

Federal Court



Cour fédérale

**Date: 20110407**

**Docket: T-845-10**

**Citation: 2011 FC 435**

**Ottawa, Ontario, April 7, 2011**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**TRICON TELEVISION29 INC.**

**Applicant**

**and**

**MINISTER OF CANADIAN HERITAGE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Director General, Cultural Industries, Canadian Heritage dated April 29, 2010, reference number PCH13235, in which the application by Tricon Television29 Inc., the Applicant in these proceedings, for a Canadian film or video production certificate for the production “Beautiful People”, was denied. The Applicant Tricon seeks to have that decision quashed and either returned for redetermination or an order that the Director General be required to issue such a certificate.

[2] For the reasons that follow I am dismissing this application with costs to the Respondent Minister of Canadian Heritage fixed in the sum of \$2500.00.

[3] The *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> supp) as periodically amended (the *Act*), section 125.4, provides the scheme whereby a Canadian corporation, which carries on the business through a permanent establishment in Canada of producing a “Canadian” film or video production, is entitled to a credit equal to 25% of its qualified labour expenditure for the year of production. The Applicant Tricon is such a Canadian corporation, the issue is whether the production “Beautiful People” is a “Canadian” film or video production. The record suggests that the amount of the credit at issue is in the order of \$350,000.00.

[4] There is a group within the Ministry of Canadian Heritage called the Canadian Audio-Visual Certification Office (CAVCO) which is charged with making a recommendation to the Director General, Cultural Industries, as to whether a particular film or video production is “Canadian” within the meaning of the *Act*. The Director General acts as the delegate of the Minister of Canadian Heritage for this purpose.

[5] The provisions of section 125.4 of the *Income Tax Act* relevant to the issues here include subsection (3) which reads:

*Tax credit*

*(3) Where*

*(a) a qualified corporation for a taxation year files with its return of income for the year*

*(i) a Canadian film or video production certificate issued in respect of a Canadian film or video production of the corporation,*

- (ii) a prescribed form containing prescribed information, and*
    - (iii) each other document prescribed in respect of the production, and*
  - (b) the principal filming or taping of the production began before the end of the year, the corporation is deemed to have paid on its balance-due day for the year an amount on account of its tax payable under this Part for the year equal to 25% of its qualified labour expenditure for the year in respect of the production.*

[6] The provisions of the *Income Tax Regulations*, CRC, c 945, as amended, pertinent to the issues here are found in section 1106. Subsections 1106(5)(a), 1106(8)(a) and 1106(9) provide:

- (5) For the purposes of this Division, the Minister of Canadian Heritage shall allot, in respect of a film or video production*
  - (a) that is not an animation production, in respect of each of the following persons if that person is an individual who is a Canadian,*
    - (i) for the director, two points,*
    - (ii) for the screenwriter, two points,*
    - (iii) for the lead performer for whose services the highest remuneration was payable, one point,*
    - (iv) for the lead performer for whose services the second highest remuneration was payable, one point,*
    - (v) for the art director, one point,*
    - (vi) for the director of photography, one point,*
    - (vii) for the music composer, one point, and*
    - (viii) for the picture editor, one point;*

...

- (8) For the purposes of this Division,*
  - (a) a lead performer in respect of a production is an actor or actress who has a leading role in the production having regard to the performer's remuneration, billing and time on screen;*

...

- (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.*

[7] CAVCO, in February 2004, published Guidelines entitled “*Canadian Film or Video Production Tax Credit (CPTC) Guidelines*” for the assistance of producers in applying for tax credits. Pertinent to the issues here are the Guidelines respecting Creative Services (live action) and Lead Performer, which provide:

**6. Creative services**

**a) Non-animated productions (live action)**

*To be recognized as a Canadian production, a live action production must be allotted a total of at least six (6) points according to the following scale:*

*(Points are allotted if the individual(s) who rendered the service is/are Canadian).*

