

Federal Court



Cour fédérale

Date: 20111228

Docket: T-1840-07

Citation: 2011 FC 1521

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 28, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

STUDIOS ST-ANTOINE INC

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Studios St-Antoine Inc. (Studios) is asking the Court to review the decision made by the Minister of Canadian Heritage (respondent) on February 28, 2007, to revoke the Studios' Canadian film or video production certificate, part A, number B082975, for the production *Péril aux Galapagos*, pursuant to subsection 125.4(6) of the *Income Tax Act*, RSC 1985, 5th Supp, as amended (ITA), and paragraph 1106(1)(ii) of the *Income Tax Regulations*, CRC, c 945 (ITR).

[2] Studios is also asking the Court to issue an order compelling the respondent to issue the certificate of completion, part B, in accordance with the film production tax credit program for the production *Péril aux Galapagos*, as well as any other orders deemed appropriate by the Court.

[3] For the following reasons, the application for judicial review by Studios is allowed, with costs.

[4] The judgment of the Court in this case does not apply to dockets T-1841-07, T-2060-07 and T-2061-07, unlike the order issued by Prothonotary Morneau on June 17, 2008.

II. Facts

[5] On February 14, 2002, Studios submitted, under the coproduction treaty between Canada and France, an application for an advance ruling for international coproduction status to Telefilm Canada (Telefilm), for the production *Péril aux Galapagos*, a one-hour documentary in coproduction with the French company Guilgamesh (see the affidavit of the Studios representative, Exhibit P-4).

[6] On or around June 1, 2002, Studios signed a coproduction contract with the company Guilgamesh for the production *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-3).

[7] On July 26, 2002, Telefilm made an advance ruling of coproduction status for the documentary *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-5).

[8] On September 9, 2002, the Centre national de la cinématographie (CNC) gave pre-authorization to Guilgamesh (see the affidavit of the Studios representative, Exhibit P-6).

[9] On September 27, 2002, the CNC sent its confirmation of coproduction to Dany Chalifour of Telefilm (see the affidavit of the Studios representative, Exhibit P-7).

[10] On December 23, 2002, the CNC issued final authorization to Guilgamesh for the production *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-9). The CNC made the final subsidy payment to the French coproducer Guilgamesh.

[11] The CNC made this decision unilaterally because Telefilm had not yet made its final recommendation for coproduction status.

[12] On November 6, 2003, Guilgamesh went into receivership but did not inform Studios (see the affidavit of the Studios representative, Exhibit P-10).

[13] On January 29, 2004, Studios submitted an application for final recommendation to Telefilm for the film production *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-11). Studios included in its application a document entitled [TRANSLATION] “accounting report”, believing that it was submitting Guilgamesh’s final accounts.

[14] On March 23, 2004, Jean-Daniel Eigenmann, a coproduction analyst with Telefilm, wrote to Amélie Blanchard, an executive producer with Studios. He asked her for additional information so that he could make a decision concerning the production *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-12).

[15] On June 10, 2004, Amélie Blanchard replied to Jean-Daniel Eigenmann and told him that there had been a delay due to the French coproducer. She committed to providing the missing documents as soon as possible (see the affidavit of the Studios representative, Exhibit P-13).

[16] On July 8, 2004, the Tribunal de commerce de Nanterre, in France, accepted a proposal to liquidate the assets of the French company Guilgamesh, submitted on June 25, 2004 (see the affidavit of the Studios representative, Exhibit P-14).

[17] On July 16, 2004, Studios received a pre-emption notification letter from the receiver, Francisque Gay (see the affidavit of the Studios representative, Exhibit P-15). The notice was issued pursuant to the *Code de la propriété intellectuelle* of France, which requires a receiver to confer a

pre-emptive right on all assigns, with priority for coproducers. Accordingly, Studios obtained a copy of the tribunal's decision.

[18] On July 28, 2004, Studios exercised its pre-emptive right to the production *Péril aux Galapagos* (see the affidavit of the Studios representative, Exhibit P-16).

