

Federal Court



Cour fédérale

**Date: 20111228**

**Dockets: T-1841-07  
T-2060-07  
T-2061-07**

**Citation: 2011 FC 1522**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

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

**Ottawa, Ontario, December 28, 2011**

**Docket: T-1841-07**

**BETWEEN:**

**LES PRODUCTIONS  
ESPACE VERT VIII INC  
(MISSION GIBBONS À BORNÉO)**

**Applicant**

**and**

**THE MINISTER OF CANADIAN HERITAGE**

**Respondent**

**Docket: T-2060-07**

**BETWEEN:**

**LES PRODUCTIONS ESPACE VERT (XI) INC  
(TERRE DES DRAGONS A.K.A. RETOUR À KOMODO)**

**Applicant**

**and**

**THE MINISTER OF CANADIAN HERITAGE**

**Respondent**

**Docket: T-2061-07**

**BETWEEN:**

**LES PRODUCTIONS ESPACE VERT (XI) INC  
(EN FAMILLE CHEZ L'OURS À LUNETTES)**

**Applicant**

**and**

**THE  
MINISTER OF CANADIAN HERITAGE**

**Respondent**

**MOTIFS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] On June 17, 2008, Prothonotary Morneau issued an order under rules 8, 105(a) and 399 of the *Federal Courts Rules* (SOR/98-106), with the direction that the applications for judicial review in dockets T-1840-07, T-1841-07, T-2060-07 and T-2061-07 be consolidated and heard together at the same hearing and that a copy of the judgment in the principal case T-1840-07 should be placed in court dockets T-1841-07 and T-2060-07 and T-2061-07 to stand as reasons in those cases.

[2] Given the Court's decision in T-1840-07, the judgment in docket T-1841-07 becomes the lead judgment and applies only to T-2060-07 and T-2061-07.

[3] Les Productions Espace Vert VII Inc. (Espace Vert) is asking the Court to review the decision made by the Minister of Canadian Heritage (the Minister), dated March 12, 2007, sent to Espace Vert on September 24, 2007, by which he revoked the Canadian film or video production certificate, (Part A, Number A 105433) of Espace Vert, for the *Mission Gibbons à Bornéo* production, pursuant to subsection 125.4(6) of the *Income Tax Act*, R.S.C 1985, 5th Supp., as amended (ITA) and paragraph 1106(1)(ii) of the *Income Tax Regulations*, CRC c 945 (ITR). Espace Vert is also asking the Court to issue an order compelling the Minister to issue the certificate of completion, part B, under the Film Tax Credit Program for the *Mission Gibbons à Bornéo* production, as well as any other orders deemed appropriate by the Court.

[4] For the following reasons, the application for judicial review by Espace Vert is dismissed, with costs.

## **II. Facts**

[5] On October 10, 2002, Espace Vert signed a coproduction agreement letter with the French company Guilgamesh, for the production *Mission Gibbons à Bornéo*.

[6] On October 11, 2002, Espace Vert submitted an application for an advance ruling for international coproduction status to Telefilms Canada (Telefilm) for the production *Mission Gibbons à Bornéo* (affidavit of the Espace Vert representative, Exhibit P-8).

[7] On October 25, 2002, Telefilm acknowledged receipt of the application for an advance ruling from Espace Vert. The application reads as follows: [TRANSLATION] “since this is a Canadian minority coproduction, it is important that we receive the decision of the relevant foreign authorities regarding the project as soon as possible. I would appreciate it if you would advise your coproducer of this”(affidavit of the Espace Vert representative, Exhibit P-9).

[8] On July 24, 2003, Lyne Côté, from Telefilm, sent an e-mail to Amélie Blanchard, a producer at Espace Vert. She wrote [TRANSLATION] “I have begun examining your file ... I will also require confirmation that the file has been accepted in France, given that it is a French majority production. I cannot make my decision until I have received confirmation” (affidavit of the Espace Vert representative, Exhibit P-10).

