Federal Court  Cour fédérale

Date: 20111228

Docket: T-1676-07

Citation: 2011 FC 1520

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 28, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

PRODUCTIONS TOONCAN (XIII) INC

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Productions Tooncan (XIII) inc. (Tooncan) is asking the Court to review the decision made by the Minister of Canadian Heritage (respondent) on August 20, 2007, to revoke Part A of Tooncan's Canadian film or video production certificate, No. A081151-A081176, for the production SNAILYMPICS (II) under subsection 125.4(6) of the *Income Tax Act*, RSC 1985, c 1

(5th Supp), as amended [ITA] and paragraph 1106(1)(ii) of the *Income Tax Regulations*, CRC, c 945 [ITR].

[2] Tooncan is also asking the Court to make an order compelling the respondent to issue the Part B certificate of completion under the film production tax credit program for the series SNAILYMPICS II and to make any other order the Court deems appropriate.

[3] For the following reasons, Tooncan's application for judicial review is allowed, but only for costs.

II. Facts

A. Parties and administrative operation

[4] Paul Cadieux is a business man from the City of Westmount and Tooncan's duly authorized representative.

[5] The Canadian Audio-Visual Certification Office [CAVCO] is the directorate of the Department of Canadian Heritage that administers, for the respondent, the responsibilities attributed to it with respect to the certification of film or audio-visual productions under the ITA and the ITR.

[6] Notably, CAVCO determines the status of Canadian productions and works for the purposes of obtaining tax benefits under the Canadian Film or Video Production Tax Credit Program. The

Canadian film or video production tax credit allows eligible productions a tax benefit of 25% of eligible labour expenditures. A Canadian producer that participates in an international coproduction may receive the same tax benefits as those granted to national productions.

[7] Telefilm Canada (Telefilm) is a Crown corporation established under the *Telefilm Canada Act*, RSC 1985, c C-16 [TFCA]. The corporation administers, *inter alia*, international coproduction treaties that the Government of Canada is a party to. Section 17 of the TFCA states that Telefilm is an agent of Her Majesty the Queen.

[8] Pursuant to an administrative agreement between the respondent and Telefilm, it must evaluate coproduction projects and submit a recommendation to the Minister regarding the status of a production as a coproduction under an agreement. Telefilm first issues this decision as an advance ruling and then carries out a final review once the audio-visual production is completed.

[9] Ultimately, the respondent has the authority to grant a certificate where a producer meets all the requirements set out in the ITA and the ITR. A certificate is issued in two stages. The Part A certificate is issued after an administrative analysis of a file in writing confirming that a production satisfies all the criteria outlined in the ITA and the ITR and may be issued before or during production to facilitate financing or claiming a tax credit at the end of a fiscal year. The Part A certificate is subject to a condition precedent because the producer must obtain the certificate of completion (Part B) within the time period prescribed by the ITR.

[10] Once production is completed, Part B of the certificate may be issued on condition that the production satisfies all the criteria outlined in the ITA and the ITR.

[11] Tooncan is requesting that a certificate be issued entitling it to a tax credit for a Canadian film or video production for its series SNAILYMPICS II. Accordingly, SNAILYMPICS II must meet all the criteria outlined in the ITA and the ITR to qualify as a Canadian film or video production.

B. Steps taken by Tooncan

[12] On December 23, 1998, Tooncan filed an application with Telefilm for an international coproduction advance ruling with respect to a coproduction project of a television series between Canada and Spain.

[13] On January 19, 1999, Telefilm issued its coproduction status advance ruling for the series SNAILYMPICS I. Telefilm was of the view that the project would respect the Agreement between the Government of Canada and the Government of Spain concerning cinematographic relations (Affidavit of Tooncan's representative, Exhibit P-2).

[14] On June 30, 1999, Michael Wernick, Assistant Deputy Minister, Cultural Development, Heritage Canada, signed a memorandum that was sent with Part A of the coproduction certificate (Affidavit of the Applicant's representative, Exhibit P-3). Mr. Wernick wrote: [TRANSLATION] "Telefilm Canada has assured us that this production complies with the Canada-Spain coproduction

agreement." He also stated that it [TRANSLATION] "[appears] . . . that the completed production will comply with the requirements outlined in section 1106 of the *Income Tax Regulations*." Finally, the memorandum concluded that [TRANSLATION] "the producer must submit a completed application for a certificate of completion (Part B) to CAVCO within twenty-five months following the end of the taxation year in which the principal photography began."

[15] On June 30, 1999, the Minister of Canadian Heritage, Sheila Copps, signed Part A of the Canadian film or video production certificate for the series SNAILYMPICS I (Affidavit of Tooncan's representative, Exhibit P-4).

[16] On August 13, 2001, Telefilm filed its recommendation for final approval for SNAILYMPICS I (Affidavit of the Applicant's representative, Exhibit P-5) following a review of the application for certification submitted on February 27, 2001 (Affidavit of Tooncan's representative, Exhibit P-6).

[17] On November 20, 2001, CAVCO sent Tooncan the Part B certificate of completion for SNAILYMPICS I signed by Michael Wernick, Assistant Deputy Minister, Cultural Development, on behalf of the respondent (Affidavit of Tooncan's representative, Exhibit P-7).

[18] On April 10, 2001, Tooncan filed with Telefilm an application for an international coproduction advance ruling for the SNAILYMPICS II project.

[19] On February 26, 2002, Telefilm issued its advance ruling on coproduction status for SNAILYMPICS II and accepted Tooncan's application for an advance ruling (Affidavit of Tooncan's representative, Exhibit P-11).

[20] On March 14, 2003, Tooncan filed an application for final approval and requested its certificate, Parts A and B, from CAVCO (Affidavit of Tooncan's representative, Exhibits P-12 and P-13).

[21] On July 9, 2003, CAVCO authorized the Canadian film or video production certificate, Part A, signed by Susan Peterson, Assistant Deputy Minister, Cultural Affairs, Heritage Canada, on behalf of the respondent (Affidavit of Tooncan's representative, Exhibit P-14).