[19] Studios recovered the assets of Guilgamesh with the judicial administrator, in Paris, on October 14, 2004 (see the affidavit of the Studios representative, Exhibit P-17).

[20] Studios also received a legal opinion from Christophe Pascal, a lawyer with the Barreau de Paris, regarding its pre-emptive right. According to Mr. Pascal, the mandatory clauses in the coproduction contracts imposed by the CNC and Telefilm have no force of law in situations where a coproducer assigns its rights to another coproducer in accordance with the *Code de la propriété intellectuelle* of France, the provisions of which are public policy (see the affidavit of the Studios representative, Exhibit P-18).

[21] On November 22, 2004, Jean-Daniel Eigenmann, of Telefilm, exchanged e-mails with Amélie Blanchard, an executive producer with Studios, about the final accounts submitted by the company Guilgamesh to the CNC (see the affidavit of the Studios representative, Exhibit P-20).

[22] On November 23, 2004, Jean-Daniel Eigenmann, of Telefilm, wrote the following to Amélie Blanchard: [TRANSLATION] "We cannot accept, as a final account from your French coproducer, a document that was never signed by it and that is virtually identical, almost to the cent,

to the budget forecast received by the CNC, as far as its figures and footnotes are concerned. I can therefore not proceed with this matter without receiving a document that complies with our standard applications or a written explanation as to your inability to provide the necessary information” (see the affidavit of the Studios representative, Exhibit P-22).

[23] On January 7, 2005, Studios sent Telefilm a copy of the assignment signed on October 14, 2004 (see the affidavit of the Studios representative, Exhibit P-23).

[24] On January 7, 2005, Brigitte Monneau, a coproduction director with Telefilm, sent an e-mail to Laurent Cormier, a director with the CNC, to determine the status of the production *Péril aux Galapagos* because Studios had assumed the rights of the French producer Guilgamesh in the production (see the affidavit of the Studios representative, Exhibits P-24 and P-25).

[25] On January 20, 2005, Laurent Cormier replied to Brigitte Monneau with the following:

[TRANSLATION]

“for us, the completed files (delivered films) are the following: *Échanges à la naissance, Enfant communiqué (enfance pas à pas), Péril aux [Galapagos]*. The buy-out by the Canadian producer is irrelevant for us; however, the film has lost its official coproduction status and can no longer be considered a European work for French channels, but a foreign work . . .” (see the affidavit of the Studios representative, Exhibit P-26).

[26] On January 25, 2005, in preparation for a meeting scheduled for January 31, 2005, Brigitte Monneau wrote to Laurent Cormier and asked him to respond to the allegations by Studios that the CNC had been informed before it proceeded with the pre-emption of Guilgamesh’s rights

(see the affidavit of the Studios representative, Exhibit P-30). Laurent Cormier confirmed that he would send an official letter to Telefilm.

[27] On January 31, 2005, the Studios representative met with Brigitte Monneau and Kenny Duggan from Telefilm. After the meeting, Brigitte Monneau wrote the following in the Studios file:

[TRANSLATION]

“I told him that the correspondence from the CNC was clear with respect to the consequences of the assignment, but that we were waiting for official correspondence” (see the affidavit of the Studios representative, Exhibit P-32).

[28] She also wrote the following:

[TRANSLATION]

“I clearly stated that we would have no choice but to revoke the advance rulings if the CNC did so because coproduction decisions are necessarily bilateral ones.”

[29] On February 3, 2005, Telefilm received a letter from Laurent Cormier of the CNC. The letter read as follows: [TRANSLATION] “if the coproduction were to disappear because one of the coproducers assigns its shares to the other, the work loses its official coproduction status and, as a result, the benefits attached thereto. Therefore, for France, such a work cannot be considered European when it is broadcast on a French channel” (see the affidavit of the Studios representative, Exhibit P-31).

[30] On February 8, 2005, the Studios representative wrote to Laurent Cormier of the CNC to suggest alternatives and to settle the dispute (see the affidavit of the Studios representative, Exhibit P-33).