<i>Director</i>	<i>2 points</i>
<i>Screenwriter</i>	<i>2 points</i>
<i>Lead performer for whose services the highest remuneration was payable</i>	<i>1 point</i>
<i>Lead performer for whose services the second highest remuneration was payable</i>	<i>1 point</i>
<i>Director of photography*</i>	<i>1 point</i>
<i>Art director**</i>	<i>1 point</i>
<i>Music composer***</i>	<i>1 point</i>
<i>Picture editor*</i>	<i>1 point</i>

*\* For video productions, the equivalents to DOP are either "technical director" or "lighting director" and the equivalent to picture editor is "off-line editor".*

*\*\* "Art director" refers to the head of the art department. In some cases, this individual may have the title of "production designer".*

*\*\*\* The point for music composer is allotted only if the music created for the production is an original work.*

*In addition, a production must obtain two of the four points allotted for the director and the screenwriter (one of the two positions must be filled by a Canadian). A production must also obtain one of the two points allotted for lead performers (one of these two positions must also be filled by a Canadian).*

*In the case of a documentary production not involving performers or other functions such as art director or music composer, a production may meet the creative services criteria even if the production has not been allotted the minimum six points required. However, all the filled creative positions must be occupied by Canadians.*

...

**d) Lead performer and screenwriter**

*i) Lead performer*

*CAVCO will use three criteria to determine which individuals are in effect the lead performers in non-animated productions:*

*(i) remuneration (including all types of benefits, residuals, travel and living expenses, etc.), (ii) billing and (iii) time on screen.*

*In the case of an animation production, CAVCO will determine which individual is in effect the lead voice on the basis of remuneration received (including benefits, residuals, travel and living expenses, etc.) and length of time that the individual's voice is heard in the production.*

*An actor or actress is an individual engaged to speak lines of dialogue or mime a scene, or whose performance consists in interpreting a character, even where there is no dialogue. When there is no actor or actress, an individual who performs one of the following functions may be considered equivalent to the lead performer: dancer, singer, specialty act performer, host (a performer who introduces or links segments of a program), narrator (a performer engaged to perform narrative material), off-camera performer (a performer other than the narrator engaged to perform a role in a dramatic work off-camera), or the actor who performs or reads the voice of a character in a film or animated production.*

*Guests on a magazine program, or the subjects of biographical documentaries, are not considered performers for certification purposes.*

[8] The 2004 Guidelines were revised on March 31, 2010 and will be discussed later in these reasons.

[9] The parties presented affidavit evidence with exhibits which reflect the correspondence and discussions between Tricon and its representatives and representatives of CAVCO. This evidence also shows some of the internal memoranda and discussions within CAVCO. In particular the Applicant Tricon filed the affidavit of Andrea Gorfolova, president of Tricon, with exhibits. The Respondent Minister filed the affidavit of Robert Soucy, Director of CAVCO, a position that he has held for twenty years, with exhibits. There was no cross-examination upon either affidavit. It is from these affidavits and exhibits that I have determined the following to be the relevant facts.

[10] On December 4, 2008 CAVCO received an application for certification as a Canadian film or video production titled “Beautiful People” as a “Documentary” comprising 13 episodes of 30 minutes each in length. The producer(s) and key creative personnel were all described as Canadian. No mention was made in the application of performers. There were no discussions between Tricon and CAVCO prior to the submission of this application as to whether the production would be likely ruled as “Canadian” or whether adjustments could be made to ensure that it was “Canadian”. Apparently it is not unusual for producers to engage in such discussions with CAVCO before expensive commitments as to production are made, for this purpose. Tricon was an experienced producer having produced at least two other television shows including “Restaurant Makeover”.