[22] On October 15, 2003, Tooncan wrote to CAVCO to confirm that all the documents required for the Part B review of SNAILYMPICS II had been filed (Affidavit of Tooncan's representative, Exhibit P-15).

[23] On March 18, 2004, Tooncan sent an e-mail to Brigitte Monneau, Telefilm's Director, International Coproductions, following a meeting between Paul Cadieux, its representative, and Ms. Monneau. In his e-mail (Affidavit of Applicant's representative, Exhibit P-16), Tooncan's representative explained to Ms. Monneau that Spain had no obligation to submit the coproduction's final accounts. In addition, he stated that the production had ended very badly. He wrote: [TRANSLATION] "In the case of series II, we provided Canada with all the same services as for series I, and we complied with the task-sharing that was established at the time of the advance ruling."

[24] Ms. Monneau replied to Tooncan the same day (Affidavit of Tooncan's representative, Exhibit P-16):

> [TRANSLATION]
> The problem we are now facing—which did not exist when we spoke at the Joint Commission—is that this project was accepted in the absence of a TV treaty between Canada and Spain. The Department of Heritage is now questioning this, and ultimately Revenue Canada may also question whether the project is entitled to tax credits.
>
> Given this situation, it is difficult for us as the administrator of the Treaty to give final approval by adding another deviation, i.e., the figures from the coproducing country have not been validated. Therefore, I regret to inform you that we must leave this project "on ice" until the treaty situation is resolved.

[25] On June 13, 2005, CAVCO wrote to Tooncan, reminding it, *inter alia*, about the 48-month deadline to submit the missing documentation for purposes of the assessment and issuance of the production certificate (Affidavit of Tooncan's representative, Exhibit P-17).

[26] On July 4, 2005, subsequent to CAVCO's letter of June 13, 2005, Annie Bourdeau, Tooncan's representative, contacted Ms. Monneau at Telefilm and asked her to recommend the coproduction at the certification stage. In addition, Tooncan wrote that Ms. Monneau had already stated [TRANSLATION] "that this type of situation was not a precedent and that, on an exceptional basis, [Telefilm may] issue a final without the other country's final agreement" (Affidavit of Tooncan's representative, Exhibit P-18).

[27] Ms. Monneau replied the same day and noted in her e-mail that the Spanish authorities were not planning at that time to recognize productions completed prior to the signing of a new treaty that would include television productions. Further on she wrote:

> [TRANSLATION]
> . . . The Department of Heritage is working actively to resolve the situation, but at this time everything is on hold. CAVCO is aware of this, and I assume that if the situation is sorted out after the normal filing deadlines, they could make an exception given the circumstances.

[28] On September 9, 2005, i.e., prior to the deadline of October 31, 2005, the applicant wrote to Kenny Duggan, case analyst at Telefilm, to explain the situation to him (Affidavit of Tooncan's representative, Exhibit P-19).

[29] Mr. Duggan replied by e-mail on September 12, 2005 (Affidavit of Tooncan's representative, Exhibit P-19):

> [TRANSLATION]
> . . . The Department is aware of the situation and is working to resolve it as quickly as possible, but we cannot proceed at this time. CAVCO is aware of the situation and, at present, even if CAVCO received a recommendation from us (which we cannot do), your file would be on hold at their office.

[30] On October 10, 2006, almost eleven months after the critical deadline of October 31, 2005, an amendment to the Agreement between the Government of Canada and the Government of Spain concerning cinematographic relations came into effect. Henceforth, television productions would be covered by the treaty (Affidavit of Tooncan's representative, Exhibit P-20).

[31] Telefilm did not send a recommendation to CAVCO prior to the October 31, 2005, deadline.

[32] On August 20, 2007, Tooncan received the respondent's decision (Affidavit of Tooncan's representative, Exhibit P-1). The respondent concluded as follows:

> [TRANSLATION]
> . . . Subsection 1106(1) of the [ITR] defines an "excluded production" as a "production . . . in respect of which . . . (ii) a certificate of completion has not been issued before the production's certification deadline."
>
> The Regulations establish a deadline of 48 months for a Part B certificate to be issued by the Minister of Canadian Heritage. The deadline is calculated from the date of the end of the first taxation year in which the principal photography began.
>
> For this production, the date the principal photography began was May 10, 2001, and the date of the end of the first taxation year was October 31, 2001. The 48-month deadline was October 31, 2005, but the Part B certificate was not issued because CAVCO had not received all the documentation required to recommend that the certificate be issued.
>
> . . . SNAILYMPICS (II) is an "excluded production" under the [Canadian film or video production tax credit]. . . .

[33] On August 24, 2007, Tooncan's representative filed two access to information requests to obtain the complete files for SNAILYMPICS I and SNAILYMPICS II. By means of these requests, he sought to demonstrate that the respondent, through his agent Telefilm, makes final recommendations on coproduction status that are contrary to the Act or are made in the absence of formal treaties.

[34] On September 21, 2007, Tooncan's representative filed a third access to information request to obtain the coproduction catalogues in order to establish that some productions are certified even in the absence of treaties.

[35] On October 19, 2007, Pierre-Yves Marchand, a paralegal at Telefilm, sent copies of the two public coproduction catalogues for the years 1999 and 2001.

[36] On December 14, 2007, Tooncan's representative received a response to his first two access to information requests.

[37] During the 2007-2008 Christmas holidays, Tooncan's representative turned his attention to the documents he had received pursuant to his access to information requests. He noted that, in the case of SNAILYMPICS I, the Spanish authorities did not communicate their agreement with the coproduction status until preliminary approval was given, i.e., September 22, 1998 (Supplementary Affidavit of Tooncan's representative, Exhibit P-28). The same situation occurred for SNAILYMPICS II on February 1, 2002 (Affidavit of Tooncan's representative, Exhibit P-22). He also maintains that at least 33 productions received certificates, Parts A and B, in the absence of treaties, between the years 1987 and 1999 (Affidavit of Tooncan's representative, Exhibit P-33).

III. Legislation

[38] The relevant sections of the *Income Tax Act* [ITA] and the *Income Tax Regulations* [ITR] are reproduced in the annex to these reasons.