[31] On February 23, 2005, Laurent Cormier sent the following e-mail to Studios, with a copy to Brigitte Monneau:

[TRANSLATION]

2) “French law grants a pre-emptive right to authors and coproducers. However, this legislation does not call into question the qualifying requirements for works, especially when it comes to European legislation and the treaty between Canada and France” (see the affidavit of the Studios representative, Exhibit P-33).

[32] He added the following:

[TRANSLATION]

3) “From the moment the Canadian producer owns an entire film, we are no longer in the presence of a coproduction within the meaning of the treaty; as a result, the work can no longer be considered a work between Canada and France, and, therefore, a European work, in France.”

[33] He went on to state the following:

[TRANSLATION]

5) “Section 15.01 of your coproduction agreements specifies that neither the Canadian group nor the French group may be replaced or may assign its rights to a third party without express written consent from the competent authorities of the country of each group for the purpose of the treaty. . . . This consent was not sought and was therefore not obtained, and the assignment of rights was accepted by the receiver. No proposal at this time can change the situation.”

[34] On April 4, 2005, Brigitte Monneau sent an internal e-mail to Mr. Eigenmann and Ève-Marie Grave to inform them of a discussion she had had with the Studios representative. She wrote the following, among other things:

[TRANSLATION]

“The CNC now seems more positive towards Green Space and is ready to negotiate the files in question. The following proposal will be made to the CNC: three unfinished productions (*Gibbons*, *Dragons de Komodo*, *Ours à lunettes*): Director Bruno Vienne will use his pre-emptive right and the judicial receiver will agree to transfer the projects back to him. Thus, the projects will become French in part and would no longer be at risk for broadcasters and for the CNC” (see the affidavit of the Studios representative, Exhibit P-35).

[35] On July 28, 2005, Brigitte Monneau sent an e-mail to Jean-Daniel Eigenmann of Telefilm, and confirmed that [TRANSLATION] “the CNC is working on a project with Films de la Perrine for which an amendment to the coproduction contract was required for pre-authorization from the authorities” (see the affidavit of the Studios representative, Exhibit P-37).

[36] According to them, [TRANSLATION] “it is unnecessary to give such an authorization once the project is delivered. Because this contradicts their position in the Guilgamesh files, counsel for P. Cadieux intends to defend this point” (see the affidavit of the Studios representative, Exhibit P-37).

[37] In the beginning of October 2006, the Studios representative maintained that he had a discussion with Jean-Daniel Eigenmann during which Telefilm stated that it was ready to certify the files that the CNC had given final approval to, including the film *Péril aux Galapagos*.

[38] Mr. Eigenmann, from Telefilm, advised Studios of its final recommendation on February 21, 2007 (see the affidavit of the Studios representative, Exhibit P-38). Mr. Eigenmann wrote the following: [TRANSLATION] “[a]fter examining the documents related to the production and in accordance with the powers granted to Telefilm Canada, Telefilm Canada recommended, on February 21, 2007, that the Minister of Canadian Heritage confirm the official coproduction status of *Péril aux Galapagos*”.

[39] Studios sent Telefilm’s decision to the Canadian Audio-Visual Certification Office (CAVCO) (see the affidavit of the Studios representative, Exhibit P-39).

[40] On February 21, 2007, Brigitte Monneau, of Telefilm, signed a recommendation addressed to the Director General of Cultural Industries from the Department of Canadian Heritage (see the affidavit of the Studios representative, Exhibit P-40). Ms. Monneau wrote the following: [TRANSLATION] “the French coproducer Guilgamesh went bankrupt in 2003. The Canadian coproducer therefore bought it out from the French receiver, which made the project ineligible as an official coproduction. However, because the CNC had already given its final authorization and because France has the controlling interest in this project, the project is still eligible. On January 12, 2007, we received a copy of documents the Canadian producer was able to retrieve from the bankrupt company, that is, the final authorization from the CNC”.