[11] A person viewing the “Beautiful People” episodes would see much on screen time occupied by one or both of Greg Hodge (a British subject) and Robert Hintze (a Danish citizen). The nature

of the relationship between these two persons and Tricon and “Beautiful People” is set out in an agreement between them dated April 24, 2008 which states, in part:

*Re; “Beautiful People”*

*Further to our recent discussion and agreements in respect of a television series entitled “Beautiful People” this letter will serve to confirm the following understanding between Tricon Television<sup>29</sup> Inc. (“Tricon”) one [sic] the one hand; and BeautifulPeople Network BP HQ Denmark, Greg Hodge (“Hodge”), Robert Hintze (“Hintze”) and Kasper Hjorth (“Hjorth”) (sometimes collectively referred to as the “Owners”) on the other hand, regarding the matters set forth below.*

*1. The Parties agree and acknowledge that Tricon Television<sup>29</sup> Inc. (“Tricon”) will commence production of the first season comprising 13 episodes of docu-soap television serious currently entitled “Beautiful People” (the “Show”) respecting the launch of Canadian operations for the company BeautifulPeople Network owned by the Owners (the “Business”). The Show will feature Owners as on-camera subjects and focus on various aspects of the Business and the Owners’ activities during the launch of Canadian operations of the Business.*

*2. Owners hereby warrant and represent that the Owners are the exclusive owners of the Business and further agree that they will establish Canadian operations of the Business in the Toronto area commencing on or about April 2008. It is a material and essential term of this agreement that Hodge and Hintze agree that they will make themselves available for and be featured as on-camera subjects as required by Tricon for the Show according to the production schedule during the term of shooting currently scheduled from April 24, through the end of October 2008 in and around Toronto. The Owners acknowledge and agree that Hodge and Hintze will be in Toronto and make themselves available for shooting by Tricon on a full time basis during the four month period from April 23 through August 23, 2008 and on a part-time basis (which for certainty comprises at least 15 shooting days per month) from August 24 through October 24, 2008.*

...

[12] If the “Beautiful People” production is not a documentary, then Hodge and Hintze would be classified as “Lead Performers” and the production would not be eligible to be certified as a

“Canadian” production. Even if the production was a “Documentary” if Hodge and Hintze were classified as “Lead Performers” the production could not be certified as “Canadian”. The question for determination as urged by the Applicant with CAVCO and with this Court, is whether “Beautiful People” can fit within subsection 1106(9) of the *Regulations* which provides that if the position of “Lead Performer” is “unoccupied” then consideration must be given to all other individuals involved in the production. Here all other such persons are Canadian. I repeat section 1106(9) of the *Regulations*:

*(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.*

[13] Reference has been made in the dealings between Tricon and CAVCO to a ruling made by the Canadian Radio-Television and Telecommunications Commission (CRTC) as to whether “Beautiful People” was a “Canadian” program for broadcasting purposes. The criteria to be applied are much the same as those applied by CAVCO with one important exception. Unlike CAVCO, the CRTC can make exceptions which it did in the case of “Beautiful People”. In its ruling set out in a letter from the CRTC to Tricon dated 2009/01/13 the CRTC found Hodge and Hintze to be Lead Performers but also found an exception was warranted. It wrote, in part:

*Although the criteria require that at least one lead performer in a production be Canadian, the Commission has carefully considered your reasons why your production should receive certification as an exception regarding the participation of Greg Hodge and Robert Luciano Hintze. The Commission is satisfied that an exception is warranted in this case, as the format of the production required that these individuals were portrayed on-screen by themselves, rather than by actors.*



*Notwithstanding this application of the exception permissible under PN CRTC 2000-42, you are reminded that the Commission looks at each application seeking an exception on a case-by-case basis and this approval should not be construed as a precedent for future applications. In this regard, it must be clear that not only does the Commission consider it of utmost importance to the Canadian program certification process that Canadians be employed in key creative positions, but also that producers make every effort to employ Canadians in these positions.*

[14] None of the parties asserted that this determination acted as a binding precedent for the issues before me.

