

Federal Court



Cour fédérale

Date: 20160122

Docket: T-317-15

Citation: 2016 FC 75

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ZONE3-XXXVI INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is seeking to have set aside a decision rendered on February 2, 2015, by and on behalf of the Minister of Canadian Heritage [Minister], refusing to issue a Canadian Film or Video Production Certificate [certificate], and a declaration from this Court stating that the television series **ON PASSE À L'HISTOIRE** [the Production] is eligible for a Canadian Film or Video Production Tax Credit [CPTC].

[2] The respondent, the Attorney General of Canada, submits that the Minister's refusal is legal and seeks the dismissal of this application for judicial review.

[3] The Court rejects the respondent's preliminary objections regarding the admissibility or relevance of any particular evidence considered in these reasons and relies, *mutatis mutandis*, on the factors and reasons set out in the interlocutory decision disposing of the respondent's motion to strike (*Zone3-XXXVI Inc v Attorney General of Canada*, 2015 FC 7), and on the applicant's arguments supporting that motion's dismissal.

[4] For the following reasons, this application for judicial review is allowed in part.

I Statutory and regulatory framework

[5] The impugned decision was rendered under the supposed authority of section 125.4 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [Act] and section 1106 of the *Income Tax Regulations*, CRC, c 945 [Regulations]. The relevant excerpts from these provisions are reproduced in Annex A. The French version of these reasons uses the masculine in references to the Minister even though the Minister at the time was the Honourable Shelly Glover.

[6] Under subsections 125.4(1) and (3) of the Act, a "qualified corporation" may claim a CPTC for a "Canadian film or video production" described in subsection 1106(4) of the Regulations [eligible production]—that is, a production other than an "excluded production" within the meaning of subsection 1106(1) of the Regulations.

[7] Subparagraphs 1106(1)(b)(i) to (xi) of the Regulations list 11 types of production that are ineligible because they fall under the “excluded production” category. In the matter at bar, the Minister denied the application for a certificate [Part A] submitted by the applicant on September 25, 2013, for the first season (26 episodes) of the Production, **ON PASSE À L’HISTOIRE (I)**, on the ground that it was an “excluded production”, in accordance with subparagraph 1106(1)(b)(iii) of the Regulations, which covers

(iii) a production in respect of a game, questionnaire or contest (other than a production directed primarily at minors),

[Emphasis added]

(iii) une production comportant un jeu, un questionnaire ou un concours, sauf celle qui s’adresse principalement aux personnes mineures,

[Soulignements ajoutés]

[8] As its production was ineligible, the applicant was unable to obtain a certificate of completion [Part B] for **ON PASSE À L’HISTOIRE (I)**, resulting in its production not qualifying for a CPTC. The series’ second season, **ON PASSE À L’HISTOIRE (II)**, followed the same formula. Consequently, it also did not qualify as a “Canadian film or video production” under the Act and Regulations.

[9] The CPTC program is administered jointly by the Department of Canadian Heritage [Department], through the Canadian Audio-Visual Certification Office [CAVCO], and by the Canada Revenue Agency [CRA]. In practice, CAVCO determines whether a production meets the requirements of section 125.4 of the Act and section 1106 of the Regulations, while the CRA verifies the qualified labour expenditure used in determining the CPTC.

[10] To obtain a CPTC, a qualified corporation must file with its T2 income tax return to the CRA: a Canadian film or video production certificate [Part A certificate]; the CRA T1131 CPTC claim form (T1131); and a certificate of completion [Part B certificate], once the production is completed. Producers must apply for all certificates [A and B] through CAVCO's online eSubmission system. In administrative terms, following a positive recommendation from CAVCO based on an analysis of detailed cost estimates and financing plans, including amounts deemed assistance, and a verification of whether the production meets the Canadian content requirements of the CPTC program, a Part A certificate is issued for and on behalf of the Department.

[11] The Part A certificate is delivered with a condition precedent. Indeed, there are strict time frames for issuing a certificate of completion [Part B certificate]. For example, under subparagraph 1106(1)(a)(ii), "excluded production" is defined as "a film or video production . . . in respect of which . . . a certificate of completion has not been issued before the production's certification". The CPTC Program sets a strict deadline for the issuance of a Part B certificate by the Minister. This deadline must be calculated as of the end of the corporation's taxation year in which the production's principal photography began. The certificate of completion confirms that a CPTC-"eligible production" was completed within the prescribed time frame for Part B certification, that is, 30 months from the corporation's first fiscal year-end following commencement of principal photography, or 48 months from this date where the Waiver Declaration for a Part B application has been completed in respect of the production (see subsection 1106(1) of the Regulations).

[12] As one can see, it is very important for both producers and CAVCO to respect these deadlines. Producers cannot obtain a certificate of completion—or can even have their [Part A] certificate revoked—if the deadlines have expired, in which case they would lose any tax credit to which they would otherwise have been entitled. In this case, even if the Minister and CAVCO are themselves responsible for the deadlines, the Federal Court determined in *Production Tooncan (XIII) Inc v Canada (Heritage)*, 2011 FC 1520 at para 85 [*Tooncan*] that even in “a difficult situation . . . , which can only be deplored, . . . [the Court] cannot order that a certificate be issued in contravention of the clear provisions of the Act”.

[13] In practice, each certificate application is analyzed by a CAVCO analyst [tax credit officer]. In principle, the tax credit officer has no discretion. The tax credit officer merely verifies whether the application satisfies the regulatory requirements. If the application is incomplete, the tax credit officer communicates with the producer to obtain any missing information or documents. Where necessary, the officer calls on CAVCO’s Advisory Committee, which is composed of senior CAVCO analysts. When a tax credit officer wishes to recommend the refusal or revocation of a certificate, the file is submitted for review by CAVCO’s Compliance Committee, composed of managers and senior analysts.

[14] CAVCO’s Advisory and Compliance committees have only the power to recommend; they are not statutorily empowered to render final determinations of issues of law or to dispose of the merits of a certificate application. They are merely part of an internal process set up to ensure administrative consistency in how the Act and the Regulations are administered. CAVCO’s recommendations nonetheless have determinative weight in the final decision by the Minister or

his or her representative. In practice, therefore, when CAVCO intends to make a negative recommendation to the Minister, it sends the producer an advance notice of denial setting out its reasons and conclusions in order to allow the producer to make representations and submit any additional evidence that could affect CAVCO's final recommendation.

II Importance of the CPTC Program and eligibility requirements

[15] The purpose of the CPTC Program is to encourage and stimulate the development of a national film and video production sector. The CPTC is a federal tax credit that can amount to up to 25% of the qualified labour expenditures for an eligible production under subsection 1106(4) of the Regulations. Where no federal tax is payable for a given fiscal year, the corporation will be reimbursed by the amount of the tax credit, subject to the right of the CRA to offset any other amount owed by the corporation.

[16] The CPTC has a provincial counterpart. In Quebec, eligible cultural enterprises involved in producing films and videos broadcast by Canadian channels may claim a tax credit for Quebec film productions [provincial tax credit]. The Société de développement des entreprises culturelles [SODEC] plays a similar role here as that played by CAVCO at the federal level. A certificate issued by SODEC allows the producer to claim a tax credit from Revenu Québec (*Act Respecting the Sectoral Parameters of Certain Fiscal Measures*, CQLR c P-5.1).

[17] It must be remembered that to achieve the objectives of the *Broadcasting Act*, SC 1991, c 11, broadcasting and programming undertakings are subject to various licensing conditions requiring them to broadcast a certain percentage of Canadian programming over the broadcast

year and during specific periods of each broadcast day. Programs certified as Canadian by the Department on recommendation by Telefilm Canada and CAVCO are recognized as Canadian by the Canadian Radio-television and Telecommunications Commission [CRTC]. However, for tax reasons, CAVCO does not automatically recognize CRTC-certified programs for CPTC purposes.

[18] When a production receives a CPTC, the production company must include “Canadian Film or Video Production Tax Credit” and the Canada wordmark in the screen credits of each program. The genre, general format of the series and particular content of a program become public knowledge when a program is broadcast on Canadian television under CRTC regulations (broadcasters are required to keep a record to this effect) even though the information and documents provided by a producer in its application for certification or a tax credit may be confidential under section 241 of the Act.