IV. Issues and standards of review

A. Issues

[39] This application for judicial review raises the following issues:

1. ***Did the respondent breach his duty to comply with the principles of procedural fairness?***

2. ***Is the respondent's decision to revoke Tooncan's coproduction certificate reasonable?***

B. Standards of review

[40] In *Tricon Television29 Inc v Canada (Minister of Canadian Heritage)*, 2011 FC 435, [2011] FCJ No 547, Mr. Justice Hughes wrote the following at paragraph 31 of his decision:

> 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.

[41] The standard of review applicable to questions involving the doctrine of legitimate expectations, promissory estoppel and rules of procedural fairness is correctness.

[42] The standard of review applicable to the respondent's decision to revoke Tooncan's coproduction certificate is reasonableness.

V. Position of the parties

A. Tooncan's position

[43] Tooncan alleges that the respondent's decision is unreasonable, was made in a perverse and capricious manner and does not comply with the Act or administrative practices. The decision to revoke the certificate is flawed in fact and in law because none of the grounds for revocation set out in the ITA are present in this case. The applicant did not make an omission or incorrect statement for the purpose of obtaining the Part A certificate.

[44] Tooncan maintains that it has completed all the steps in the production and has complied with the proportions of financial contributions that it committed to.

[45] The reason for revocation given in the decision (Affidavit of Tooncan's representative, Exhibit P-1) is without merit because the respondent had in hand all the information required to issue the Part B certificate of completion. In granting the Part A production certificate on July 9, 2003, the respondent must have known that the coproduction treaty with Spain did not formally include television productions. The respondent could not therefore justify revoking the part A certificate and refusing to issue the Part B certificate of completion on the ground that the treaty with Spain did not formally include television productions.

[46] After reviewing Tooncan's application for an advance ruling , Telefilm took the position in its recommendation of February 26, 2002, that the project [TRANSLATION] "will comply with the standards in the Agreement [between the Government of Canada and the Government of Spain concerning cinematographic relations], subject to [certain] conditions" (Affidavit of Tooncan's representative, Exhibit P-11).

[47] Tooncan also submits that the SNAILYMPICS II production respects the spirit of the treaty with Spain. The government programs and statutory provisions that apply in this case are intended to promote the creation of Canadian products by the private sector for distribution in local and international markets. In fact, Tooncan relies on the parameters of the cinema treaty with Spain and contends that they apply by analogy to television productions, without further formalities.

[48] Tooncan has done nothing wrong because it followed through on its commitments and complied with the directives of both the respondent and Telefilm.

[49] Tooncan points out that Telefilm made the final recommendation for the SNAILYMPICS I series without any contact with the Spanish authorities and, therefore, without any confirmation of the Spanish coproducer's final accounts. Tooncan notes, moreover, that in the case of SNAILYMPICS II, Telefilm emphasized, however, that the Spanish coproducer had no obligation to file its final accounts with the Spanish authorities.

[50] Telefilm's actions as the respondent's agent bind the respondent. In its recommendations for issuing the Part A certificate, Telefilm wrote that the SNAILYMPICS II production complied with the provisions of the coproduction treaty with Spain. At the risk of abusing his authority, the respondent must issue the Part B certificate of completion because he did so previously with the SNAILYMPICS I production. The respondent must be consistent in making his decisions.

[51] According to Tooncan, the lack of a television amendment or coproduction treaty between the two countries is not an obstacle to issuing the certificate of completion. The respondent has granted certificates of completion to other coproductions even without a television amendment to a treaty (Affidavit of Tooncan's representative, Exhibit P-33).

[52] By comparing the dates when the treaties were signed with the production dates indicated in the Telefilm catalogues (see the coproductions listed at paragraphs 18 to 21 of the supplementary affidavit of Tooncan's representative), Tooncan submits that the respondent signed certificates under Parts A and B, in accordance with the ITA and the ITR, in the absence of formal treaties between Canada and other foreign countries.

[53] The respondent could have signed the Part B certificate of completion after the television amendment was made in the treaty with Spain, which was signed on October 10, 2006 (Affidavit of Tooncan's representative Exhibit P-20).

[54] On the other hand, Tooncan argues that the wording of subsection 125.4(6) of the ITA suggests that the certification process is not formal but is subject to a flexible decision-making process.

B. Respondent's position

[55] The respondent submits that he has complied with all the principles of procedural fairness in his relations with Tooncan. The decision to revoke the certificate is not discriminatory.

[56] Moreover, Tooncan benefited from an extension of time to produce the documents required for reviewing its application (Affidavit of Tooncan's representative, Exhibit P-17). The additional time given to Tooncan was the result of an amendment to the ITR, specifically, Section VII.

[57] Tooncan was aware of the difficulties Telefilm encountered in including previous projects in the new agreement with Spain (Affidavit of Tooncan's representative, Exhibit P-18, Reply by Brigitte Monneau, Telefilm's Manager, Coproductions, to the e-mail sent by Annie Bourdeau of Productions Tooncan). Despite this knowledge, Tooncan introduced no evidence to establish that its productions qualified as a film or video production under the ITA.

[58] Tooncan knows and cannot disregard the fact that its production did not qualify for the tax credit.

[59] The respondent cannot be forced to sign a certificate for a production that does not meet the requirements of the ITA and its Regulations. The Minister has no obligation to grant a certificate, especially where the requirements of the ITA and the ITR have not been satisfied. Moreover, Tooncan recognized this in its written representations; the respondent's decision is within his discretion.

[60] The respondent notes that in the *Khadr* decision the Federal Court stated that the term "may" in a statute can, in certain circumstances, be tantamount to an obligation of refusal (see *Khadr v Canada (Attorney General)*, 2006 FC 727 at paragraph 109).

[61] Finally, the respondent contends that Tooncan cannot expect to be granted substantive rights outside of the certification procedure (see *Cinémas Guzzo Inc v Canada (Attorney General)*, 2005 FC 691).