[9] That same day, Lyne Côté followed up with her counterpart. She e-mailed Claudine Manzanares at the Centre National de la cinématographique (CNC), asking her if she had received the file (affidavit of the Espace Vert representative, Exhibit P-11).

[10] On July 28, 2003, Bérangère Térouanne, of the CNC, replied to Lyne Côté and confirmed to her that *Mission Gibbons à Bornéo* had been approved by her, as a French production, but without a Canada-France coproduction agreement (affidavit of the Espace Vert representative, Exhibit P-12). That same day, Lyne Côté asked her interlocutor, B. Térouanne: [TRANSLATION] “Would you be so kind as to forward me a copy of the prior authorization that you sent to the French producer?” (affidavit of the Espace Vert representative, Exhibit P-12)

[11] On August 4, 2003, Lyne Côté wrote to Espace Vert. She requested explanations because Guilgamesh had not included a Canadian coproducer in its financing forecast plan submitted in France. The project was therefore not recognized as a coproduction in France. That same day, Espace Vert replied to Lyne Côté, telling her it was probably an administrative error (affidavit of the Espace Vert representative, Exhibits P-13 and P-14).

[12] On October 21, 2003, Lyne Côté once again wrote to Claudine Manzanares at the CNC, requesting that she be sent the decision regarding *Mission Gibbons à Bornéo* (affidavit of the Espace Vert representative, Exhibit P-15). The CNC did not respond to Telefilm's request.

[13] On December 10, 2003, Brigitte Monneau, coproduction director at Telefilm, sent an e-mail to Espace Vert. She attached the e-mail from Laurent Cormier of the CNC (affidavit of the Espace Vert representative, Exhibit P-16). Laurent Cormier wrote: [TRANSLATION] "Here are our answers: some of the files have already been with us for quite a while and were not submitted as France-Canada coproductions. Mission Gibbons: OK July 2003, not a Canadian coproduction – Guilgamesh production".

[14] Subsequent to this e-mail, Ms. Monneau from Telefilm decided to meet with the representative of Espace Vert, Mr. Cadieux. He explained to her that Espace Vert had no control over the actions of its coproducers or of the CNC.

[15] The representative of Espace Vert contacted the representative of Guilgamesh, who told him that he had verbally informed Claudine Manzanares of the CNC that this coproduction had been

added and that she had not informed Laurent Cormier, who was replacing her while she was on vacation, of this.

[16] On or about October 3, 2003, Guilgamesh filed its final application for authorization with the CNC for the production *Mission Gibbons à Bornéo*. The application was to include the final budget for the production. Guilgamesh submitted its application, with the final accounting for France and the original Canadian budget.

[17] On November 6, 2003, the French coproducer, Guilgamesh, went into receivership (under the French equivalent of the *Companies Creditors Arrangement Act*, R.S.C 1985, c C-36), without informing Espace Vert of this (affidavit of the Espace Vert representative, Exhibit P-17).

[18] On March 1, 2004, Lyne Côté, analyst at Telefilm, signed the advance ruling recommendation (affidavit of the Espace Vert representative, Exhibit P-20). She wrote:

[TRANSLATION] “communication with authorities: e-mail dated February 24, 2004: Mr. Harold Valentin of the CNC confirms that the *Mission Gibbons à Bornéo* file received an advance ruling from France”. In fact, the CNC had not received anything from the French coproducer to amend the file and the previous agreement, stating that it was a 100% French production, remained in effect.

[19] That same day, Telefilm rendered its advance ruling of coproduction status for *Mission Gibbons à Bornéo* (affidavit of the Espace Vert representative, Exhibit P-21).

[20] On March 2, 2004, Brigitte Monneau, of Telefilm, wrote to Laurent Cormier, requesting that he forward her the constitutive elements of the French file. These elements were never forwarded (affidavit of the Espace Vert representative, Exhibit P-22).