[19] The Minister has “quasi-regulatory” authority under subsection 125.4(7) of the Act. Indeed, the Minister may adopt “guidelines respecting the circumstances under which the conditions in the definition Canadian film or video production certificate in subsection (1) are satisfied”. Even though these guidelines are not “statutory instruments” as defined in the *Statutory Instruments Act*, RSC 1985, c S-22, subsection 125.4(7) of the Act nonetheless requires them to be issued by the Minister.

[20] In practice, producers rely on the Guidelines and CAVCO’s established practices to plan new productions. It is hard to imagine that an experienced producer would propose a series to be

broadcast on prime-time TV to a broadcaster without having looked at previous cases and evaluated its chances of obtaining a tax credit.

[21] On April 2, 2012, the Minister published a 58-page guide entitled “CPTC Program Guidelines” [Guidelines], which sets out the eligibility requirements found in the Act and the Regulations (Part I – Requirements), provides technical details regarding the documents and information required (Part II – How to Apply), and includes a glossary of definitions of the various production genres accepted by the cinema and television industry (Part III – Definitions). The Guidelines were therefore developed to assist producers in anticipating how the Minister is likely to determine whether a production is eligible and to organize themselves accordingly.

[22] A preliminary version of the new Guidelines was disseminated beforehand on the Department’s website on March 31, 2010, and on CAVCO’s online application system. This gave all cinema and television industry stakeholders an opportunity to comment. In an official letter dated February 8, 2011, sent to the Association des producteurs de films et de télévision du Québec [APFTQ], Canadian Heritage’s Deputy Director General of Cultural Industries informed the APFTQ’s Deputy General Director that the updating of CAVCO’s Guidelines should not result in any policy changes with respect to the genre definitions and the eligibility requirements.

[23] The Deputy Director General explained that it was not the Department’s [TRANSLATION] “intention to change [the CPTC] program eligibility requirements, including in relation to the intended scope of the definitions for ineligible genres. CAVCO will continue to apply the definitions for these genres, as well as other policy related to the CPTC, in a manner consistent

with the Income Tax Act (Act) and Regulations and its established practices”, meaning that industry members could legitimately expect the Minister and CAVCO to continue interpreting and enforcing the Act and the Regulations in the same manner and in accordance with established practices, unless of course the Minister publicly announces that he or she has decided to change the policies or any past interpretation of “excluded” or “eligible production”.

[24] In addition to the Guidelines, the Department of Canadian Heritage occasionally publishes public notices describing the policy followed by CAVCO or the criteria it applies when processing certificate applications. For example, Public Notice 2014-01 published on the Department’s website outlines the definitive policy for how CAVCO will determine which performers are eligible for lead performer points for the CPTC. The Department has not published any public notices concerning game shows and the criteria used to determine whether a hybrid production—that is, one that combines elements from an excluded genre with elements from one or more qualifying genres—is primarily a game show.

III Application process for certification of the Production

[25] The applicant is a television and film production corporation incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44. It is a production subsidiary of Zone3 Inc., a leader in television production in Quebec and one of the key players in this field in Canada. In fact, Zone3 Inc. produces over 850 hours of television a year for the Francophone and Anglophone markets. To fund the production of its television programs, Zone3 Inc. subsidiaries frequently obtain both provincial and federal tax credits. The applicant and its staff are therefore very familiar with the eligibility requirements for tax credits and how the credits work.

[26] In 2013, the applicant produced 26 episodes of the first season of the Production **ON PASSE À L'HISTOIRE (I)**, and, in 2014, 26 episodes of the second season, **ON PASSE À L'HISTOIRE (II)**. All the episodes have since been broadcast on specialized French-language channel TV5 Québec Canada [TV5] in 2014 and 2015. The applicant assumed all the costs associated with the Production. On August 22, 2013, the funding for **ON PASSE À L'HISTOIRE (I)** was structured in the following manner: about two-thirds came from TV5, which undertook to pre-buy the program rights; the remaining third of the funding was to come from the Bell Broadcast and New Media Fund in the form of a licence fee top-up, from the public purse in the form of the provincial tax credit and the CPTC, and lastly, from the applicant, in the form of a private investment.

[27] Under the program rights pre-purchase agreement the applicant entered into with TV5 on September 19, 2013, the delivery and acceptance of the 26 episodes of **ON PASSE À L'HISTOIRE (I)** followed a strict schedule ending on December 6, 2013. To receive the final amounts owed by TV5, the applicant had to provide TV5 with the Part A certificate and the Canadian content certificate (CRTC) or the Part B certificate issued by CAVCO.

[28] On September 25, 2013, the applicant submitted its online application for a Part A certificate. To obtain its CPTC, once the production is completed, it has to receive its certificates (A and B) by no later than October 31, 2017. It estimated its CPTC at \$188,396.

[29] In its application, the applicant describes the Production as being in the “magazine” genre—a genre that qualifies for the CPTC Program and that is not explicitly covered by the

definition of “excluded production” (see subparagraphs 1101(1)(b) (i) to (xi) of the Regulations).

The Guidelines provide the following definition of “magazine”:

Magazine: A production genre covering disparate but contemporary topics that may include lifestyle programming, culture, instruction and entertainment.

[30] In fact, according to the synopsis provided by the applicant, the Production [TRANSLATION] “is a new general knowledge quiz that is both fun and educational, with each episode dealing with the life and times of a real historical or contemporary figure”. However, even though the applicant describes the Production as a quiz, it then states that this is a [TRANSLATION] “pretext”:

[translation]

The premise is a simple one: the program delves into the story of Cleopatra, Molière or even J.F. Kennedy. . . . This pretext gives rise to 60 minutes of questions covering a range of categories—facts, curiosities and pop culture—about the person chosen and the world in which he or she lived. The three contestants—Quebec stars or celebrities—are lively, witty and funny.

To flesh out the educational component of the program, the presenter is supported by a learned historian, who will provide additional insight on a variety of topics. In addition, a multi-instrumentalist will provide musical entertainment by playing music adapted to each episode.

[Emphasis added]

[31] On October 1, 2013, the applicant paid all the necessary fees, and its application for a Part A certificate was complete. According to the evidence on the Court record, the usual time for making a decision, once an application is complete, is 90 days (cross-examination on affidavit by the Director of CAVCO, answers to questions 57 to 60). Despite the fact that the

Minister did not issue a certificate, the applicant's president felt confident that the applicant would obtain a CPTC. The applicant relied on the fact that, in the past, the Minister had certified several quiz shows and shows where performers competed in friendly competitions with no money involved.

[32] In the matter at bar, according to the case report prepared afterwards by the tax credit officer (Version 3) [at issue here is the first season, filming of which took place between April 11, 2013, and December 13, 2013], the Production satisfied the following requirements of the CPTC Program:

[TRANSLATION]

- (a) the Canadian producer has and maintains full control over the development of the project from the time at which the producer has secured underlying rights;
- (b) the Canadian producer has and maintains full responsibility and control over all aspects (creative and financial) of the production of the project;
- (c) the Canadian producer has and maintains full responsibility and control over the negotiation of initial exploitation agreements;
- (d) the producer has reasonable and demonstrable monetary participation in terms of budgeted fees and overhead, and participation in revenues of exploitation;
- (e) the budget and/or the audited statement or the review engagement report have been verified and do not contain any irregularities;

- (f) all the applicable application deadlines and the Waiver Declaration (T2029), and the production respects the applicable deadlines;
- (g) the production company is a qualified taxable Canadian corporation;
- (h) there has not been a distribution made in Canada by a non-Canadian entity within two years of the production being commercially exploitable.
- (i) all the financing agreements were reviewed and verified, and the production is fully financed;
- (j) the mandatory key creative points were acquired. Since this is a series, each episode has acquired the mandatory points;
- (k) the production will be distributed / broadcast in Canada within two years of it being commercially exploitable; and
- (l) the production company retains the exclusive worldwide copyright ownership in the production for the 25-year period that begins once the production is commercially exploitable.