[62] The Court took two objections under advisement:

1. First, counsel for Tooncan objected to the production of Exhibits P-21 and P-23 in the respondent's record because these exhibits were not introduced in accordance with the Rules of the Court. As a result, they cannot be part of the Court record. Those exhibits are Telefilm's coproductions guide and a Telefilm document entitled "Official Coproductions:

Mandate, Policies and Requirements". The Court upholds the applicant's objection; these exhibits were not the subject of an affidavit in accordance with the Rules of the Court.

2. Counsel for the respondent objected to Tooncan's submissions on the necessity for prior notice and on the inadequacy of the reasons for decision because these two arguments were not specifically mentioned in Tooncan's memorandum. The Court dismisses the respondent's objection because Tooncan is relying, *inter alia*, on promissory estoppel and the doctrine of legitimate expectations, which give rise to procedural fairness obligations. Tooncan's arguments as to the necessity for prior notice and the inadequacy of the reasons are simply a result of applying these doctrines and are admissible as such.

VI. Analysis

1. Did the respondent breach his duty to comply with the principles of procedural fairness?

[63] The Court finds, for the following reasons, that the respondent in this case failed to comply with the principles of procedural fairness.

[64] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 21 [*Baker*], the Supreme Court of Canada stated that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (see also *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653).

[65] In *Island Timberlands LP v Canada (Minister of Foreign Affairs)*, 2009 FC 258, [2009] FCJ No 335 at paragraph 33, Justice de Montigny stated as follows:

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.
> (See also *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602)

[66] In this case, the Minister's decision is analogous to a purely administrative decision. On the recommendation of Telefilm and under the ITA and the ITR, the respondent may issue a coproduction certificate. Thus, the duty to subject the decision-making process to the rules of procedural fairness is normally minimal.

[67] Tooncan argues legitimate expectations to justify the intervention of our Court. On this issue, it is interesting to read what Madam Justice L'heureux-Dubé of the Supreme Court wrote at paragraph 26 of *Baker*:

> . . . Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)*, (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15;

> D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)*, (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[68] Thus, the application of this doctrine depends on two factors: "(i) whether the tribunal made an undertaking to follow set procedures; and (ii) whether the undertaking was not in conflict with the tribunal's statutory duty" (see *Addy v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia*), [1997] 3 FC 784, [1997] FCJ No 796 at paragraph 49).

[69] Tooncan argues that the context of the application for the SNAILYMPICS I production supports applying the doctrine of legitimate expectations. Toucan also argues that promissory estoppel should apply. In Toucan's view, the respondent's decision not to issue the Part B certificate of completion and to revoke the Part A production certificate for SNAILYMPICS II is unfair and constitutes an abuse of right.

[70] In summary, Tooncan is asking that a second certificate be issued, in contravention of the applicable rules, because Telefilm recommended that a certificate be issued the first time in the absence of a television treaty between Canada and Spain, and the respondent acted on this recommendation for SNAILYMPICS I.

[71] The television agreement between the two countries came into effect on October 10, 2006. The Spanish producer had no obligation to file its final production accounts with the Spanish authorities prior to that date. CAVCO maintains that accordingly it could not recommend that the certificate be issued even though it did so in SNAILYMPICS I. Given the failure to submit certain documents, the most important of which was Telefilm's recommendation, the respondent submits that he had no choice but to revoke the film or video production certificate because SNAILYMPICS II is an excluded production under the ITA.

[72] In principle, the doctrine of legitimate expectations " can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation" (see *Canada (Minister of Employment and Immigration) v Lidder*, [1992] FCJ No 212, [1992] 2 FC 621 at paragraph 4 [*Lidder*]). In addition, a public authority is bound as to its procedure, "but in no case can it place itself in conflict with its duty and forego the requirements of the law" (see *Lidder* at paragraph 4).

[73] In this case, Tooncan saw the respondent treat the two applications it submitted differently. First, in the SNAILYMPICS I case, the respondent, based on documents that his agent, Telefilm, sent to him, certified a coproduction that clearly did not meet the criteria outlined in the ITA and the ITR because there was no treaty between Canada and Spain that applied to television productions. Second, the respondent's agent, Telefilm, on the basis of a new direction at CAVCO, did not file a recommendation. As a result, the respondent revoked the Part A certificate, which had already been issued, but for a purely technical reason. In fact, he alleged that Telefilm had not given a recommendation within the time allowed under the Act in order to avoid dealing with the real issue,

i.e., its change in policy. In an e-mail on March 18, 2004, Brigitte Monneau, Telefilm's Manager, Coproductions, wrote to Tooncan's representative (Affidavit of Tooncan's representative, Exhibit P-16):

> [TRANSLATION]
> The problem we are now facing—which did not exist when we spoke at the Joint Commission—is that this project was accepted in the absence of a TV treaty between Canada and Spain. The Heritage Minister is now questioning this, and ultimately Revenue Canada may also question whether the project is entitled to tax credits.
>
> Given this situation, it is difficult for us as the administrator of the Treaty to give final approval by adding another deviation, i.e., the figures from the coproducing country have not been validated. Therefore, I regret to inform you that we must put this project "on ice" until the treaty situation is resolved.

[74] This e-mail confirms a major change compared with previous practices of the respondent and his agent. First, it establishes that the respondent questioned the fact that coproduction projects were accepted in the absence of treaties (Affidavit of Tooncan's representative, Exhibit P-33) although he had already accepted a certain number of coproductions, notwithstanding the lack of treaties in the past.

[75] This change in direction and policy when the SNAILYMPICS II production was finished should have led the respondent to send at least a draft decision dealing with his real reasons. He should have advised Tooncan of his intentions and invited it to make representations. Especially since on July 4, 2004, Brigitte Monneau wrote to Tooncan's representative: [TRANSLATION] "The Department of Heritage is working actively to resolve the situation, but at this time everything is on hold. CAVCO is aware of this, and I assume that if the situation is sorted out after the normal filing deadlines, they could make an exception given the circumstances."

[76] On September 12, 2005, in the absence of Brigitte Monneau, her assistant, Mr. Duggan, wrote to Tooncan's representative, who was pressuring him to act and to file a recommendation given the October 31, 2005, deadline:

> [TRANSLATION]
> . . . We understand the position you are in, but we cannot make a recommendation for this project knowing that the Agreement in force does not include television. As for Snailympics I, our office dealt with that file before the Department informed us that there was a problem . . .