[21] On March 4, 2004, Claudine Manzanares, upon returning from her vacation, sent an e-mail to Thomas Saigne of Telefilm (affidavit of the Espace Vert representative, Exhibit P-23):

[TRANSLATION] “I would like to confirm the approval of the CNC for the following programs for which, due to a late submission by the French producer, provisional authorizations were unable to be issued in 2003; the final authorizations will therefore be issued when the final accounting reports for each program are submitted by the French company (including) ... *Mission Gibbons à Bornéo*, 152’ for France 3: coproduction with the Espace Vert company”.

[22] On July 8, 2004, the Tribunal de commerce of Nanterre, in France, accepted a proposal, submitted to the court on June 25, 2004, to liquidate the assets of the French company Guilgamesh for the benefit of Aller-Retour Films (affidavit of the Espace Vert representative, Exhibit P-24). Le representative of Espace Vert claims that this was an orchestrated manoeuvre by the owner of Guilgamesh, Bernard Choquet, in conjunction with the receiver, because Espace Vert was never informed of it.

[23] On July 16, 2004, Espace Vert received a notice of pre-emption from the receiver, Francis Gay, for a number of coproductions, including *Mission Gibbons à Bornéo* (affidavit of the Espace Vert representative, Exhibit P-25). The notice was issued pursuant to the French *Code de propriété*

*intellectuelle*, which requires a receiver to confer a pre-emptive right on all assigns, with priority for coproducers.

[24] Espace Vert found it had no other choice but to exercise its pre-emptive right in order to protect its investments (affidavit of the Espace Vert representative, Exhibit P-26). Espace Vert obtained a decision from the French court and immediately consulted the CNC.

[25] On July 30, 2004, the receiver once again wrote to Espace Vert, explaining that *Mission Gibbons à Bornéo* was among the unfinished Guilgamesh productions. To exercise its pre-emptive right, Espace Vert would have to pay 6,000 Euros.

[26] On July 28, 2004, Espace Vert exercised its pre-emptive right to the production *Missions Gibbons à Bornéo* (affidavit of the Espace Vert representative, Exhibit P-29).

[27] On October 14, 2004, Espace Vert recovered the assets whose sale it had pre-empted by signing an assignment in Paris (affidavit of the Espace Vert representative Exhibit 30). According to Mr. Pascal, Espace Vert's French lawyer, the pre-emption section of the *Code de Propriété intellectuelle* is public policy and the mandatory clauses in the coproduction contracts imposed by both the CNC and Telefilm have no force of law in such a situation (affidavit of the Espace Vert representative, Exhibit P-31). Therefore, these clauses would not be binding on Espace Vert.

[28] On January 7, 2005, Espace Vert sent Telefilm a copy of the assignment signed on October 14, 2004 (affidavit of the Espace Vert representative, Exhibit P-33).



[29] That same day, Brigitte Monneau, of Telefilm, wrote to Laurent Cormier, of the CNC, to inquire, among other things, about the status of the production *Missions Gibbons à Bornéo* in light of Espace Vert's recovery of the assets (affidavit of the Espace Vert representative, Exhibit P-34).

[30] On January 17, 2005, Brigitte Monneau once again wrote to Laurent Cormier. She wrote as follows: [TRANSLATION] "The Canadian producer tells us that, if this means losing coproduction status, it would re-assign the projects to another French company; would that be possible for you?" (affidavit of the Espace Vert representative, Exhibit P-37)

[31] On January 20, 2005, Laurent Cormier replied to Brigitte Monneau. He stated that [TRANSLATION] "[f]or us, the unclosed files are: aventurière de mère en fille, **Les Gibbons**, Komodo, Les ours à lunettes ... For these unclosed files, if they were to be recovered by the Canadian producer they would surely lose their official coproduction status and therefore access to French assistance." (affidavit of the Espace Vert representative, Exhibit P-37)

[32] On January 25, 2005, in preparation for a meeting scheduled for the 31st with Espace Vert's representative, Brigitte Monneau, of Telefilm, once again contacted Laurent Cormier, of the CNC, requesting an official letter and clarifications regarding Espace Vert's allegations that the CNC had been informed before it proceeded with the pre-emption of Guilgamesh's rights (affidavit of the Espace Vert representative, Exhibit P-41).