[33] The only regulatory criterion to which the tax credit officer responded negatively is the following one: [TRANSLATION] “I have reviewed the genre and confirm it is not an ‘excluded production’”. The officer responded [TRANSLATION] “no” [emphasis added].

[34] On October 11, 2013, the tax credit officer asked the applicant to provide him with a DVD of an episode of the Production. On November 13, 2013, the DVD of the episode on Catherine the Great was sent to him. On November 28, 2013, the tax credit officer watched the DVD and verified the production genre (CAVCO analysis report, page 16). However, for a

reason that the Director of CAVCO did not explain in her affidavit or under cross-examination, several months went by before the tax credit officer communicated with CAVCO's Advisory and Compliance committees.

[35] In the meantime, the applicant was informed by SODEC on February 4, 2014, that the first season of the series had been reclassified as a “documentary series” and not as “magazine”, but that this would not have [TRANSLATION] “any impact” on the provincial tax credit. In passing, let us note that in the Guidelines, the “documentary” genre—another genre that is not excluded under the Regulations—is described as follows:

Documentary: An original work of non-fiction, primarily designed to inform but which may also educate and entertain, providing an in-depth critical analysis of a specific subject or point of view.

[36] On June 12, 2014, with still no decision from the Minister, the applicant filed online with CAVCO its application for certification for the second season of the series, **ON PASSE À L'HISTOIRE (II)**, filming of which began on February 18, 2014, with an expected completion date of August 15, 2014. In the summary of the new application, the applicant estimated a CPTC of \$178,209. To obtain its CPTC, once production was completed, the production had to be certified [A and B] by no later than October 31, 2018.

[37] On August 25, 2014, CAVCO sent the applicant advance notice of denial for the first season of the series, writing as follows:

[translation]

I am writing to you about your application for a Canadian film or video production certificate (commonly referred to as Part A) for

the production **ON PASSE À L'HISTOIRE (I)** (26 episodes) that you produced on behalf of the corporation Zone3-XXXVI Inc.

The analysis of your case reveals that the production **ON PASSE À L'HISTOIRE (I)** is not a *Canadian film or video production* under section 125.4 of the *Income Tax Act* (“Act”) and section 1106 of the *Income Tax Regulations* (“Regulations”) for the following reason: the production is a production in respect of a game, questionnaire or contest and is therefore an “excluded production” under subparagraph 1106(1)(b)(iii) of the *Regulations* (definition of “excluded production”).

The guidelines published by the Canadian Audio-Visual Certification Office (CAVCO) for the administration of the Canadian Film or Video Production Tax Credit (CPTC) program provide more information on the various types of excluded production which do not qualify for the CPTC. CAVCO considers a production to be a “game show” when it features “games of skill and chance, as well as quizzes”.

CAVCO’s viewing of the production **ON PASSE À L'HISTOIRE (I)** revealed that each episode follows a game show format with a historical theme. The host of the show introduces the contestants, who compete against each other by answering a series of questions on the topic(s) chosen for the episode. In addition, **ON PASSE À L'HISTOIRE (I)** is associated with a “quiz”-type computer application that viewers can use to play along with the contestants at home while watching the series.

The Minister of Canadian Heritage cannot issue a certificate for a production that does not meet the requirements of the Act and the Regulations.

You may send the undersigned any new information that could affect our assessment of this application within 30 days of the date of this advance notice. Upon expiration of the 30 days, CAVCO will recommend that the Minister of Canadian Heritage deny the certificate unless the additional information provided establishes that the production is eligible.

[38] In response to the various points raised in the advance notice of denial, on September 23, 2014, the applicant’s representative provided written arguments explaining why the Production was not a “game show”, but primarily a [TRANSLATION] “a magazine-type program characterized

by its high informational content presented in an entertaining, lively manner”. Furthermore, even though [TRANSLATION] “in its form”, the show used [TRANSLATION] “some aspects” of the [TRANSLATION] “question and answer” format, this merely served as a [TRANSLATION] “pretext and tool for making the informational content of the program more interesting”. The rules of the [TRANSLATION] “game” are very [TRANSLATION] “flexible”, and the determination of the [TRANSLATION] “winner” is of hardly any or no importance: [TRANSLATION] “Very often, it is hard to determine at the end of the episode which of the performers is the ‘winner’ and how the victor’s ‘honours’ were awarded since the rules for giving ‘points’ are rarely followed”. The applicant also argued that several other [TRANSLATION] “programs similar” to the Production did receive certificates from CAVCO in the past. In addition, SODEC classified the Production as a program in the “documentary” genre.

[39] On September 29, 2014, the Compliance Committee met to examine the case and drafted a request for further information on the allegedly similar programs certified by the Minister in the past. On October 17, 2014, the applicant’s representative provided CAVCO with a detailed explanation and non-exhaustive illustrative list of programs [TRANSLATION] “featuring games of skill and chance, as well as quizzes” that all obtained a certificate from the Minister. The list includes programs featuring performers competing in games of skill or quizzes such as the series *Fidèles au poste* in which [TRANSLATION] “[e]very week, two teams of three celebrities from the arts world participated in various original and entertaining games”; the series *Dieu Merci!*, in which every week [TRANSLATION] “four performers participated in a friendly competition testing their wit and ability to improvise”; and the series *Le match des étoiles*, in which [TRANSLATION] “[e]very week, guest performers participated in a friendly dance competition”. The applicant’s

representative mentioned the following series as examples where the contestants were not performers: *Occupation Double* and *Loft Story* [TRANSLATION] “where, every week, one or more participants were eliminated”; *Allume-moi*, a festive [TRANSLATION] “entertainment show during which three or four suitors were faced with a group of 30 single women in an elaborate selection process”; and *La course Évasion autour du monde*, [TRANSLATION] “a 10-week race around the world, the participants being young people who have to produce a report each week”. From these examples, the applicant’s representative concluded that [TRANSLATION] “when the ‘game’, ‘quiz’ or ‘competition’ is secondary to the program’s main objective, which is to entertain, the use of such a format is not considered to be a ground for refusing Canada’s production tax credit”.

IV Decision challenged by the applicant

[40] On February 2, 2015, almost a year and a half after it applied for a certificate for **ON PASSE À L’HISTOIRE (I)**, the applicant was informed of the Minister’s final decision regarding the first season of the program in the form of a notice of denial, which reads as follows:

[translation]

I am writing to you about your application for a Canadian film or video production certificate (commonly referred to as Part A) [“certificate”] for the production **ON PASSE À L’HISTOIRE (I)** (26 episodes) that you produced on behalf of Zone3-XXXVI Inc.

On August 25, 2014, the Canadian Audio-Visual Certification Office (CAVCO) sent you advance notice of denial of your application for a certificate for this production. CAVCO informed you that the production **ON PASSE À L’HISTOIRE (I)** is not a *film or video production* within the meaning of section 125.4 of the *Income Tax Act* (“Act”) and section 1106 of the *Income Tax Regulations* (“Regulations”) for the following reason: the production is a production in respect of a game, questionnaire or contest and is therefore an “excluded production” under

subparagraph 1106(1)(b)(iii) of the Regulations (definition of “excluded production”). CAVCO considers a production to be a “game show” when it features “games of skill and chance, as well as quizzes”.

Through your legal representative, André Véronneau, you made submissions to CAVCO in response to the advance notice of denial in letters dated September 23, 2014, and October 17, 2014. CAVCO reviewed the arguments set out in these letters. It is CAVCO’s opinion that the additional information provided does not establish that the production is eligible.

Consequently, for the reasons described in the advance notice of denial sent to you by CAVCO, I agree with CAVCO’s recommendation that the production **ON PASSE À L’HISTOIRE (I)** is a production in respect of a game, questionnaire or contest. The fact that the production is described as a “general entertainment” program or that the contestants are celebrities does not change the fact that the production does in fact include a game, a quiz or a contest and that this type of production is excluded under the Regulations. Furthermore, how SODEC deals with this production is irrelevant to the determination of the status of the production under the regime of the Canadian Film or Video Production Tax Credit (CPTC) program. Lastly, each application under the CPTC Program is decided upon its own merit, and the eligibility of each production is determined according to the requirements of the Act and the Regulations.