[41] On February 22, 2007, the CAVCO wrote to Studios announcing that the respondent wanted to revoke the certificate, part A. Subsequently, the applicant’s auditor, Joe Iacono, sent an e-mail to Placide Turenne from the CAVCO emphasizing the following: “in [the] treaty [of] co-production

[. . .] there are special dispensations that should allow you to issue beyond the 48 months. [. . .] I am afraid that if you revoke the certificate we will need to reimburse tax credits received and loose [our] Canadian content designation and create problems with our broadcasters”. On February 28, Placide Turenne replied the following: “I want to assure you (and Mr. Cadieux) that CAVCO will do everything to accommodate the Canadian producer and to comply [with] the requirements of the Act. I wanted to give a heads-up to Mr. Cadieux by sending that email on Friday. We need to have some internal discussions prior to take our final decision to resolve this issue. I’ll keep you inform in due time” (see the affidavit of the Studios representative, Exhibit P-41).

[42] On September 6, 2007, Studios wrote to Robert Soucy, of the CAVCO, asking him to intervene [TRANSLATION] “in order to prevent a revocation by your department for the production [*Péril aux Galapagos*] and to ensure that we are in a situation similar to that of SNAILYMPICS . . . ” (see the affidavit of the Studios representative, Exhibit P-42).

[43] On September 18, 2007, the applicant sent another e-mail to Robert Soucy, of the CAVCO, seeking an answer to its request dated September 6, 2007 (see the affidavit of the Studios representative, Exhibit P-43).

[44] On September 24, 2007, the CAVCO sent a copy of the certificate revocation for the purpose of the tax credit (see the affidavit of the Studios representative, Exhibit P-1). The revocation was dated February 28, 2007.

III. Legislation

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

IV. Issues and standard of review

A. Issues

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

1. *Did the respondent respect the rules of procedural fairness?*
2. *Is the respondent's decision to revoke Studios' coproduction certificate, part A reasonable?*

B. Standard of review

[47] In *TriCon Television 29 Inc v Canada (Minister of Canadian Heritage)*, 2011 FC 435, [2011] FCJ No 547, Justice Hugues 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.

V. Position of the parties

A. Position of Studios St-Antoine

[48] Studios alleges that the respondent's decision to revoke the coproduction certificate, part A, and to refuse to issue the completion certificate, part B, is patently unreasonable, perverse and capricious because it is contrary to the Act and administrative practices.

[49] Studios emphasizes that it made no incorrect statements or omissions with a view to obtaining the certificate, part A, that all of the production elements were completed and that the funding proposals were complied with.

[50] Because *Péril aux Galapagos* was created and completed as a coproduction and broadcast in France even before Studios pre-empted the rights of its coproducer, Guilgamesh, Studios met all of the respondent's requirements.

[51] Certification of a coproduction by a national authority is not necessarily bilateral, according to Studios.

[52] Studios submits that it was a victim of manoeuvring by its coproducer. Guilgamesh unilaterally put its company into receivership without even informing the said coproducers in advance, trying to buy back its own production to resolve its financial problems.

[53] These actions by the coproducer Guilgamesh gave Studios no choice. It had to exercise the rights conferred on it by French law and become assignees of the rights to the production *Péril aux Galapagos*.

[54] According to Studios, the pre-emption of the coproducer's rights does not change the fact that this was a true coproduction between Canada and France because the producers from the two countries had completed all of the coproduction elements before the assignment of rights.

[55] Studios argues that the respondent acted unreasonably by refusing to issue the final coproduction certificate (part B) and by erroneously indicating that the coproduction was not covered by an agreement.

[56] Studios also notes that the CAVCO, or its agent, Telefilm, possessed all of the elements allowing it to issue the completion certificate before the deadline, that is, before the end of

October 2006. The respondent therefore acted unreasonably by finding in error that the CAVCO had not received all of the required documents.