[33] On January 26, 2005, Laurent Cormier replied to Brigitte Monneau. He stated that [TRANSLATION] “a representative of the Canadian producer did in fact telephone me several months ago to inquire about the balance of CNC funding of films in production and I provided her with an answer on this point; as for the rest, I considered it, perhaps a bit perfidiously, to be their business. Of course I can do an official letter for you” (affidavit of the Espace Vert representative, Exhibit P-41).

[34] On January 31, 2005, Espace Vert representatives Paul Cadieux and Anne Pages, met with Brigitte Monneau and Kenny Duggan, of Telefilm. Brigitte Monneau wrote, in a note to file, that she explained to Espace Vert’s representatives that the CNC’s correspondence was clear with respect to the consequences of the assignment, but that Telefilm was waiting for official correspondence. She added that Mr. Cadieux wanted Telefilm to intervene politically if necessary because the revocation of the decisions would bankrupt his company. She further wrote: [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” (affidavit of the Espace Vert representative, Exhibit P-43).

[35] The CNC’s pre-authorization and Telefilm’s advance ruling bilaterally confirmed the framework of the coproduction. Telefilm’s advance ruling (affidavit of the Espace Vert representative, Exhibit P-21) states that the Canadian producer is expected to comply with terms listed in the ruling. The ruling also states that Telefilm will be in a position to submit a final recommendation after having viewed the program.

[36] Brigitte Monneau replied to the e-mail from Laurent Cormier. She wrote the following: [TRANSLATION] “I informed the producer when I met with him that he was at fault with respect to us, as there was a clause in the coproduction contract requiring him to inform the authorities in the case of any assignment or transfer of the project. Given that he did not inform Telefilm prior to the transaction, it was not possible for us, in contrast to what we had done for the file, to warn him of the consequences of the transaction”. She further added [TRANSLATION] “perhaps you could, in your letter, make reference to the fact that there are always clauses in coproduction contracts which are there to avoid this kind of situation... and that they should have been applied. Indeed, once the transaction has been completed, there is very little we can do... it is clear that if coproduction status is dropped on the French side, it is dropped here as well”.

[37] According to the Espace Vert representative, Ms. Monneau dismissed the arguments presented at their meeting on January 31, 2005, that the CNC had clearly indicated, since the summer of 2004, that assignments that occur after production is completed do not require any French authorization.

[38] On February 3, 2005, Laurent Cormier sent the official letter to Brigitte Monneau (affidavit of the Espace Vert representative, Exhibit P-42), stating his official view of the films coproduced by Espace Vert with Guilgamesh. According to the Espace Vert representative, the letter did not answer the question raised by Brigitte Monneau in her e-mail on January 7, 2005.

[39] On February 23, 2005, Laurent Cormier replied to Espace Vert by e-mail, forwarding a copy to Brigitte Monneau (affidavit of the Espace Vert representative, Exhibit P-44). Among other

things, he wrote, that the remaining grants could only be given to a French company. According the Espace Vert representative, Espace Vert's pre-emptive right included the requirement to finalize 3 films and in return, the receiver undertook to remit to Espace Vert the grants owed to it on behalf of Guilgamesh.

[40] The Espace Vert representative alleged that Mr. Cormier, of the CNC, adopted a legal position that contradicts sections XII and XIII of the coproduction treaty, which grant the production all of the benefits of the laws in force in France.

[41] The Espace Vert representative also argued that Mr. Cormier refused to answer the question of whether reassignment was possible. In fact, he reiterated the position of the CNC and Telefilm to the effect that from the moment one producer holds all of the rights to a film, it is no longer possible to qualify the production as a France-Canada coproduction.

[42] Lastly, he mentioned that an assignment to a third party is impossible without obtaining written consent from the competent authorities of the country of each group for the purpose of the treaty.

[43] On July 28, 2005, Brigitte Monneau sent an e-mail to Jean-Daniel Eigenmann, of Telefilm. She wrote: [TRANSLATION] "the CNC (...) on a project with Films de la Perrine for which an amendment to the coproduction contract was required for pre-authorization from the authorities apparently said that, acceding to them, it is unnecessary to give such an authorization once the project is delivered. As this contradicts their position in the Guilgamesh files, counsel for P.