I therefore regret to inform you, for and on behalf of the Minister of Canadian Heritage, that your application for a certificate for the production **ON PASSE À L’HISTOIRE (I)** is denied. This decision is final.

[41] The notice of application for judicial review was served and filed with the Court on March 2, 2015; it was amended on October 2, 2015, following the applicant’s discovery of new facts that would have a determinative impact on the matter. Indeed, it was not until after the filing of the affidavit of the Director of CAVCO and her cross-examination that the applicant was informed during the course of summer 2015 of the actual criteria that were used in this case to determine whether the Production was a production in respect of “a game, questionnaire or

contest” under the Regulations and learned of the existence of the “Decision Tree” reproduced in Annex B of these reasons and which was used in this case by CAVCO to determine whether the Production was eligible in the “game show” genre.

V Parties’ general arguments

[42] The applicant essentially alleges that CAVCO and/or the Minister failed to observe a principle of natural justice or procedural fairness in the processing of the application for certification of the Production, given that the Minister’s refusal to issue a certificate affected the applicant’s legitimate expectations, was contrary to the Act and the Regulations, or was otherwise unreasonable. The Minister’s decision was arbitrary and unpredictable, completely ignoring previous decisions that certified programs “featuring games of skill and chance, as well as quizzes”. Moreover, the advance notice and notice of denial are seriously deficient and do not mention the actual criteria used in this matter. The applicant was deprived of its right to make useful representations regarding the use of the Decision Tree used by CAVCO to determine whether a particular genre of program “in respect of a game, questionnaire or contest” is covered by the exclusion defined at subparagraph 1106(1)(b) of the Regulations. The applicant also argues that it suffered a high monetary loss, exacerbated by the unreasonably long time it took to process the application for certification. In addition, therefore, to seeking that the impugned decision be set aside, the applicant is asking the Court, in the exercise of its discretion, to declare that the Production qualifies for a certificate as a “Canadian film or video production”, which would entitle it to a CPTC.

[43] The respondent is challenging this application for judicial review. In the matter at bar, the assessment process was transparent, and the application for a certificate was processed in a timely manner. The impugned decision is supported by reasons and relies on the evidence on file. The doctrine of legitimate expectations does not confer any substantive rights, only procedural ones. The advance notice of denial was sufficient here. The fact that SODEC certified the Production as being eligible for a provincial tax credit is irrelevant, and the Minister is not bound by positive precedents of CPTC-eligible game shows. The Minister's refusal was reasonable. It must be assumed that the Minister considered all the evidence on file and the applicant's arguments that the Production is similar to previous productions featuring "games of skill and chance, as well as quizzes" that CAVCO considered to be eligible in the past. Even if the Court finds that a reviewable error was committed, the matter should not be referred back to the Minister because the result would be the same. When a production features "a game, questionnaire or contest", CAVCO is not restricted to asking, according to the Guidelines, whether this production features "games of skill and chance, as well as quizzes" but applies an analysis grid—the "Decision Tree"—to determine whether or not the production is an "excluded production" under subparagraph 1106(1)(b)(iii) of the Regulations. In the matter at bar, if the Court answers the questions in the Decision Tree, it must exclude the Production in light of the evidence on file because the quizzes have "objective outcomes", rather than "subjective" ones.

VI Scope of the review of the legality of the Minister's denial

[44] The appropriate standard of review for issues involving whether the decision-maker respected the rules of procedural fairness is that of correctness, while the standard of reasonableness applies to the review of questions of fact and/or of law: *Tooncan* at paras 41 and

42; *Tricon Television29 Inc v Canada (Canadian Heritage)*, 2011 FC 435 at para 31 [*Tricon*]. In the matter at bar, the eligibility requirements for the CPTC Program are not found solely in the Act and the Regulations; in addition, under subsection 125.4(7) of the Act, the Minister may issue guidelines respecting the circumstances under which the conditions in the definition of “Canadian film or video production certificate” in subsection (1) are satisfied.

[45] In reviewing the reasonability of the impugned decision, courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15, [2011] 3 SCR 708 [*Newfoundland Nurses' Union*]. Moreover, the direction that courts are to give “respectful attention to the reasons” which could be offered in support of an administrative decision is not a *carte blanche* to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result, nor should it be taken as diluting the importance of giving proper reasons for an administrative decision: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54, [2011] 2 SCR 654; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 63, [2009] 1 SCR 339) [*Khosa*].

[46] Consequently, with respect to the transparency and intelligibility of the administrative decision under review, when the Minister decides to enforce a recommendation from CAVCO not to certify a production, the Minister’s notice of denial, or failing that, CAVCO’s advance notice of denial, must include the particular criteria that were used to determine that the

production is not eligible under the Act and the Regulations and the reasons why this production is not—in light of the evidence on file—part of the admissible genre described by the producer in the application for certification. (For an example of “adequate and even exemplary” reasons provided by CAVCO to deny an application for certification, see *Tricon* at paras 22, 28, 38 and 39).

[47] On the other hand, the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 21, [1999] 2 SCR 817 [*Baker*]). The following factors were identified in *Baker* to determine the content of the duty of procedural fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive. The Court may consider any other relevant factors appropriate to the statutory, institutional, and social context of the decision (*Baker* at paras 23-28). We will not revisit in detail each of the aspects already described in paragraphs 5 to 14 (statutory and regulatory framework) and paragraphs 15 to 24 (importance of the CPTC Program and eligibility requirements), except to say that we will keep them in mind when analyzing the five factors set out in *Baker*.

[48] In practice, the Minister’s powers with respect to the issuance of certificates A and B, which producers must obtain in order to receive a CPTC, are exercised by a senior level

designate acting on the Minister's behalf. However, before a notice of denial is sent to a producer, the producer will have received an advance notice of denial to allow it to argue its perspective and submit additional evidence. Even though CAVCO has no decision-making power, CAVCO's recommendations can generally be expected to carry significant weight in the Minister's final decision. Since certificates are issued by the Minister, the Minister's decisions are very important for how production corporations organize future activities (*VIA Rail Canada Inc v National Transportation Agency* (FCA), [2001] 2 FCR 25 at para 20).

[49] There is nothing in *Baker* to suggest that administrative decisions affecting economic rights are by their nature less important than judicial or quasi-judicial decisions affecting individual rights, and it would be conceptually wrong to describe from the outset such decisions as being less important: *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398 at para 27 [*Uniboard Surfaces Inc*]. Certainly, the Minister's decisions do not affect the lives of individuals, but they do play a key role in the cinema and television sector by supporting the funding and production of Canadian programs to be broadcast or distributed throughout Canada.

[50] Let us not forget that the production of films and television programs by qualifying Canadian production companies is central to the expression of Canadian identity. The funding of these productions plays an active part in enriching Canadian heritage and the cultural diversity of peoples across the country, in light of the regional particularities and special needs of the French- and English-language markets. In the matter at bar, the monetary loss the applicant will suffer if it does not obtain the sought tax credits for the Production (approximately \$500,000) is

substantial, in terms of the money the applicant will have to invest in the Production and which, consequently, will not be available for it to fund other independent Canadian productions.

[51] The production of a series of 26 episodes per season involves significant human and financial challenges for an independent producer. It is a complex undertaking that demands a great deal of time and effort as the producer must apply to several agencies and obtain pre-financing or bridge financing from a financial institution. While “the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain” (*Baker* at para 26), it does offer producers some assurance as to the analysis framework and criteria used by CAVCO and the Minister to determine whether a production is eligible. This is the idea behind having guidelines and not using esoteric analytical tools known only to a select few and not generally available to producers on the Department’s website.

[52] Procedural fairness requires the criteria used by CAVCO and the Minister to be transparent and intelligible, and it must be assumed that these criteria are not discriminatory, arbitrary or capricious. Consequently, if CAVCO and the Minister decide to unilaterally change their practices and to differently interpret which productions qualify for the CPTC Program, producers have a legitimate expectation that any such change be advertised by those responsible.