[15] Following the submission of the application by Tricon for certification by CAVCO there were exchanges by e-mail and otherwise as to information and documents required. The main contact at CAVCO during this time was Hiba Hreiche who wrote an internal memorandum dated June 2, 2009 to a superior, saying:

*After the thorough review of the above noted production, I have come to the conclusion that this production is not, in fact a Documentary, but rather it leans towards a Reality Show hosted by 2 non-Canadians.*

*The production is claimed to be a Documentary with the subject being a website called beautifulpeople.net. Also considered to be the subject is the founders and directors of the website, Robert Luciano Hintze and Greg Hodge. After viewing the DVD's of this production it has become apparent that, if this production is a Documentary, that the subject is beautifulpeople.net and Robert Luciano Hintze and Greg Hodge are the hosts. That being said, this production would be ineligible since both men are not Canadian (they would lose both points for First and Second Lead Performers).*

*At this point, I am referring this file for your recommendation, and possibly the denial of the Part A certificate.*

*Please view the DVD's and advise.*

[16] This was an internal communication at CAVCO and not communicated to Tricon.

[17] The concern raised in this memorandum was apparently discussed internally at CAVCO following which Hreiche sent out an e-mail to Tricon, Caminie Mahadeo, on July 24, 2009, saying:

*Hi Caminie;*

*I would like to inform you, that after discussions with my supervisor we found that there might be a problem with the eligibility of this production due to the nationality of your First and Second Lead Performers. After viewing the DVD's, it appears like your Lead Performers were Robert Luciano Hintze and Greg Hodge. The subject of the documentary seems to be the website- Beautiful People- rather than the individuals who co-founded the website. Thus, this file has been recommended to our internal compliance committee for consultation at the senior management level. If it is decided that the file is eligible, I will notify you, otherwise you will hear from our compliance committee addressing our concerns.*

*Should you have any questions please do not hesitate to contact me.*

[18] Mahadeo responded on July 27, 2009 by e-mail offering to send the CRTC decision previously referred to in these reasons. Mahadeo said:

*Hello Hiba*

*Hope you had a great week-end*

*I am very concerned that there might be a problem with the eligibility of this production- I do not know if it will help you to have the CRTC certification? It was initially rejected by the CRTC but the producer on the show explained the nature of the show in great detail which led to a favourable ruling from the Commission.*

*Let me know if you think these documents will assist.*

[19] A further exchange of e-mails occurred in which the CRTC decision and copies of other documents were requested and sent, on September 16, 2009. These documents included a copy of

the April 24, 2008 agreement between Tricon, Hodge, Hintze and others previously referred to in which, in paragraph 1, uses the word “*docu-soap*” to describe the production.

[20] Debra Wynter, a Senior Policy Advisor at CAVCO sent an e-mail to Mahadeo on October 14, 2009 indicating that CAVCO was of the view that the production did not qualify as “Canadian”.

In part, the e-mail said:

*Hi Caminie,*

*Thank you for your response dated September 16<sup>th</sup>, 2009. I have had a chance to review it and consider its contents.*

*We are of the view that the production BEAUTIFUL PEOPLE does not qualify for the Canadian Film or Video production Tax Credit (CPTC), as the two leading performers are not Canadian (i.e. there is no Canadian lead performer who is highest or second-highest remunerated, which is a requirement of the CPTC program when there are leading performers in a production). In a “docu-soap” reality based television series, such as how this production is identified, the individuals who appear on screen are typically deemed to be performers in the production. Robert Hintze and Greg Hodge play themselves and are remunerated for their participation in this series. Further, we note that your company acknowledges that Hintze and Hodge are lead performers in this production, as your company’s appeal to the CRTC to receive an exemption from the CRTC’s requirement to have a Canadian lead simply describes why these foreign lead performers were necessary for the production. We understand that the CRTC granted this production an exemption in this regard. However, CAVCO has no jurisdiction to grant a similar exemption from the requirements of the Income Tax Regulations.*

*There are other elements in this production that also concern CAVCO with respect to the eligibility of this production for the CPTC:*

[21] Following this e-mail CAVCO conducted internal discussions and prepared an internal memorandum dated October 20, 2009. That memorandum reviewed some of the history of the matter and the position of Tricon as expressed in discussions between CAVCO and Tricon’s lawyer

Ken Rosenthal. The memorandum concluded with a recommendation that an Advance Notice of Denial letter be sent to Tricon so as to afford it an opportunity to make further representations.