[77] On August 20, 2007, the Department of Heritage wrote to Tooncan's representative, informing him that SNAILYMPICS II was an excluded production because a certificate of completion had not been issued before the certification deadline. The Department stated: [TRANSLATION] "For this production, the date the principal photography began was May 10, 2001, and the date of the end of the first taxation year was October 31, 2001. The 48-month deadline was October 31, 2005, but the Part B certificate was not issued because CAVCO had not received all the documentation required to recommend that the certificate be issued."

[78] This evidence leads us to conclude that the respondent should have at least permitted Tooncan to make representations prior to making this decision that contravened the respondent's policy or, at least, the respondent's previous practice in the SNAILYMPICS I file.

[79] Counsel for Tooncan relies primarily on the Supreme Court decision in *Mount Sinai Hospital Center v Quebec* (*Minister of Health and Social Services*), 2001 SCC 41. In that case, Mount Sinai Hospital was requesting that a permit be issued in accordance with the promises made by numerous ministers over the years to persuade it to move to Montréal. The hospital had been

encouraged to continue its vocation as a long-term and short-term care facility although its original permit provided for long-term care beds only. It is important to point out that Mr. Justice Binnie stated, at paragraph 47 of that decision, that "[p]ublic law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. As stated in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, *per* Rand J., at p. 220: 'there can be no estoppel in the face of an express provision of a statute'."

Mr. Justice Strayer in *Aurchem Exploration Ltd v Canada*, [1992] FCJ 427, noted that one must look at the Act and consider the power granted to the decision-maker, in this case the scope of the discretion granted to the respondent. In this case, the respondent asserts that the Minister has no discretion in tax matters. He relies on the decision of the Supreme Court of Canada in *Canada (Minister of National Revenue) v Inland Industries Limited*, 1974 SCR 514, and *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 1 SCR 715 to support this position. The Court concurs with the respondent's position. Furthermore, Pierre-André Côté writes at page 525, paragraph 1758, of the *Interpretation of Legislation in Canada*:

> However, two principles can be drawn from the present case law of the Supreme Court. First, the fact that the literal meaning is clear, that it is free of any ambiguities or imprecisions, does not constitute a justifiable reason to ignore the objectives of the provision: these must always be borne in mind as a contextual element. Second, when establishing the meaning of a rule of tax law, arguments drawn from the objectives of a provision could tip the balance where the literal meaning is obscure; on the other hand, their weight would be noticeably reduced in the presence of a text whose literal meaning, when analysed contextually, appears plain.

[80] The Court recognizes that the respondent cannot act in a manner contrary to the Act. The provisions of the ITA and the ITR are clear and unambiguous, as are the objectives of the Act. There is no place for interpretation. The Minister must apply the Regulations correctly: he cannot, in the absence of a treaty, certify a production.

[81] The respondent should have at least received Tooncan's representations and made the decision he deemed appropriate in the circumstances while respecting the limits that the Act imposes on him. In the past, the respondent had never made these arguments to refuse to issue a Part B certificate. The change in practice and policy should have been brought to Tooncan's attention. Thus, in principle, it is for the respondent to correct this defect, which breaches his duty to act fairly.

[82] The entire history of this file convinces us that the respondent breached his duty of procedural fairness. He did not permit Tooncan to put forward its point of view prior to making his decision and, moreover, he based his decision on technical considerations rather than the real reasons that were the basis for it.

2. Is the respondent's decision to revoke Tooncan's coproduction certificate reasonable?

[83] The advance decision of February 26, 2002 (Affidavit of Tooncan's representative, Exhibit P-11), is clear and unequivocal. Telefilm undertook [TRANSLATION] "[to view] the final version of the production and [to review] the project's final data to [ensure] that it was produced in accordance

with the documentation submitted; [TLFC will] then be able to recommend SNAILYMPICS II to the Minister of Canadian Heritage for final approval of official coproduction status."

[84] However, referring to paragraph 1106(1)(ii) of the ITR, Jean-François Bernier, Director General, Cultural Industries, determined that SNAILYMPICS II was an excluded production. CAVCO did not receive all the documentation required to grant the Part B certificate within the time limits prescribed by the ITR. Thus, Telefilm could not recommend SNAILYMPICS II to the Minister of Canadian Heritage for final approval. The respondent revoked the coproduction certificate because the Part B certificate was not issued within the time limits set out in the Act.

[85] The respondent's decision is not reasonable in this case because the respondent did not comply with the principles of procedural fairness. Normally, when the Court makes this finding, it remits the file to the Minister. However, in this case, the Minister cannot grant a certificate in contravention of the Act since the production is excluded under the Regulations given that the treaty that was in force did not apply to television productions. Even if he had received the representations he should have received, he cannot issue a certificate retroactively or grant a certificate if there is no television agreement in place during the relevant period. The provisions of the ITA and the ITR establish a strict time limit (see *Granger v Canada* (*Employment and Immigration Commission*), [1986] 3 FC 70 at paragraph 34). Tooncan is asking us to make an order compelling the respondent to issue the Part B certificate. The Court cannot agree to this request because it would be contrary to the applicable provisions of the ITA (see *Satinder v Canada (Attorney General)*, 2002 FCA 491 at paragraph 9). The Court is sympathetic to Tooncan, which is in a difficult situation as a result of

Telefilm and CAVCO's actions, which can only be deplored, but the Court cannot order that a certificate be issued in contravention of the clear provisions of the Act.

VII. Conclusion

[86] The respondent in this case has not complied with his duty of procedural fairness, and his decision to revoke the coproduction certificate is therefore not reasonable. However, the application for judicial review is allowed for costs only since the Minister cannot make any other decision than the one he made.

JUDGMENT

THE COURT RULES that it allows the application for judicial review but for costs only.

"André F.J. Scott"

Judge

Certified true translation
Mary Jo Egan, LLB

Annex

- **Section 125.4 of the *Income Tax Act*, RSC 1985, c. 1, 5th Supp, as amended:**

Canadian Film or Video Production Tax Credit

Definitions

125.4 (1) The definitions in this subsection apply in this section.