[53] Upon considering all the evidence submitted by the parties in light of the relevant factors set out in *Baker*, giving particular weight to legitimate expectations and the statutory, institutional, and social context of the impugned decision, it is my opinion that the duty of procedural fairness requires CAVCO and the Minister to be transparent and predictable in the

criteria they adopt and their practical application of any general analytical framework, especially when dealing with a seemingly hybrid production genre, which, according to the uncontradicted evidence on the record, is the case here.

[54] For the following reasons, I conclude that CAVCO and the Minister breached their duty of procedural fairness towards the applicant; in addition, the reasons for denial are seriously inadequate, which makes the impugned decision, in every respect, reviewable by this Court.

VII Reviewability of the impugned decision

[55] The Minister had to determine whether, under subsections 125.4(1) and (3) of the Act, the Production is a “Canadian film or video production”, that is, one that is not otherwise excluded by subsections 1106(1) and (4) of the Regulations. However, according to the reasoning of the Regulations, a production is eligible in principle, unless it is principally a production in one of the excluded genres described in subparagraphs 1106(1)(i) to (xi) of the Regulations.

[56] When reviewing whether the reasons for the Minister’s denial are reasonable, the Court must consider both the notice of denial and the advance notice of denial. In the notice of denial, the Minister concludes that the Production is [TRANSLATION] “a production in respect of a game, questionnaire or contest” and is therefore an [TRANSLATION] “excluded production” under subparagraph 1106(1)(b)(iii) of the Regulations (definition of “excluded production”). According to the Guidelines, a production is a game show when it features “games of skill and chance, as well as quizzes”. Yet [TRANSLATION] “[the] viewing of the production **ON PASSE À**

L’HISTOIRE (I) reveal[ed] that each episode follows a game show format with a historical theme”, while [TRANSLATION] “[t]he host of the show introduces the contestants, who compete against each other by answering a series of questions on the topic(s) chosen for the episode”. The Production also [TRANSLATION] “is associated with a ‘quiz’-type computer application viewers can use to play along with the contestants at home while watching the series”. Furthermore, [TRANSLATION] “[t]he fact that the production is described as a ‘general entertainment’ program or that the contestants are celebrities does not change the fact that the production does in fact include a game, a quiz or a contest and that this type of production is excluded under the Regulations”.

[57] The applicant alleges that the above reasons are quite inadequate and seriously deficient given the actual issues raised during the review of the Production’s eligibility for a CPTC. I share this view. The applicant and the respondent in this case agree on one basic point at least. A production is not necessarily excluded if it features “games of skill and chance, as well as quizzes”: this depends on the circumstances and the specific evidence submitted to CAVCO and the Minister. The fundamental flaw of the advance notice and the notice of denial in this case is that the reasons do not include a serious analysis of the true nature or the main feature of the Production based on the substantial physical and documentary evidence the applicant submitted to CAVCO.

[58] The DVD containing the episode on Catherine the Great speaks for itself: the series is not merely a continuous stream of “quizzes”. Indeed, the reasons for the denial do not directly dispute the fact that, according to the evidence on file, the series **ON PASSE À L’HISTOIRE** is

a general entertainment program with high informational and/or educational content and that the question-and-answer format used merely serves as a pretext or vehicle for effectively presenting the information content.

[59] According to the evidence on the record, each program of the **ON PASSE À L'HISTOIRE** series follows the same order and presents historical and cultural content aside from the questions the guest performers are asked:

- Each episode starts with a short video produced by the applicant and providing an overview of the featured figure;
- Throughout the episode, an historian is there to provide additional information (and the research for the program is performed by two historians);
- Two further video clips produced by the applicant and a film excerpt with commentary from one of the historians are shown during the episode in order to provide further information on the figure whose story is being told.

[60] Moreover, the reasons provided by CAVCO and the Minister do not actually deal with the applicant's main argument regarding its description of the Production as a "magazine" or "documentary" series—which qualifies the production for a CPTC because these two genres are not mentioned in subparagraphs 1701(1)(b)(i) to (xi) of the Regulations. In the absence of articulate reasoning, the final outcome is arbitrary and capricious. The sparse reasons of the advance notice and notice of denial do not allow this Court to verify whether the Minister actually questioned whether the Production is primarily a "game" or a "contest" under subparagraph 1106(1)(b)(iii) of the Regulations. The current reasons do not allow the Court to understand why, in practice, several productions also featuring "games of skill and chance, as

well as quizzes” were certified in the past by the Minister because they were “eligible productions”.

[61] When, as in this case, factors, precedents and elements favour the description the applicant gave to the Production, the reasons provided must allow the Court to determine that these were actually examined by the Minister. Empty or boilerplate phrases such as “the evidence, precedents or relevant factors were considered by the decision-maker” are not sufficient to allow the reviewing court to determine whether the outcome is an acceptable one. While it is true that the Minister is not bound by the positive decision made by SODEC when determining whether the Production is eligible for a CPTC, one may well ask why the Production was classified as a “documentary series” by a provincial organization with a high level of expertise in the same area of activity.

[62] As reiterated by the Federal Court of Appeal in *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 40 [*Turner*], the decision-maker need not address each and every argument made by a party. It must nonetheless consider the important points in issue, and its reasons must reflect consideration of the main relevant factors (*Turner* at para 41).

Consequently, when an applicant establishes that it raised an important relevant point, and where, taking into account the record as a whole, the reasons of the tribunal do not allow a reviewing court to understand why the point was disregarded, a reviewable error may be found to exist (*Turner* at para 42). When the reviewing court is not in a position to determine if the decision on that point or argument falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the decision will usually be found to be

unreasonable, unless the reviewing court can itself reasonably find that the outcome of the proceedings would not have changed even if the point or argument has been dealt with by the tribunal one way or the other (*Turner* at para 45). The same reasoning applies in the case under review.

[63] The current reasons are certainly vague and do not really respond to the applicant's main argument. The respondent is therefore now asking this Court to go beyond the current reasons and the contents of the Certified Tribunal Record. According to the respondent, additional information provided by the Director General of CAVCO, Ms. Mennie, in her affidavit dated June 1, 2015, fill any clear gaps in the reasons for denial given to the applicant.

[64] The Director of CAVCO provides the following explanation at paragraphs 40 and 41 of her affidavit:

[translation]

40. When a program is a "game", CAVCO generally considers the following questions:

- a. Does one of the contestants win the game, contest or quiz?
- b. Does the production feature participants or characters that the audience can watch develop from one episode to the next?
- c. Are the games or questions in the production objective (true or false) or subjective (to be decided by a judge)?

41. The features of the production revealed by these questions are used to identify the key elements of productions in the game or quiz genre. By applying such an analytical framework to each case involving a production with respect to a game, contest or quiz, CAVCO aims to ensure that its analyses are consistent in order to treat each case fairly.

[65] On July 15, 2015, the Director of CAVCO was cross-examined at length about these statements by counsel for the applicant. She admitted that, in this case as in previous cases, CAVCO had used [TRANSLATION] “a working tool”—the Decision Tree. Its use in this case was determinative of the outcome. The new evidence submitted by the respondent—which was unknown to the applicant—corroborates, however, that, in practice, CAVCO and the Minister have always interpreted administratively and narrowly the concept of “game show” and the scope of the exclusion defined in subparagraph 1106(1)(b)(iii) of the Regulations.

[66] The basic problem in this case is that the reasoning and justification provided by the Director of CAVCO in her affidavit and examination *a posteriori* not only do not appear in the reasons for the impugned decision, but they also contradict some important aspects. For example, the advance notice of denial provides a particular reason for the denial, namely, the use of a computer application that allows viewers to play along at home and which, as the Director of CAVCO admitted herself under examination, is not a relevant or determinative factor here (Ms. Mennie’s answers to questions 154 to 157).

[67] The respondent relies on *Newfoundland Nurses Union*, but adequacy of reasons is not a matter to be trifled with that can be fixed through an exercise in judicial creativity. To quote this Court in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, “[i]t is ironic that Newfoundland Nurses, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made”.