[22] On October 22, 2009 CAVCO sent an Advance Notice of Denial to Tricon saying:

**ADVANCE NOTICE OF DENIAL**

*Dear Ms. Gorfolova:*

*I am writing to you concerning your application for a Canadian film or video production certificate (the “certificate”) for **BEAUTIFUL PEOPLE**.*

*A review of your application reveals that **BEAUTIFUL PEOPLE** is not a Canadian film or video production within the meaning of section 125.4 of the Income Tax Act (the “Act”) and section 1106 of the Income Tax Regulations (the “Regulations”) because neither the first nor the second lead performer is Canadian. This is contrary to the requirement at subsection 1106(6) of the Regulations which states: “A production ... is a Canadian film or video production only if there is allotted in respect of the production... one point under subparagraph (5)(a)(iii) or (iv).”*

*No certificate can be issued to a production that does not meet one or more requirements of the Act and Regulations.*

*You are welcome to submit a written response to the attention of the undersigned, within thirty (30) days following the date of this advance notice, accompanied by any new information and/or documentation that could impact on the evaluation of this matter. Upon expiry of this period, CAVCO will recommend that the certificate be denied by the Minister of Canadian Heritage in respect of **BEAUTIFUL PEOPLE** unless additional information is provided in support of the production’s eligibility for the Canadian Film or Video Production Tax Credit.*

[23] Tricon’s lawyer, Rosenthal, wrote a lengthy letter in response to CAVCO dated November 18, 2009. In addressing whether Hodge and Hintze were “Lead Performers” that letter said, in part:

*Under CAVCO’s definition of Lead Performer in the CAVCO Guidelines, a Lead Performer is: “an actor or actress engaged to speak lines of dialogue or mime a scene or whose performance*

*consists of interpreting a character... When there is no actor or actress an individual who performs one of the following functions may be considered equivalent to the lead performer: **dancer, singer, specialty act performer, host (a performer who introduces or links segments of a program), narrator, off camera performer.. .or the actor who performs or reads the voice of a character in a film. tab 4***

*Again, Hintze and Hodge could not be considered Lead Performers by any reading of CAVCO's own published Guidelines.*

*Ms. Wynter either ignored or failed to apply the relevant Regulations and Guidelines. No interpretation of the relevant Guidelines and Regulations could lead to the conclusion that Hintze and Hodge are Lead Performers.*

*Rather than relying on the very Regulations and Guidelines provided to the public, Ms. Wynter apparently relied upon internal CAVCO policy -- unknown and not communicated to the public and not supported by any relevant legislation, rule or guideline -- that is, Ms. Wynter concludes Hintze and Hodge are Lead Performers because the Production "is deemed to be a "docu-soap" (the term "docu-soap" is not defined anywhere in the regulations or guidelines or public announcements) and because "individuals who appear on screen in docu-soaps are typically deemed to be performers."*

*Typically? Does this mean frequently? mainly? often?*

*This begs the question: -- How can a determination be said to have been properly made if it is not supported by the Regulations CAVCO is mandated to follow, but instead is based on an opinion and internal policy, unknown to the public, applied only frequently (i.e. not always) to a term ('docu-soap') that is not defined anywhere in any statute, rule, Regulation or Guideline?*

[24] Apparently due to the pressure of other work and the Christmas holidays this matter did not receive immediate attention at CAVCO. On January 13, 2010, Karyn Wichers, Manager, Delivery and Strategic Planning at CAVCO, circulated a memorandum for internal use which reviewed the situation and concluded that "Beautiful People" was not a Documentary by genre but that was immaterial since Hodge and Hintze were Lead Performers and not Canadian. The memorandum concluded with the recommendation that the production not be certified. The memorandum also

pointed out that certain genres and other definitions were unclear in the 2004 guidelines and should be clarified in the forthcoming 2010 guidelines. Examples of such definitions were given. The Conclusions and Recommendations portion of the memorandum stated:

***Conclusions and Recommendations***

*For the case of Beautiful People in particular, it is recommended that CAVCO not certify the production as a Canadian film or video production. The production is not a documentary series for the reasons stated above. Therefore, a lead performer point is necessary, however, the two leads are non-Canadian.*

*In regards to the larger policy questions that this production has raised, the following is recommended:*

- CAVCO issue its genre definitions soon, perhaps prior [to] the official launch of CAVCO Online. This will give more precision for CAVCO and producers when trying to understand genre issues.*
- CAVCO needs to add a definition of reality-based television to its list of eligible genres since one does not exist in the CAVCO Online definitions which were created by the System Council. It will be important to make a distinction between reality-surveillance programming which is ineligible and reality-based television such as Beautiful People and the many other examples of similar programming that is eligible. CAVCO will need to examine the few industry definitions that already exist such as the CRTC and SODEC (as explained above).*
- CAVCO should re-examine its definition of lead performer which was written prior to the emergence of the explosion of reality television in the industry. This will also be part of the list of definitions in the new guidelines.*

[25] Counsel for Tricon at the hearing made reference to this memorandum in support of an argument that CAVCO was applying criteria established only in the subsequent March 31, 2010 guidelines and that those criteria had not been communicated to Tricon so as to allow Tricon to give a meaningful response. I do not view this memorandum in this way. I view the memorandum as being directed to two issues, one being the certification of “Beautiful People” under the existing

guidelines and recommending against certification. The other issue is directed to the necessity of ensuring that clarification is made in the new guidelines.

[26] On January 19, 2010, Rosenthal sent an e-mail to CAVCO saying that “very relevant information has come to light” and asking for 10 days to submit that information. That extension was given. The information, as submitted was a summary written by the director of “Beautiful People”. In part, it says:

*BEAUTIFUL PEOPLE- the series is the only complete documentation of the site and its off colour creators that exists. It chronicles from the moment they arrive in Canada to the moment they launched the Canadian site. Greg and Rob are not actors. They are the founders of Beautiful People.*

*The Series also profiles real members of Beautiful People. All individuals featured as members in the Series are real members. They don't play one on television. We made a creative decision from the Show's inception to focus not only on the founders but on actual Canadians who joined, wanted to join or who were rejected by the Web site. Each and every episode profiles regular Canadians and/or the Canadian media reaction to the BP business and/or Canadian businesses seeking alliances with the business.*

*BEAUTIFUL PEOPLE is a documentary series. It documents the first months of birthing the Canadian site and all the related press coverage and strong reactions to its Canadian launch.*

[27] On April 23, 2010 Debra Wynter at CAVCO prepared an internal memorandum which was approved by her manager and sent by the Director, Robert Soucy, to the Director General, Jean-Francois Bernier. The memorandum concluded by saying that a Notice of Denial for Mr. Bernier's signature would follow. The memorandum said, in part:

*BEAUTIFUL PEOPLE is a 13-episode television series (30 minutes) which highlights the Canadian launch of the controversial website BeautifulPeople.net. It follows the exploits of European playboys founder Robert Hintze (“Hintze”) and website managing*

*director Greg Hodge (“Hodge”) as they interact with Canadian members of the website and the Canadian media. The CRTC categorized this production as General entertainment and human interest (category 11) and refused the production company’s claim that the production is a documentary. It also deemed Hintze and Hodge to be the sole lead performers in the production. CAVCO’s analysis of the application for a Canadian film or video production certificate concurs with the CRTC’s determination. Because neither lead performer is Canadian the production is ineligible for the Canadian Film or Video Production Tax Credit because the requirement at subsection 1106(6) of the Income Tax Regulations has not been met.*

[28] The Notice of Denial sent to Tricon on April 29, 2010, is the subject of this judicial review.

