure of personal information obtained by producers in casting questionnaires or otherwise as part of any casting or audition process for the television show. In addition, since reality television programming also typically involves the casting of amateur or non-unionized performers, all competitors, judges, hosts and other individuals participating in the program will be required to sign release forms in which they grant the producer the irrevocable right to use and reproduce their appearance and performance in the show, as taped and edited by producer, in any manner, in all media, in perpetuity.

A good form of release will also ensure that the producer is released from any and all claims in connection with the travel for, par-

ticipation in, and/or elimination from the program, as well as the contestant selection process, exploitation of the program, and claims arising from any contests, games or competitions incorporated in the program. Other considerations include claims based on dissatisfaction with any prizes, program cancellation, misrepresentation, violation of privacy or publicity rights, defamation or any physical or mental injury arising as a result of the individual's participation in the program.

Although these releases cannot prevent lawsuits by individuals who may subsequently claim that the releases were obtained under false pretences or are otherwise unenforceable (like the two anonymous plaintiffs who claimed that they were under the influence of alcohol when they signed their releases in favour of the producers of the film *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*), legal practitioners would be prudent to ensure that all releases require participants to agree that they have obtained (or had ample opportunity to obtain) independent legal advice prior to signing the document.

Finally, legal counsel must also attend to routine production legal contracts such as broadcast licence agreements, talent agreements, location agreements, music and footage licenses and writer and director agreements.

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Provinces have greater powers

PRIVACY

—continued from p. 11—

mation was posted on a publicly available website used for securities-related filings (*Investigation Report P2005-IR-005, July 12, 2005*) has had a significant impact on the manner in which commercial transactions proceed and in which due diligence efforts are conducted.

The jurisdictional limit of the authority of a provincial privacy commissioner does not represent the very broad impact of a decision or order of a provincial commissioner. The fact that provincial privacy commissioners have the ability to make orders (as compared to the power of the federal privacy commissioner to make recommendations only) lends further force to the findings made by

those provincial commissioners.

The federal privacy commissioner must apply to the Federal Court for an order compelling an organization to implement the commissioner's recommendations. The widest jurisdictional mandate (PIPEDA applies to all commercial activity unless, as in the case of B.C., Alberta, Quebec and, to a more limited extent, Ontario, provincial legislation applies in its stead) also has the most limited direct ability to compel implementations of the commissioner's recommendations.

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