[68] While the application of “the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain” (*Baker* at para 26), the fact remains that

[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[Emphasis added] (*Baker* at para 28)

[69] In truth, if one examines the document reproduced in Annex B and the type of pointed questions it features, it is obvious that the Decision Tree is much more than a mere [TRANSLATION] ”working tool”. The Decision Tree provides new, additional criteria that do not appear in the Regulations or the Guidelines for determining whether or not a “program featuring games of skill and chance, as well as quizzes” is eligible for a CPTC. For example, according to the Decision Tree, a “game show” is considered to be an “eligible production” under the Regulations if “the games being played or the tasks being completed” have “outcomes” that are “subjective” rather than “objective”, or if the series “keep[s] the same group of contestants for the duration of the series”. With respect to the latter criterion, the Director of CAVCO referred to these contestants as [TRANSLATION] “participants whose character develops”, which would make such a production eligible for a CPTC even if the contestants are competing in games of skill or quizzes (transcript, Ms. Mennie’s answers to questions 112 to 145).

[70] Furthermore, the applicant had a legitimate expectation that the advance notice of denial list the exact criteria used by CAVCO to allow it to make timely, relevant representations and to

submit additional information in order to satisfy CAVCO that it would meet these criteria or that these criteria were not relevant or applicable in the case of the Production.

[71] As noted by the Supreme Court in *Canada (Attorney General of Canada) v Mavi*, 2011 SCC 30 at para 39, [2011] 2 SCR 504, “it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions”. Yet it is clear that the process that was followed in this case was neither fair nor open, nor did it allow the applicant to fully present its case. The lack of transparency resulted in various harms to the applicant that can no longer be rectified at this stage of the case.

[72] In short, whether the Minister’s denial is examined in terms of whether the reasons were reasonable or whether the Minister breached procedural fairness, the Court’s interference is clearly warranted.

VIII Legal remedy

[73] The applicant would like the Court not only to set aside the impugned decision, but also to grant a declaration in its favour; in turn, the respondent invites the Court to dismiss the application for judicial review because the answers to the questions of the Decision Tree suggest that the Production is not eligible. Even though the decision made by the Minister is reviewable, any relief this Court may grant is discretionary (*Khosa* at para 36).

[74] First, I am not satisfied that, as the respondent submits, this is a case where the Court, in exercising its discretion, should dismiss the application for judicial review on the ground that the

final result would be the same (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 1994 CanLII 114 (SCC) at p 228).

[75] For one thing, it cannot be held here that “because of the inconsequential, trivial or mere technical nature of the breach, the relief sought should not be granted” (*Uniboard Surfaces Inc* at para 24). The applicant has suffered actual prejudice here, and the final outcome is not predetermined. There are a number of possible outcomes, all depending on how the definitions of eligible production and excluded production are interpreted and applied. The present situation is therefore very different from the case in *Tooncan*, where, in the absence of an international treaty and the expiry of the 48-hour regulatory deadline, the Minister could not lawfully certify a coproduction and the Court could not order that “a certificate be issued in contravention of the clear provisions of the Act” (*Tooncan* at para 85).

[76] Secondly, the Decision Tree (Annex B) on which the respondent is now relying to seek the dismissal of this application is not a binding regulation—or even a guideline to give direction. Consequently, the Decision Tree cannot limit the Minister’s discretion. The Minister must examine the true or primary nature of a production in order to determine whether it is a “Canadian film or video production” under subsection 1106(4) of the Regulations or an “excluded production” as defined in subsection 1106(1) of the Regulations.

[77] According to the evidence on the record, the Production includes a number of extrinsic elements—animation, stock footage, reports, and documentaries—that have nothing in common with the usual quiz format. Indeed, the respondent is not challenging the fact that the Production

has high informational content (up to 30%), with each episode telling a different story, that of a real or fictional person, in respect of which the additional information provided by a historian and the video clips produced by the applicant provide a more complete picture. The Minister had to determine therefore whether, based on the facts, the Production is primarily a “game show”, a “magazine” or a “documentary” program, as indicated in the “notes” following the Decision Tree: “If there are non-game show /contest elements then we need to determine whether it is ‘primarily’ a game show/contest or not”.

[78] The applicant, citing specific examples of other productions featuring quizzes or games of skill that received a CPTC, submits that some of the criteria in the Decision Tree are irrational and inconsistent, and bear no relation to the objectives of the CPTC Program; in addition, they are applied inconsistently by the Minister. The applicant should make its arguments directly to the Minister. It is not this Court’s role to determine whether the applicant’s arguments against the use of the criteria in the Decision Tree have any merit, nor is its role to reconsider the evidence and to substitute its interpretation for the interpretation CAVCO or the Minister gave or might give to section 1106 of the Regulations.

[79] I am not prepared today to issue a declaration that the television series **ON PASSE À L’HISTOIRE** qualifies for a CPTC, or even to order the Minister to issue a certificate to the applicant. There is no evidence that CAVCO or the former Minister acted in bad faith. At this stage, we must also assume that the current Minister (the Honourable Mélanie Joly) will act in good faith and that she will take this Court’s reasons into consideration. This is what distinguishes the present matter from *LeBon v Canada (Public Safety and Emergency*

Preparedness), 2012 FC 1500 at paras 25 to 27, aff'd 2013 FCA 55 at paras 10 to 15, where the Court issued an order obliging the Minister of Public Safety and Emergency Preparedness to act in a certain manner. Following the Federal Court of Appeal's setting aside of his decision to deny a transfer request (*LeBon v Canada (Attorney General)*, 2012 FCA 132 at paras 25 to 28), the Minister of Public Safety and Emergency Preparedness clearly chose to ignore the reasons and directions given by the Federal Court of Appeal.

[80] In the matter at bar, the Minister, in the past, seems to have given a broad interpretation to "eligible production", and the respondent did not argue before this Court that previous similar productions referred to by the applicant should not have been certified because they were excluded according to a new and correct interpretation of the Act and the Regulations. On the other hand, the positive precedents cited by the applicant only draw their value from how they are interpreted and applied by the Minister. We can also not make any assumptions about the outcome or any future interpretation that might be given to the concept of "game show", should, for example, the Guidelines be amended in the meantime as a result of public consultation with industry stakeholders or a change in policy with respect to the CPTC Program's eligibility requirements from the new government.

[81] The application for judicial review will therefore be allowed in part. The request for a declaration that the television series **ON PASSE À L'HISTOIRE** qualifies for a CPTC is denied. In exercising my discretion, it seems sufficient here to simply set aside the impugned decision and to refer the matter back for redetermination by the Minister within 90 days, which

seems a reasonable time frame to me, given that the record is complete and we are not close to the expiration dates for the issuance of certificates of completion for the Production.

[82] In light of this outcome, the applicant is entitled to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed in part. The request for a declaration that the television series **ON PASSE À L'HISTOIRE** [the Production] is eligible for a tax credit for a Canadian film or video production [CPTC] is denied. The February 2, 2015, decision is set aside, and the matter is referred back to the Minister for redetermination within 90 days of the date of this decision. The Minister shall take the reasons accompanying this decision into account and allow the applicant to make its case regarding any aspect concerning the use of the Decision Tree and the Production's eligibility for a CPTC. With costs in favour of the applicant.

“Luc Martineau”

Judge

Certified true translation
Johanna Kratz, Translator

ANNEX A

Section 125.4 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp)

**Canadian Film or Video
Production Tax Credit**

**Crédit d'impôt pour
production
cinématographique ou
magnétoscopique
canadienne**

Definitions

Définitions

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

125.4 (1) Les définitions qui suivent s'appliquent au présent article.

