



**They're Beautiful People, They're Just Not Canadian -  
The Federal Court's Tricon Decision**

May 30, 2011 by Bob Tarantino

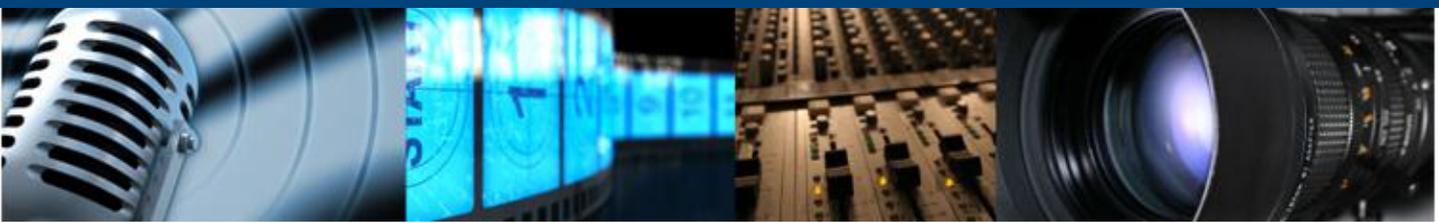
A relatively rare event recently occurred: the Federal Court of Canada delivered a decision regarding a "Canadian content" certification decision made by CAVCO (the Canadian Audio-Visual Certification Office). With a hat tip to Tara Parker, the decision in Tricon Television29 Inc. v Minister of Canadian Heritage (2011 FC 435) provides an opportunity to confirm a number of matters regarding the certification of "Canadian content" projects.

In *Tricon*, the producers created a television series entitled *Beautiful People*, which chronicled the Canadian launch of the "BeautifulPeople Network", an online community for, well, beautiful people. The Canadian producers of the show hoped to have the series certified as "Canadian content", which would entitle them to receive certification as "Canadian content" which would entitle them to claim what are colloquially referred to as "content" tax credits (such as the federal government's Canadian Film or Video Production Tax Credit (CPTC)) - "content" credits are more lucrative than the lower "services" credits (for full details about the tax credits available for financing film and television projects, see Heenan Blaikie's Producing in Canada guide).

To qualify as "Canadian content", a live action production must obtain six out ten possible "points" (see Article 4 of the CAVCO's CPTC Guidelines for details). Two points are available for "lead performers" - and, crucially, at least one "lead performer" must be Canadian in order for a project to qualify as "Canadian content".

And there's where the quirks started popping up in the analysis. *Beautiful People* followed the exploits of two non-Canadians (one British, one Danish) in their efforts to expand their business into Canada. Measured by screen time, those two non-Canadians (Greg Hodge and Robert Hintze) would, in the absence of any other information, appear to be the "lead performers" - they occupy the bulk of the screen time, and, according to CAVCO, they "also act as hosts of the production, as their performances regularly link or introduce segments of the production to enable the storyline to progress". But things in film/TV production are never quite that simple.

The series is a type of show sometimes referred to as "reality TV" - an imprecise term which covers a fair bit of ground. The producers' position was that the show was a "documentary" (they identified it as such when they applied for certification of their project). When it comes to documentaries, it's not immediately clear that they *have* "lead performers". Tricon's position was that *Beautiful People* did not have "lead performers" because the two principals of the BeautifulPeople Network (who were prominently featured in the series) were not "acting", their activities were simply being filmed - they were "being themselves", to use an inelegant phrase. But if a show does not have "lead performers", how can it satisfy the requirement that at least one "lead performer" be Canadian? The regulations to the *Income Tax Act* (Canada) contemplate precisely that situation. Section 1106(9) provides that:



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.

In other words, if you are producing a documentary and you have no "lead performers" so long as the other positions on the points list (director, screenwriter, art director, director of photography, composer, editor) are filled by Canadians, you can still qualify as "Canadian content".