[57] Studios also alleges that the issuance of the final coproduction certificate cannot depend on the opinion of the French authority because, if that were the case, the respondent would therefore not be able to exercise his discretionary authority in an independent manner. Provided that the Canadian producer completed the essential coproduction elements and complied with the spirit of the treaty with France, the respondent must exercise his authority as conferred on him by the ITA.

[58] The respondent's advance ruling on certification specified the conditions Studios had to meet. Because Studios satisfied all of those requirements, the respondent had a duty to issue the final production certificate (part B).

[59] According to Studios, the representatives of the respondent's agent acted in bad faith and ignored their obligations to assist Studios, preferring instead to focus on an unreasonable interpretation of the criteria for issuing a coproduction certificate; they were accommodating towards the French authorities, clearly wanting to avoid contradicting them despite the fact that they were in the wrong.

[60] Studios also notes that there are no rules of procedure concerning the treaty between France and Canada.

[61] The reason for the revocation, which was indicated in the respondent's decision, has no merit according to Studios because all of the information required to issue the completion certificate, part B, was in the possession of the respondent or its agent, Telefilm.

[62] Studio also contends that the respondent's decision fails to indicate which documents were missing.

[63] According to Studios, the respondent's actions seem to show that the certification process does not follow strict rules but is instead a flexible and informal process.

[64] Alleging that the respondent issued completion certificates in the past in comparable circumstances, Studios claims that it must therefore do so in this case because it must act consistently and avoid arbitrariness in its decision making.

[65] Alternatively, Studios claims that the deadline for issuing a completion certificate, part B, is not mandatory and that no harm can result in an analysis that is carried out subsequent to the deadline.

B. Position of the respondent

[66] First, the respondent maintains that Studios was not treated in a discriminatory manner because the rules of procedural fairness were respected at all times in the processing of the *Péril aux Galapagos* file.

[67] According to the respondent, Studios is aware of the conditions for a Canadian film or video production to benefit from the tax credit.

[68] According to the respondent, despite the exchanges between Studios and its agent, Telefilm, Studios cannot benefit from the tax credit because the documents necessary to establish that *Péril aux Galapagos* qualified as a Canadian film or video production were not submitted within the required time.

[69] The respondent notes that the wording of the Act and its Regulations creates no obligation for the Minister of Heritage to issue a certificate, or the absolute right for Studios to obtain this certificate in the absence of compliance with the requirements set out in the legislative provisions. He alleges that the Federal Court decision in *Polchies v Canada*, 2007 FC 493, at paragraphs 61 and 62, supports this proposal.

[70] In the case of *Péril aux Galapagos*, the certificate was revoked because of the late filing of documents. The respondent's decision to revoke a completion certificate arises from the formal requirements of the Act and not from a discretionary authority, contrary to what Studios claims.

[71] Finally, the respondent notes that Studios cannot expect to be entitled to substantive rights outside of the certification process set out in the Act.

VI. Analysis

1. Did the respondent respect the rules of procedural fairness?

[72] Telefilm, in accordance with the mandate conferred on it by the then Secretary of State and which has never been revoked since, is responsible for managing treaties entered into by Canada with foreign governments in the area of film and video production. Telefilm also analyzes coproduction projects and makes recommendations to the Minister about the status of a production; does it qualify as a “treaty coproduction”? This qualification has consequences for the producer because it gives entitlement to tax credits. This recommendation by Telefilm is made in the form of an advance ruling. It is then reviewed when the audiovisual production is complete. The Minister responsible must subsequently determine whether a production meets the criteria set out in the Act and its Regulations to give entitlement to the tax credit. When the producer meets the requirements of the Act and its Regulations, the Minister may issue the certificate. The certificate is issued in two steps. The certificate, part A, is issued after an administrative analysis of a written record that establishes that a production has met the requirements of the Act and its Regulations. It may be issued before or during the production because it facilitates interim funding or, at a minimum, the claiming of a tax credit at the end of the first fiscal year of production. The certificate, part A, is issued under conditions precedent because it is conditional to obtaining a certificate, part B, within the time constraints imposed by the Regulations, that is, within 48 months after the start of the production.