Canadian film or video production certificate means a certificate issued in respect of a production by the Minister of Canadian Heritage certifying that the production is a Canadian film or video production in respect of which that Minister is satisfied that, except where the production is a treaty co-production (as defined in subsection 1106(3) of the *Income Tax Regulations*), an acceptable share of revenues from the exploitation of the production in non-Canadian markets is, under the terms of any agreement, retained by

certificat de production cinématographique ou magnétoscopique canadienne Certificat délivré par le ministre du Patrimoine canadien relativement à une production et attestant qu'il s'agit d'une production cinématographique ou magnétoscopique canadienne relativement à laquelle ce ministre est convaincu que, sauf s'il s'agit d'une coproduction prévue par un accord, au sens du paragraphe 1106(3) du *Règlement de l'impôt sur le revenu*, une part acceptable des recettes provenant de l'exploitation de la production sur les marchés étrangers est retenue, selon les modalités d'une convention, par:

(a) a qualified corporation that owns or owned an interest in, or for civil law a right in, the production;

a) une société admissible qui est ou était propriétaire d'un intérêt ou, pour l'application du droit civil, d'un droit sur la production;

(b) a prescribed taxable Canadian corporation related

b) une société canadienne imposable visée par règlement

to the qualified corporation; or

(c) any combination of corporations described in paragraph (a) or (b).
(certificat de production cinématographique ou magnétoscopique canadienne)

...

Canadian film or video production has the meaning assigned by regulation.
(production cinématographique ou magnétoscopique canadienne)

...

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

qui est liée à la société admissible;

c) toute combinaison de sociétés visées aux alinéas a) ou b). (Canadian film or video production certificate)

[...]

production cinématographique ou magnétoscopique canadienne
S'entend au sens du Règlement de l'impôt sur le revenu. (Canadian film or video production)

[...]

Crédit d'impôt

(3) La société qui est une société admissible pour une année d'imposition est réputée avoir payé, à la date d'exigibilité du solde qui lui est applicable pour l'année, un montant au titre de son impôt payable pour l'année en vertu de la présente partie égal à 25 % de sa dépense de main-d'oeuvre admissible pour l'année relativement à une production cinématographique ou magnétoscopique canadienne, si les conditions suivantes sont réunies:

a) la société joint les documents suivants à la déclaration de revenu qu'elle produit pour l'année:

(i) le certificat de production cinématographique ou

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.

...

Revocation of certificate

(6) If an omission or incorrect statement was made for the purpose of obtaining a Canadian film or video production certificate in respect of a production, or if the production is not a Canadian film or video production,

(a) the Minister of Canadian Heritage may

(i) revoke the certificate, or

(ii) if the certificate was issued in respect of productions

magnétoscopique canadienne délivré relativement à la production,

(ii) un formulaire prescrit contenant les renseignements prescrits,

(iii) tout autre document visé par règlement relativement à la production;

b) les principaux travaux de prise de vue ou d'enregistrement de la production ont commencé avant la fin de l'année.

[...]

Révocation d'un certificat

(6) Si une omission ou un énoncé inexact a été fait en vue d'obtenir un certificat de production cinématographique ou magnétoscopique canadienne relativement à une production ou s'il ne s'agit pas d'une production cinématographique ou magnétoscopique canadienne, les règles ci-après s'appliquent:

a) le ministre du Patrimoine canadien peut:

(i) soit révoquer le certificat,

(ii) soit, si le certificat a été délivré relativement à des

included in an episodic television series, revoke the certificate in respect of one or more episodes in the series;

(b) for greater certainty, for the purposes of this section, the expenditures and cost of production in respect of productions included in an episodic television series that relate to an episode in the series in respect of which a certificate has been revoked are not attributable to a Canadian film or video production; and

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

Guidelines

(7) The Minister of Canadian Heritage shall issue guidelines respecting the circumstances under which the conditions in the definition *Canadian film or video production certificate* in subsection (1) are satisfied. For greater certainty, those guidelines are not statutory instruments as defined in the *Statutory Instruments Act*.

[Emphasis added]

productions faisant partie d'une série télévisuelle à épisodes, révoquer le certificat relatif à un ou plusieurs épisodes de la série;

b) il est entendu que, pour l'application du présent article, les dépenses et le coût de production relatifs à des productions faisant partie d'une série télévisuelle à épisodes qui se rapportent à un épisode de la série relativement auquel un certificat a été révoqué ne sont pas attribuables à une production cinématographique ou magnétoscopique canadienne;

c) pour l'application du sous-alinéa (3)a(i), le certificat révoqué est réputé ne jamais avoir été délivré.

Lignes directrices

(7) Le ministre du Patrimoine canadien publie des lignes directrices sur les circonstances dans lesquelles les conditions énoncées dans la définition de *certificat de production cinématographique ou magnétoscopique canadienne* au paragraphe (1) sont remplies. Il est entendu que ces lignes directrices ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

[Soulignements ajoutés]

Section 1106 of the *Income Tax Regulations*, CRC, c 945

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.

...

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.
 (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

SECTION VII
Certificats délivrés par le
ministre du Patrimoine
canadien

Définitions

1106 (1) Les définitions qui suivent s’appliquent à la présente section et à l’alinéa x) de la catégorie 10 de l’annexe II.

[...]

certificat d’achèvement
 Certificat attestant l’achèvement d’une production cinématographique ou magnétoscopique d’une société, délivré par le ministre du Patrimoine canadien avant le jour (appelé “date limite d’attestation de la production” à la présente section) qui suit de six mois la date limite de demande relative à la production. (certificate of completion)

[...]

demande de certificat d’achèvement
 Demande relative à une production cinématographique ou magnétoscopique qu’une société canadienne imposable visée présente au ministre du Patrimoine canadien avant le jour (appelé “date limite de demande relative à la production” à la présente section) qui correspond au dernier en date des jours

suivants:

(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.

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.

a) le jour qui suit de 24 mois la fin de l'année d'imposition de la société au cours de laquelle ont débuté les principaux travaux de prise de vue relatifs à la production;

b) le jour qui suit de 18 mois le jour visé à l'alinéa a), si la société a présenté à l'Agence du revenu du Canada la renonciation visée au sous-alinéa 152(4)a)(ii) de la Loi — et en a fourni une copie au ministre du Patrimoine canadien — au cours de la période normale de nouvelle cotisation qui lui est applicable pour les première et deuxième années d'imposition se terminant après le début des principaux travaux de prise de vue relatifs à la production.

producteur Est le producteur d'une production cinématographique ou magnétoscopique le particulier qui, à la fois:

a) contrôle la production et en est le principal décideur;

b) est directement responsable de l'acquisition de l'intrigue ou du scénario de la production ainsi que de l'élaboration, du contrôle créatif et financier et de l'exploitation de la production;

c) est identifié dans la production comme en étant le

(producteur)

producteur.

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

production exclue Production cinématographique ou magnétoscopique d'une société canadienne imposable visée (appelée "société donnée" à la présente définition), qui, selon le cas:

(a) in respect of which

a) est une production à l'égard de laquelle l'un des faits suivants se vérifie:

(i) the particular corporation has not filed an application for a certificate of completion before the production's application deadline,

(i) la société donnée n'a pas présenté de demande de certificat d'achèvement la concernant avant la date limite de demande relative à la production,

(ii) a certificate of completion has not been issued before the production's certification deadline,

(ii) aucun certificat d'achèvement la concernant n'a été délivré avant la date limite d'attestation de la production,

(iii) if the production is not a treaty co-production, a person (other than the particular corporation or a prescribed person)

(iii) dans le cas où elle n'est pas une coproduction prévue par un accord, une personne (sauf la société donnée ou une personne visée):

(A) is a copyright owner of the production for any commercial exploitation purposes at any time during the 25-year period that begins at the earliest time after the production was completed that it is commercially exploitable, or

(A) ou bien est titulaire du droit d'auteur sur la production en vue de son exploitation commerciale à tout moment de la période de vingt-cinq ans qui commence dès que la production est exploitable commercialement après son achèvement,

(B) controls the initial licensing of commercial exploitation,

(B) ou bien contrôle le processus de concession de la licence d'exploitation commerciale initiale,

(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,

(iv) aucune convention écrite, faisant état d'une contrepartie à la juste valeur marchande, n'a été conclue à son égard avec l'une des personnes suivantes pour qu'elle soit diffusée au Canada au cours de la période de deux ans qui commence dès qu'elle est exploitable commercialement après son achèvement:

(A) une société, ayant la qualité de Canadien, qui est distributrice de productions cinématographiques ou magnétoscopiques,