It said in part:

*After careful consideration of your November 18<sup>th</sup>, 2009 response and the supplemental documentation submitted electronically on January 28<sup>th</sup>, 2010, CAVCO remains of the view that the production BEAUTIFUL PEOPLE does not meet the aforementioned requirement of the Regulations and has recommended to the Minister of Canadian Heritage that your application for a Canadian film or video production be denied.*

*CAVCO considers that the production has, for the purpose of the Regulations, two lead performers and that these positions are not occupied by individuals who are Canadian. The two lead performers and protagonists in the production are Robert Luciano Hintze (“Hintze”), a Danish citizen, who is founder of the BeautifulPeople.net website, and Greg Hodge (“Hodge”), a British citizen, who is managing director of the website. Hintze and Hodge are lead performers because, while they play themselves, they perform particular personas of themselves. A large portion of the dialogue between Hintze and Hodge, and their statements on screen, are staged and edited for dramatic effect. Hintze and Hodge also act as hosts of the production, as their performances regularly link or introduce segments of the production to enable the storyline to progress. Examples of the performances of Hintze and Hodge, as seen in the episodes submitted to CAVCO, are provided in Annex A (attached hereto).*

*The three criteria that are used to determine who the leading performers are in a production for purposes of the Canadian Film or Video Production Tax Credit, i.e. remuneration, billing, and time on*



*screen, are applicable to Hintze's and Hodge's roles in the production as illustrated below:*

*o Remuneration*

*Although no direct remuneration was paid to Hintze and Hodge, they are effectively secured and remunerated by the producer for their participation in the production through the payment of \$60,000 (to be used exclusively toward activities relating to the Canadian website launch) and by the coverage of the costs of Hintze's and Hodge's airfare and accommodation and the provision of the use of a furnished office in Toronto while shooting.*

*o Billing*

*The production's stylized generic opening showcases Hintze and Hodge as the "stars" of the production, as do the graphic transitions to the commercial breaks. The end credits commence rolling with the industry-standard term "Featuring" before the name of Hintze and Hodge, who are the only performers credited.*

*o Time on screen*

*The production follows the exploits of Hintze and Hodge. Accordingly, their time on screen is predominant in the production, which is reflective of lead performers.*

*In view of the foregoing, please be informed that, on behalf of the Minister of Canadian Heritage, I have accepted CAVCO's recommendation in this matter. Your application for a Canadian film or video production certificate for the production **BEAUTIFUL PEOPLE** is denied. Please note that this decision is final.*

[29] An attachment to that Notice provided several examples of scenes from the series used to support the position that Hodge and Hintze were lead performers.

## ISSUES

[30] The Applicant Tricon raised a number of issues in its memorandum which, as a result of submissions by its Counsel at the hearing, can be reduced to the following:

1. Did CAVCO owe a duty of fairness to Tricon and was that duty breached? In particular did CAVCO use guidelines which were not available to the public at the time that its decision was reached.
2. Were CAVCO's reasons reasonable and transparent?
3. Did CAVCO err in law in its interpretations of the *Act*, *Regulations* or *Guidelines*?
4. Was CAVCO's decision reasonable?
5. Was CAVCO biased in respect of its determination as to the genre and lead performer?

## **GENERAL DISCUSSION**

[31] In general the applicable principles of law as enunciated by the Supreme Court of Canada in cases including *Dunsmuir v New Brunswick*, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339; and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 are not in dispute:

1. On a judicial review of a decision of a federal board, the standard of review of correctness is applied in considering questions of law;
2. On a judicial review of a decision of a federal board which has acted within its legal mandate, the matter is to be determined on a standard of reasonableness, with a deference being afforded to the board particularly where the decision is within the scope of its unique experience;
3. Where issues of natural justice, fairness and bias arise, the standard is one of proper adherence to those principles; and
4. Reasons given by the board must be intelligible and transparent, sufficient so as to inform the intended recipient of the result and how it was achieved.

[32] In the present case I am struck by the patience and courtesy extended by the members of CAVCO to Tricon and its representatives. Tricon was provided with several opportunities to know the preliminary views that CAVCO had formed in respect of the matters in issue and was given not only formal advance notice of a determination, but informal advance notice with ample opportunity to make submissions. Those submissions were received and considered.