[73] In the case of *Péril aux Galapagos*, in August 2007, Studios received the Minister’s decision dated February 27, 2007, revoking the certificate, part A, on the ground that this production

had become an excluded production on October 31, 2006, because the Minister had not received the necessary documents in the time allotted.

[74] Did the Minister and his agent, Telefilm, respect the rules of procedural fairness when processing the file? When the Court considers the sequence of events in this file, there is no doubt that Studios was able to make its submissions repeatedly, whether to Telefilm or, subsequently, to the CAVCO.

[75] Because the parties to the treaty never adopted the rules of procedure for coproductions as set out in Article XII of the *Agreement between the Government of Canada and the Government of the French Republic on Television Relations*, it is difficult for the Court to establish whether there was a breach of the rules of procedural fairness by Telefilm or, ultimately, by the CNC, because there are no written rules of procedure in force. However, it must be emphasized that all communication by Studios generally received a response. Because we are not in a situation where legitimate expectation can apply, and even if that were the case, it is clearly established that it cannot create substantive rights. The Court has reached the conclusion that there was no breach of the rules of procedural fairness.

2. *Was the decision to revoke the certificate for the production *Péril aux Galapagos* reasonable?*

[76] In the case of *Péril aux Galapagos*, Telefilm possessed all of the information to proceed with and send a recommendation to the respondent by the beginning of October 2006, that is, a few

weeks before the fateful deadline of October 31, 2006 (see the affidavit of the Studios representative, Exhibits P-26 and P-31). No evidence was submitted by the respondent to contradict this fact. The mandator's knowledge is that of the mandatary; this principle is clearly established in Quebec civil law (see *Desrosiers v Canada*, [1920] SCJ No 5; and *Armatures Bois-Francs inc v Leblanc*, [2011] JQ No 5797 at paragraphs 35-38). Furthermore, article 2160 of the *Civil Code of Québec*, SQ 1991, c 64 (CcQ) sets out that the mandator is liable to third persons for the acts performed by the mandatary in the performance and within the limits of his mandate. Under these circumstances, the respondent's decision to revoke the certificate, part A, on the ground that he did not have in his possession all of the documents that would allow him to issue the certificate, part B, is unreasonable. Certainly, the Court recognizes that the rights of Guilgamesh were pre-empted by Studios, but, in October 2004, the production was already finished and the French party had already endorsed it, as it appears in the CNC's final authorization (see the affidavit of the Studios representative, Exhibit P-9). Furthermore, Telefilm acknowledged this in the wording of its late recommendation, which reads as follows: [TRANSLATION] "The French coproducer Guilgamesh went bankrupt in 2003. The Canadian coproducer therefore bought it out from the French receiver, which made the project ineligible as an official coproduction. However, because the CNC had already given its final authorization and because France has the controlling interest in this project, the project is still eligible." (see the affidavit of the Studios representative, Exhibit P-40).

[77] Furthermore, Telefilm was aware of the CNC's final authorization well before January 12 because, on January 20, 2005, Laurent Cormier, of the CNC, confirmed it in an e-mail to Brigitte Monneau (see the affidavit of the Studios representative, Exhibit P-26) and reaffirmed it

again in an official letter dated February 3, 2005 (see the affidavit of the Studios representative, Exhibit P-31).

[78] There is no doubt that the delay experienced that resulted in the respondent's decision cannot be justified in any way. The Court must intervene and refer the matter back to the respondent for him to take into account the fact that his agent possessed all of the elements to make a favourable recommendation within the prescribed time.

[79] For these reasons, the application for judicial review is allowed. The matter is referred back to the respondent for him to render the appropriate decision, with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. the application for judicial review is allowed with costs; and
2. the matter is referred back to the Minister for review.

“André F.J. Scott”

Judge

Certified true translation
Janine Anderson, Translator

Annex

- **Section 125.4 of the *Income Tax Act*, RSC 1985, 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

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