(B) une société titulaire d'une licence de radiodiffusion délivrée par le Conseil de la radiodiffusion et des télécommunications canadiennes pour les marchés de la télévision,

(v) la production a été distribuée au Canada au cours de la période de deux ans qui commence dès qu'elle est exploitable commercialement, après son achèvement, par une personne qui n'a pas la qualité de Canadien;

b) est une production qui est, selon le cas:

(i) une émission d'information, d'actualités ou d'affaires publiques ou une émission qui comprend des bulletins sur la météo ou les marchés boursiers,

(ii) une interview-variétés,

- | | |
|---|--|
| (iii) a production in respect of a game, questionnaire or contest (other than a production directed primarily at minors), | (iii) une production comportant un jeu, un questionnaire ou un concours, sauf celle qui s'adresse principalement aux personnes mineures, |
| (iv) a sports event or activity, | (iv) la présentation d'une activité ou d'un événement sportif, |
| (v) a gala presentation or an awards show, | (v) la présentation d'un gala ou d'une remise de prix, |
| (vi) a production that solicits funds, | (vi) une production visant à lever des fonds, |
| (vii) reality television, | (vii) de la télévision vérité, |
| (viii) pornography, | (viii) de la pornographie, |
| (ix) advertising, | (ix) de la publicité, |
| (x) a production produced primarily for industrial, corporate or institutional purposes, or | (x) une production produite principalement à des fins industrielles ou institutionnelles, |
| (xi) a production, other than a documentary, all or substantially all of which consists of stock footage. | (xi) une production, sauf un documentaire, qui consiste en totalité ou en presque totalité en métrage d'archives. |

...

[...]

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

Production cinématographique ou magnétoscopique canadienne

(4) Sous réserve des paragraphes (6) à (9), pour l'application de l'article 125.4 de la Loi, de la présente partie et de l'annexe II, production cinématographique ou magnétoscopique canadienne s'entend d'une production

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

cinématographique ou magnétoscopique, à l'exception d'une production exclue, d'une société canadienne imposable visée, à l'égard de laquelle le ministre du Patrimoine canadien a délivré un certificat (sauf un certificat qui a été révoqué en vertu du paragraphe 125.4(6) de la Loi) et qui, selon le cas:

(a) a treaty co-production; or

a) est une coproduction prévue par un accord;

(b) a film or video production

b) remplit les conditions suivantes:

(i) whose producer is a Canadian at all times during its production,

(i) son producteur a la qualité de Canadien tout au long de sa production,

(ii) in respect of which the Minister of Canadian Heritage has allotted not less than six points in accordance with subsection (5),

(ii) le ministre du Patrimoine canadien y a attribué au moins six points en conformité avec le paragraphe (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

(iii) au moins 75 % du total des coûts des services fournis dans le cadre de sa production, à l'exception des coûts exclus, était à payer relativement à des services fournis à ou par des particuliers qui ont la qualité de Canadien; pour l'application du présent sous-alinéa, sont des coûts exclus:

(A) costs determined by reference to the amount of income from the production,

(A) les coûts déterminés en fonction du revenu provenant de la production,

(B) remuneration payable to, or in respect of, the producer or individuals described in any

(B) la rémunération payable au producteur ou aux particuliers visés à l'un des

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.

...

[Emphasis added]

sous-alinéas (5)a(i) à (viii) et b(i) à (vi) ou à l'alinéa (5)c), ou à leur égard, (y compris les particuliers qui seraient visés à l'alinéa (5)c) s'ils avaient la qualité de Canadien),

(C) les sommes à payer au titre des frais d'assurance, de financement et de courtage et des frais juridiques et comptables et les sommes semblables,

(D) les coûts visés au sous-alinéa (iv),

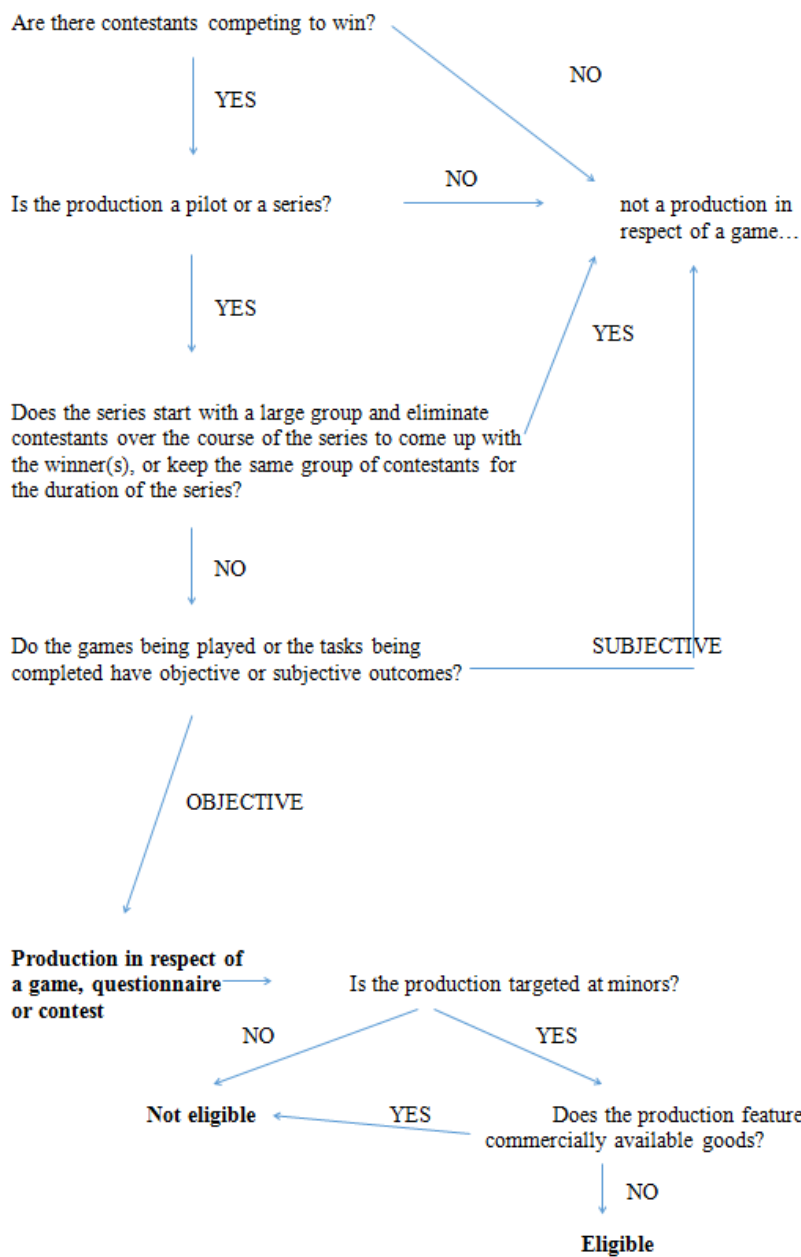
(iv) au moins 75 % du total des coûts se rapportant à sa postproduction, y compris les travaux de laboratoire, la prise de son et le montage de la bande sonore et de l'image, (à l'exception, d'une part, des coûts déterminés en fonction du revenu provenant de la production et, d'autre part, de la rémunération payable au producteur ou aux particuliers visés à l'un des sous-alinéas (5)a(i) à (viii) et b(i) à (vi) ou à l'alinéa (5)c), ou à leur égard, y compris aux particuliers qui seraient visés à l'alinéa (5)c) s'ils avaient la qualité de Canadien) ont été engagés relativement à des services fournis au Canada.

[...]

[Soulignements ajoutés]

ANNEX B
Decision Tree

**Production in respect of a game, questionnaire or contest
(other than a production directed primarily at minors)**



Notes:

- Whether or not there is a prize does not factor into the decision
- If there are non-game show /contest elements then we need to determine whether it is “primarily” a game show/contest or not. Prolonged set-up to a challenge should still be considered part of the challenge.
- If the winner of each episode of a series returns in the next episode until they are beaten by a new challenger, it is still considered to have new contestants in every episode.

FEDERAL COURT
SOLICITORS OF RECORD

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