[33] The fact that the Applicant has now become aware of several of the internal memoranda, correspondence and exchanges within CAVCO does not make the decision making process suspect or any less valid. In a quote attributed to Chancellor Otto von Bismarck:

*“Laws are like sausages, it is better not to see them made.”*

[34] It is entirely normal and a good thing that there was an internal debate in CAVCO as to whether Hodge and Hintze were “actors” and “Lead Performers”. Tricon was given full opportunity to make submissions in respect of the issue. Those submissions were fully considered.

[35] To address the issues in particular.

***ISSUE #1. Did CAVCO owe a duty of fairness to Tricon and was that duty breached? In particular did CAVCO use guidelines which were not available to the public at the time that its decision was reached?***

[36] As previously discussed, the internal memorandum distributed January 13, 2010 addresses two issues. One is whether “Beautiful People” was a documentary and whether Hodge and Hintze

were lead performers. The other issue was to address the forthcoming new guidelines and emphasis that certain descriptions required great precision.

[37] Under the 2004 Guidelines it was determined that Hodge and Hintze were lead performers. Nothing in the 2010 Guidelines would have changed that determination. There was no denial of fairness. The final determination was made under the old guidelines.

***ISSUE #2. Were CAVCO's reasons reasonable and transparent?***

[38] The Notice of Denial dated April 29, 2010 is clear as to the denial and reasons for it. It particularly addresses the issue of the roles of Hodge and Hintze in the production using the criteria set out in section 1106(8)(a) of the *Income Tax Regulations* - remuneration billing and time on screen:

*(8) For the purposes of this Division,  
(a) a lead performer in respect of a production is an actor or actress who has a leading role in the production having regard to the performer's remuneration, billing and time on screen;*

[39] The reasons are quite adequate and even exemplary.

***ISSUE #3. Did CAVCO err in law in its interpretations of the Act, Regulations or Guidelines?***

[40] No error of law has been established. The decision of CAVCO is within the criteria and boundaries of the *Income Tax Act*, the *Regulations* and the *Guidelines*.

**ISSUE #4. Was CAVCO's decision reasonable?**

[41] The decision at issue is one that is to be reviewed on the standard of reasonableness. In this regard the well known statements of the Supreme Court of Canada in *Dunsmuir*, *supra* at paragraph 47 and *Khosa*, *supra* at paragraph 46 are pertinent:

*Dunsmuir*:

*[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

*Khosa*:

*[46] More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.*

[42] The decision at issue here, whether Hodge and Hintze are “lead performers” is clearly well within the administrative mandate and expertise of CAVCO. While the decision was not an easy one, it was one that CAVCO was entitled to make. It made that decision fully aware of Tricon’s representations. It was reasonable.

***ISSUE #5 Was CAVCO biased in respect of its determination as to the genre and lead performer?***

[43] Simply because CAVCO made a determination against the interests of Tricon does not mean that it is biased. The fact that internal memoranda discussing the issue were generated does not mean that the authors or recipients were biased. I find nothing on the record that would suggest bias.

**CONCLUSION AND COSTS**

[44] In conclusion I find that there is no basis upon which to set aside the decision denying Tricon's application for certification of "Beautiful People" as "Canadian". There is no basis for quashing that decision or for the Court to direct that CAVCO determine that certification should be granted.

[45] Counsel for the Minister suggested that costs be fixed in the sum of \$2500.00 and I will do so.

**JUDGMENT**

**FOR THE REASONS provided:**

**THIS COURT'S JUDGMENT is:**

1. The application is dismissed;
2. The Respondent is entitled to costs fixed in the sum of \$2500.00.

"Roger T. Hughes"  
\_\_\_\_\_  
Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-845-10

**STYLE OF CAUSE:** TRICON TELEVISION<sup>29</sup> INC. v.  
MINISTER OF CANADIAN HERITAGE

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 4, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** HUGHES J.

**DATED:** April 7, 2011

**APPEARANCES:**

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