Cadieux intends to defend this point”. Ms. Monneau also noted that he alleged that Telefilm did nothing to clarify this point to the CNC (affidavit of the Espace Vert representative, Exhibit P-48).

[44] On November 23, 2006, Espace Vert had the final accounts signed by the Guilgamesh representative (affidavit of the Espace Vert representative, Exhibit P-49).

[45] After November 23, 2006, Espace Vert’s representative called Jean-Daniel Eigenmann in order to inform him that he wanted to proceed with a reassignment of his rights to the production to the French company les Films de la Perrine. However, the CNC reiterated that the 3 films could not be France-Canada coproductions.

[46] Mr. Boisshot, of Films de la Perrine, subsequently asked Espace Vert to submit to him proof of coproduction obtained by the CNC. Espace Vert then contacted Mr. Eigenmann of Telefilm in this regard. Mr. Eigenmann then sent them a confirmation e-mail from the CNC (affidavit of the Applicant’s representative, Exhibit P-50).

[47] Espace Vert had a reassignment drawn up, which it presented to Mr. Boisshot of Films de la Perrine. However, Mr. Boisshot wanted to consult Mr. Cormier, of the CNC, before proceeding with the reassignment.

[48] One June 18, 2007, Espace Vert received a draft notice of assessment from auditor René Pétrin of the Canada Revenue Agency (Agency) (affidavit of the Espace Vert representative, Exhibit P-51).

[49] The applicant's representative contacted Mr. Pétrin to inform him that there was an error regarding the due date because the end of the first fiscal year of the company Productions Espace Vert VIII Inc. fell on December 15, 2003.

[50] After having received the Agency's draft notice of assessment, Espace Vert once again tried to open the file with Canadian Audio-Visual Certification Office (CAVCO).

[51] On June 28, 2007, Christophe Pascal, Espace Vert French lawyer, sent Laurent Cormier the final accounting sought by the judicial administrator, as had been requested in the e-mail on June 9, 2005, as well as a request for delivery of the final authorizations. That e-mail remains unanswered to this day (affidavit of the Espace Vert representative, Exhibit P-54).

[52] On August 1, 2007, Jocelyn Casimir, of the CAVCO, confirmed that CAVCO had reopened the file. Furthermore, according to Espace Vert's representative, Mr. Casimir mentioned that the file was no longer revoked and that he was awaiting a response from Telefilm.

[53] On September 20, 2007, the applicant received a notice of assessment from Mr. Pétrin of the Agency. The Espace Vert representative claimed that it was unusual for an auditor to send a notice of assessment without first consulting the taxpayer in order to provide him or her with a timeline for submitting the relevant documents.

[54] On September 24, 2007, CAVCO sent copy of the revocation of the production *Mission Gibbons à Bornéo*.

[55] Espace Vert asked Telefilm to set up a joint commission to raise the seriousness of the problems regarding Article XVI of the *Agreement between the Government of Canada and the Government of the French Republic on Television Relations* (Canada-France Agreement) (affidavit of the Espace Vert representative, Exhibit P-59).

[56] The Espace Vert representative claimed that Telefilm failed to meet this obligation contained in its mandate (affidavit of the Espace Vert representative, Exhibit P-60). Telefilm responded that its mandate is limited to receiving and assessing applications for certification of projects as official coproductions and, based on the treaties and applicable guidelines, to decide whether or not to recommend the government to grant domestic status (affidavit of the Espace Vert representative, Exhibit P-61).

[57] On October 3, 2007, Telefilm sent a draft of the rules of procedure to Espace Vert, following access to information request filed by the latter.

[58] On August 2, 2007, Telefilm confirmed the revocation, by letter (affidavit of the Espace Vert representative, Exhibit P-69).

[59] To date, the Espace Vert representative claims that the 48-month time limit to revoke coproduction status had not passed because the Agency's notice of assessment was dated from the

end of the first fiscal after the first day of filming, namely, December 15, which meant that the time limit ran until December 15, 2007, while the revocation decision was made on March 12, 2007.