- "assistance"

  « montant d'aide »

  "assistance" means an amount, other than a prescribed amount or an amount deemed under subsection 125.4(3) to have been paid, that would be included under paragraph 12(1)(*x*) in computing a taxpayer's income for any taxation year if that paragraph were read without reference to subparagraphs 12(1)(*x*)(v) to 12(1)(*x*)(vii).

- "Canadian film or video production"

  « production cinématographique ou magnétoscopique canadienne »

  "Canadian film or video production" has the meaning assigned by regulation.

- "Canadian film or video production certificate"

  « certificat de production cinématographique ou magnétoscopique canadienne »

  "Canadian film or video production certificate" means a certificate issued in respect of a production by the Minister of Canadian Heritage

  - (*a*) certifying that the production is a Canadian film or video production, and
  - (*b*) estimating amounts relevant for the purpose of determining the amount deemed under subsection 125.4(3) to have been paid in respect of the production.

- "investor"

  « investisseur »

  "investor" means a person, other than a prescribed person, who is not actively engaged on a regular, continuous and substantial basis in a business carried on through a permanent establishment (as defined by regulation) in Canada that is a Canadian film or video production business.

- "labour expenditure"

« dépense de main-d'oeuvre »

"labour expenditure" of a corporation for a taxation year in respect of a property of the corporation that is a Canadian film or video production means, in the case of a corporation that is not a qualified corporation for the year, nil, and in the case of a corporation that is a qualified corporation for the year, subject to subsection 125.4(2), the total of the following amounts to the extent that they are reasonable in the circumstances and included in the cost or, in the case of depreciable property, the capital cost to the corporation of the property:

- (*a*) the salary or wages directly attributable to the production that are incurred after 1994 and in the year, or the preceding taxation year, by the corporation for the stages of production of the property, from the final script stage to the end of the post-production stage, and paid by it in the year or within 60 days after the end of the year (other than amounts incurred in that preceding year that were paid within 60 days after the end of that preceding year),
- (*b*) that portion of the remuneration (other than salary or wages and other than remuneration that relates to services rendered in the preceding taxation year and that was paid within 60 days after the end of that preceding year) that is directly attributable to the production of property, that relates to services rendered after 1994 and in the year, or that preceding year, to the corporation for the stages of production, from the final script stage to the end of the post-production stage, and that is paid by it in the year or within 60 days after the end of the year to
  - (i) an individual who is not an employee of the corporation, to the extent that the amount paid
    - (A) attributable to services personally rendered by the individual for the production of the property, or
    - (B) is attributable to and does not exceed the salary or wages of the individual's employees for personally rendering services for the production of the property,
  - (ii) another taxable Canadian corporation, to the extent that the amount paid is attributable to and does not exceed the salary or wages of the other corporation's employees for personally rendering services for the production of the property,
  - (iii) another taxable Canadian corporation all the issued and outstanding shares of the capital stock of which (except directors' qualifying shares) belong to an individual and the activities of which consist principally of the provision of the individual's services, to the extent that the amount paid is attributable to services rendered personally by the individual for the production of the property, or
  - (iv) a partnership that is carrying on business in Canada, to the extent that the amount paid
    - (A) is attributable to services personally rendered by an individual who is a member of the partnership for the production of the property, or

        - (B) is attributable to and does not exceed the salary or wages of the partnership's employees for personally rendering services for the production of the property, and
    - (*c*) where
        - (i) the corporation is a subsidiary wholly-owned corporation of another taxable Canadian corporation (in this section referred to as the "parent"), and
        - (ii) the corporation and the parent have agreed that this paragraph apply in respect of the production,

    the reimbursement made by the corporation in the year, or within 60 days after the end of the year, of an expenditure that was incurred by the parent in a particular taxation year of the parent in respect of that production and that would be included in the labour expenditure of the corporation in respect of the property for the particular taxation year because of paragraph (*a*) or (*b*) if

        - (iii) the corporation had had such a particular taxation year, and
        - (iv) the expenditure were incurred by the corporation for the same purpose as it was by the parent and were paid at the same time and to the same person or partnership as it was by the parent.

- "qualified corporation"

  « société admissible »

  "qualified corporation" for a taxation year means a corporation that is throughout the year a prescribed taxable Canadian corporation the activities of which in the year are primarily the carrying on through a permanent establishment (as defined by regulation) in Canada of a business that is a Canadian film or video production business.

- "qualified labour expenditure"

  « dépense de main-d'oeuvre admissible »

  "qualified labour expenditure" of a corporation for a taxation year in respect of a property of the corporation that is a Canadian film or video production means the lesser of

    - (*a*) the amount, if any, by which
        - (i) the total of
            - (A) the labour expenditure of the corporation for the year in respect of the production, and
            - (B) the amount by which the total of all amounts each of which is the labour expenditure of the corporation for a preceding taxation year in respect of the production exceeds the total of all amounts each of which is a qualified labour expenditure of the corporation in respect of the production for a preceding taxation year before the end of which the principal filming or taping of the production began

exceeds

- (ii) where the corporation is a parent, the total of all amounts each of which is an amount that is the subject of an agreement in respect of the production referred to in paragraph (*c*) of the definition "labour expenditure" between the corporation and its wholly-owned corporation, and

- (*b*) the amount determined by the formula

  A - B

  where

  - A

    is 48% of the amount by which

    - (i) the cost or, in the case of depreciable property, the capital cost to the corporation of the production at the end of the year,

      exceeds

    - (ii) the total of all amounts each of which is an amount of assistance in respect of that cost that, at the time of the filing of its return of income for the year, the corporation or any other person or partnership has received, is entitled to receive or can reasonably be expected to receive, that has not been repaid before that time pursuant to a legal obligation to do so (and that does not otherwise reduce that cost), and

  - B

    is the total of all amounts each of which is the qualified labour expenditure of the corporation in respect of the production for a preceding taxation year before the end of which the principal filming or taping of the production began.