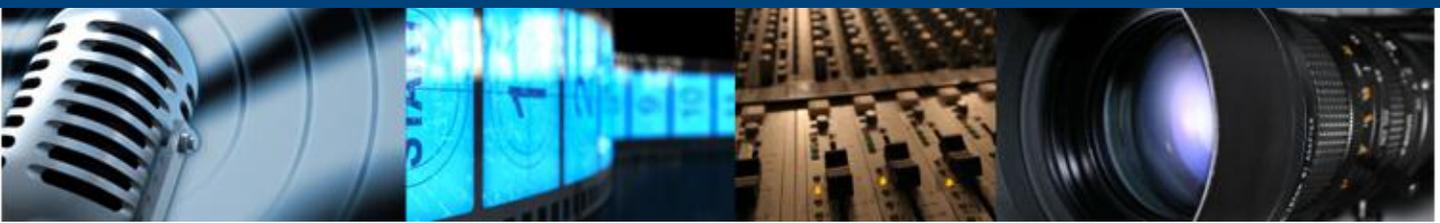
But note the condition there: 1106(9) only applies *if the project is a documentary*. If *Beautiful People* is not a documentary then one of the two lead performers must be Canadian in order to qualify for "Canadian content" tax credits. Unfortunately for the producers of the show, CAVCO concluded that the show was not a documentary, and thus denied certification as Canadian content. That decision, which meant that the more lucrative content credits were not available for the show, would have been devastating for the financing of the show's production.

Tricon requested judicial review of CAVCO's decision, raising a number of different arguments, all of which were rejected by the Federal Court. To make a long story short (and keep this post to manageable lengths for both writer and reader), the Court held that no duty of fairness had been breached by CAVCO, CAVCO's reasons for making their decision were reasonable and transparent, CAVCO's decision was reasonable and did not constitute an error in law. Indeed, the Court was rather emphatically more sympathetic to CAVCO than to the producers.

The decision (indeed the entire story) provides a cautionary tale for producers who seek Canadian content certification: where any doubt might exist about eligibility, early discussions with CAVCO are advisable in order to identify threats to certification and permit sufficient time to re-fashion the structure of a project in order to meet CAVCO's concerns.

All that being said, the decision made by CAVCO remains troubling: the decision was made under a previous iteration of the CAVCO Guidelines, which, as noted by internal CAVCO memoranda quoted in the Federal Court's decision, were written for a television environment which did not have nearly as much emphasis on "reality TV" as the current one. As a result, those earlier guidelines did not contain the fine variegations of program type that the 2010 CAVCO Guidelines contain - previously, when it came to eligible genres of live action productions, you had "documentaries" and then everything else; the current Guidelines not only provide a definition of "documentary", but clarify that "lifestyle / human interest" programs are a separate type of non-documentary programming (subject to the same requirements as other non-documentary programming).

But the producers of *Beautiful People* did not have the benefit of the new, clearer, guidelines: there was at least a cogent argument to be made that some "reality TV" programs *were* documentaries - and they proceeded on that basis. CAVCO obviously disagreed, identifying the program as a "'docu-soap' reality-based television series" (the term "docu-soap" appears to have originated in an agreement that Tricon entered into with Hodge and Hintze). Whatever else one might think of the



accuracy of the description, "docu-soap" is not a recognized category of production for CAVCO purposes - and, at least based on the materials reproduced in the Federal Court decision, CAVCO did not provide any explanation of *how* it determined that *Beautiful People* was not a documentary - in other words, what criteria of "documentary"-ness was *Beautiful People* measured against and found wanting?

The new Guidelines contain about as cogent a definition for "documentary" as you're going to find (and they should be commended for that): "An original work of non-fiction, primarily designed to inform but which may also educate and entertain, providing an in-depth critical analysis of a specific subject or point of view". But it's unclear whether that definition was what CAVCO used to assess *Beautiful People* (and, in any event, it's not clear that the producers were ever provided with that definition, since it did not appear in the previous guidelines). For producers operating under the new CAVCO Guidelines, while there are inevitably going to be infelicities of expression and ambiguities in language, the Guidelines do an admirable job of providing guidance as to how different programs will be treated. Unfortunately, it's not clear that the producers of *Beautiful People* had that advantage.

---

The articles and comments contained in this publication provide general information only. They should not be regarded or relied upon as legal advice or opinions. © Heenan Blaikie LLP.