- "salary or wages"

  « traitement ou salaire »

  "salary or wages" does not include an amount described in section 7 or any amount determined by reference to profits or revenues.

Rules governing labour expenditure of a corporation

(2) For the purpose of the definition "labour expenditure" in subsection 125.4(1),

- (*a*) remuneration does not include remuneration determined by reference to profits or revenues;
- (*b*) services referred to in paragraph (*b*) of that definition that relate to the post-production stage of the production include only the services that are rendered at that stage by a person who performs the duties of animation cameraman, assistant colourist, assistant mixer, assistant sound-effects technician, boom operator, colourist, computer graphics designer, cutter, developing technician, director of post production, dubbing technician, encoding technician, inspection technician — clean up, mixer, optical effects technician, picture editor, printing technician, projectionist, recording technician, senior editor, sound editor, sound-effects technician, special effects editor, subtitle technician, timer, video-film recorder operator, videotape operator or by a person who performs a prescribed duty; and
- (*c*) that definition does not apply to an amount to which section 37 applies.

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.

Exception

(4) This section does not apply to a Canadian film or video production where an investor, or a partnership in which an investor has an interest, directly or indirectly, may deduct an amount in respect of the production in computing its income for any taxation year.

When assistance received

(5) For the purposes of this Act other than this section, and for greater certainty, the amount that a corporation is deemed under subsection 125.4(3) to have paid for a taxation year is assistance received by the corporation from a government immediately before the end of the year.

Revocation of a certificate

(6) A Canadian film or video production certificate in respect of a production may be revoked by the Minister of Canadian Heritage where

- (*a*) an omission or incorrect statement was made for the purpose of obtaining the certificate, or
- (*b*) the production is not a Canadian film or video production,

and, for the purpose of subparagraph 125.4(3)(*a*)(i), a certificate that has been revoked is deemed never to have been issued.

- **Section 1106 of the *Income Tax Regulations*, CRC c 945 (ITR):**

Division VII

Certificates Issued by the Minister of Canadian Heritage

Interpretation

1106. (1) The following definitions apply in this Division and in paragraph (*x*) of Class 10 in Schedule II.

- "application for a certificate of completion"

  « demande de certificat d'achèvement »

  "application for a certificate of completion", in respect of a film or video production, means an application by a prescribed taxable Canadian corporation in respect of the production, filed with the Minister of Canadian Heritage before the day (in this Division referred to as "the production's application deadline") that is the later of

  - (*a*) the day that is 24 months after the end of the corporation's taxation year in which the production's principal photography began, or

- (*b*) the day that is 18 months after the day referred to in paragraph (*a*), if the corporation has filed, with the Canada Revenue Agency, and provided to the Minister of Canadian Heritage a copy of, a waiver described in subparagraph 152(4)(*a*)(ii) of the Act, within the normal reassessment period for the corporation in respect of the first and second taxation years ending after the production's principal photography began.

- "Canadian"

  « *Canadien* »

  "Canadian" means a person that is

  - (*a*) an individual who is
    - (i) a citizen, as defined in subsection 2(1) of the *Citizenship Act*, of Canada, or
    - (ii) a permanent resident, as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*, or
  - (*b*) a corporation that is a Canadian-controlled entity, as determined under sections 26 to 28 of the *Investment Canada Act*.

- "Canadian government film agency"

  « agence cinématographique d'État »

  "Canadian government film agency" means a federal or provincial government agency whose mandate is related to the provision of assistance to film productions in Canada.

- "certificate of completion"

  « certificat d'achèvement »

  "certificate of completion", in respect of a film or video production of a corporation, means a certificate certifying that the production has been completed, issued by the Minister of Canadian Heritage before the day (in this Division referred to as "the production's certification deadline") that is six months after the production's application deadline.

- "excluded production"

  « production exclue »

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

  - (*a*) in respect of which
    - (i) the particular corporation has not filed an application for a certificate of completion before the production's application deadline,
    - (ii) a certificate of completion has not been issued before the production's certification deadline,

        - (iii) where the production is not a treaty co-production, neither the particular corporation nor another prescribed taxable Canadian corporation related to the particular corporation
            - (A) is, except to the extent of an interest in the production held by a prescribed taxable Canadian corporation as a co-producer of the production or by a prescribed person, the exclusive worldwide copyright owner in the production for all commercial exploitation purposes for the 25-year period that begins at the earliest time after the production was completed that it is commercially exploitable, and
            - (B) controls the initial licensing of commercial exploitation,
        - (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, or
    - (*b*) that is
        - (i) news, current events or public affairs programming, or a programme that includes weather or market reports,
        - (ii) a talk show,
        - (iii) a production in respect of a game, questionnaire or contest (other than a production directed primarily at minors),
        - (iv) a sports event or activity,
        - (v) a gala presentation or an awards show,
        - (vi) a production that solicits funds,
        - (vii) reality television,
        - (viii) pornography,
        - (ix) advertising,
        - (x) a production produced primarily for industrial, corporate or institutional purposes, or
        - (xi) a production, other than a documentary, all or substantially all of which consists of stock footage.
- "producer"

  « producteur »

  "producer" means a producer of a film or video production, except that it does not include a person unless the person is the individual who

    - (*a*) controls and is the central decision maker in respect of the production;

- (*b*) is directly responsible for the acquisition of the production story or screenplay and the development, creative and financial control and exploitation of the production; and
- (*c*) is identified in the production as being the producer of the production.

- "remuneration"

  « rémunération »

  "remuneration" means remuneration other than an amount determined by reference to profits or revenues.

- "twinning arrangement"

  « convention de jumelage »

  "twinning arrangement" means the pairing of two distinct film or video productions, one of which is a Canadian film or video production and the other of which is a foreign film or video production.

Prescribed Taxable Canadian Corporation

(2) For the purposes of section 125.4 of the Act and this Division, "prescribed taxable Canadian corporation" means a taxable Canadian corporation that is a Canadian, other than a corporation that is

- (*a*) controlled directly or indirectly in any manner whatever by one or more persons all or part of whose taxable income is exempt from tax under Part I of the Act; or
- (*b*) a prescribed labour-sponsored venture capital corporation, as defined in section 6701.

Treaty Co-production

(3) For the purpose of this Division, "treaty co-production" means a film or video production whose production is contemplated under any of the following instruments, and to which the instrument applies:

- (*a*) a co-production treaty entered into between Canada and another State;
- (*b*) the Memorandum of Understanding between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on Film and Television Co-Production;
- (*c*) the Common Statement of Policy on Film, Television and Video Co-Productions between Japan and Canada;
- (*d*) the Memorandum of Understanding between the Government of Canada and the Government of the Republic of Korea on Television Co-Production; and
- (*e*) the Memorandum of Understanding between the Government of Canada and the Government of the Republic of Malta on Audio-Visual Relations.

Canadian Film or Video Production

(4) Subject to subsections (6) to (9), for the purposes of section 125.4 of the Act, this Part and Schedule II, "Canadian film or video production" means a film or video production, other than an excluded production, of a prescribed taxable Canadian corporation in respect of which the Minister of Canadian Heritage has issued a certificate (other than a certificate that has been revoked under subsection 125.4(6) of the Act) and that is

- (*a*) a treaty co-production; or
- (*b*) a film or video production
    - (i) whose producer is a Canadian at all times during its production,
    - (ii) in respect of which the Minister of Canadian Heritage has allotted not less than six points in accordance with subsection (5),
    - (iii) in respect of which not less than 75% of the total of all costs for services provided in respect of producing the production (other than excluded costs) was payable in respect of services provided to or by individuals who are Canadians, and for the purpose of this subparagraph, excluded costs are
        - (A) costs determined by reference to the amount of income from the production,
        - (B) remuneration payable to, or in respect of, the producer or individuals described in any of subparagraphs (5)(*a*)(i) to (viii) and (*b*)(i) to (vi) and paragraph (5)(*c*) (including any individuals that would be described in paragraph (5)(*c*) if they were Canadians),
        - (C) amounts payable in respect of insurance, financing, brokerage, legal and accounting fees, and similar amounts, and
        - (D) costs described in subparagraph (iv), and
    - (iv) in respect of which not less than 75% of the total of all costs incurred for the post-production of the production, including laboratory work, sound re-recording, sound editing and picture editing, (other than costs that are determined by reference to the amount of income from the production and remuneration that is payable to, or in respect of, the producer or individuals described in any of subparagraphs (5)(*a*)(i) to (viii) and (*b*)(i) to (vi) and paragraph (5)(*c*), including any individuals that would be described in paragraph (5)(*c*) if they were Canadians) was incurred in respect of services provided in Canada.

(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;

- (*b*) that is 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, one point,
  - (ii) for the lead voice for which the highest or second highest remuneration was payable, one point,
  - (iii) for the design supervisor, one point,
  - (iv) for the camera operator where the camera operation is done in Canada, one point,
  - (v) for the music composer, one point, and
  - (vi) for the picture editor, one point;
- (*c*) that is an animation production, one point if both the principal screenwriter and the storyboard supervisor are individuals who are Canadians; and
- (*d*) that is an animation production, in respect of each of the following places if that place is in Canada,
  - (i) for the place where the layout and background work is done, one point,
  - (ii) for the place where the key animation is done, one point, and
  - (iii) for the place where the assistant animation and in-betweening is done, one point.

(6) A production (other than a production that is an animation production or a treaty co-production) is a Canadian film or video production only if there is allotted in respect of the production two points under subparagraph (5)(*a*)(i) or (ii) and one point under subparagraph (5)(*a*)(iii) or (iv).

(7) An animation production (other than a production that is a treaty co-production) is a Canadian film or video production only if there is allotted, in respect of the production,

- (*a*) one point under subparagraph (5)(*b*)(i) or paragraph (5)(*c*);
- (*b*) one point under subparagraph (5)(*b*)(ii); and
- (*c*) one point under subparagraph (5)(*d*)(ii).

Lead performer/screenwriter

(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;
- (*b*) a lead voice in respect of an animation production is the voice of the individual who has a leading role in the production having regard to the length of time that the individual's voice is heard in the production and the individual's remuneration; and
- (*c*) where a person who is not a Canadian participates in the writing and preparation of the screenplay for a production, the screenwriter is not a Canadian unless the principal screenwriter is an individual who is otherwise a Canadian, the screenplay for the

production is based upon a work authored by a Canadian, and the work is published in Canada.

Documentary Production

(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.

Prescribed Person

(10) For the purpose of section 125.4 of the Act and this Division, "prescribed person" means any of the following:

- (*a*) a corporation that holds a television, specialty or pay-television broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission;
- (*b*) a corporation that holds a broadcast undertaking licence and that provides production funding as a result of a "significant benefits" commitment given to the Canadian Radio-television and Telecommunications Commission;
- (*c*) a person to which paragraph 149(1)(*l*) of the Act applies and that has a fund that is used to finance Canadian film or video productions;
- (*d*) a Canadian government film agency;
- (*e*) in respect of a film or video production, a non-resident person that does not carry on a business in Canada through a permanent establishment in Canada where the person's interest in the production is acquired to comply with the certification requirements of a treaty co-production twinning arrangement; and
- (*f*) a person
    - (i) to which paragraph 149(1)(*f*) of the Act applies,
    - (ii) that has a fund that is used to finance Canadian film or video productions, all or substantially all of which financing is provided by way of a direct ownership interest in those productions, and
    - (iii) that, after 1996, has received donations only from persons described in paragraphs (*a*) to (*e*).

Prescribed Amount

(11) For the purpose of the definition "assistance" in subsection 125.4(1) of the Act, "prescribed amount" means an amount paid or payable to a taxpayer under the License Fee Program of the Canada Television and Cable Production Fund or the Canada Television Fund/Fonds canadien de télévision.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1676-07
STYLE OF CAUSE:	LES PRODUCTIONS TOONCAN (XIII) INC v MINISTER OF CANADIAN HERITAGE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 1, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	December 28, 2011

APPEARANCES:

Roch Guertin	FOR THE APPLICANT
Bernard Letarte	FOR THE RESPONDENT

SOLICITORS OF RECORD

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