[60] Furthermore, according to Espace Vert, Telefilm had all of the necessary documents on hand to grant the completion certificate.

#### **IV. Legislation**

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

#### **V. Issues and standards of review**

##### **A. Issues**

[62] 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 the certificate, part A, for the productions *Mission Gibbons à Bornéo, Terre des Dragons A.K.A. Retour à Komodo and l'Ours à lunettes* reasonable?*



**B. Standards of review**

[63] In *Tricon Television29 Inc v Canada (Minister of Canadian Heritage)*, 2011 FC 435, [2011]

FCJ No 547, Mr. Justice Hughes wrote the following at paragraph 31 of his decision :

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

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

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

[65] The standard of review applicable to the respondent's decision to revoke Espace Vert's coproduction certificate is reasonableness.

**VI. Position of the parties**

**A. Espace Vert's position**

[66] Espace Vert 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.

[67] Espace Vert emphasizes that it made no incorrect statements or omissions with a view to obtaining the certificate, part A. It further claims to have honoured all of its commitments because all of the production elements were completed and the elements of financial contributions were complied with.

[68] Certification of a coproduction by a national authority is not necessarily bilateral, according to Espace Vert.

[69] Espace Vert submits that it was a victim of manoeuvring by its coproducer. Guilgamesh unilaterally put its company into receivership without even informing it, the said coproducer trying to buy back its own productions to resolve its financial problems.

[70] The actions by the coproducer Guilgamesh gave Espace Vert no choice, and it had to exercise the pre-emptive right conferred upon it by French law and become assignees of the rights to the above-mentioned productions.

[71] According to Espace Vert, 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.

[72] Espace Vert argues that the respondent acted unreasonably by refusing to issue the final coproduction certificates (part B) and by erroneously indicating that the coproductions were not covered by an agreement.

[73] Espace Vert also noted that CAVCO, or its agent, Telefilm, possessed all of the elements allowing it to make a positive recommendation positive and issue the completion certificates. The respondent therefore acted unreasonably by finding in error that the CAVCO had not received all of the required documents.

[74] Espace Vert 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 be at risk of breaching his duty of exercising 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 grant final certification, part B.

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

[76] According to Espace Vert, the representatives of the respondent's agent acted in bad faith and ignored their obligations to assist Espace Vert, preferring instead to focus on an unreasonable interpretation of the criteria for issuing coproduction certificates. Telefilm was accommodating towards the French authorities and clearly wanted to avoid contradicting them despite the fact that they were in the wrong.

[77] Espace Vert also notes that there are no rules of procedure concerning the treaty between France and Canada.

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

[79] Espace Vert also contends that the respondent's decision fails to indicate which documents were missing.

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

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

[82] Alternatively, Espace Vert 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 set out in the ITR.

**B. Position of the respondent**

[83] First, the respondent maintains that Espace Vert was not treated in a discriminatory manner because the rules of procedural fairness were respected at all times in the processing of the three files: *Ours à lunettes*, *Mission Gibbons à Bornéo* and *Retour à Komodo*.

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

[85] According to the respondent, despite the exchanges between Espace Vert and its agent, Telefilm, Espace Vert cannot benefit from the tax credit because the documents necessary to establish that the three above-mentioned productions qualified as Canadian film or video productions were not submitted within the required time.

[86] The respondent notes that the wording of the ITA and the IRA creates no obligation for the Minister of Heritage to issue a certificate, or absolute right for Espace Vert 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.

[87] In the case of the three above-mentioned productions, the certificate was revoked because the productions did not qualify as coproductions, Espace Vert having proceeded with the buyback of the French portion. By doing so, Espace vert became the sole producer. 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 Espace Vert claims.

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

## **VII. Analysis**

[89] In this case, there are two issues before the Court. Did the respondent respect the rules of procedural fairness? And is the respondent's decision to revoke the certificate, part A, for the productions *Mission Gibbons à Bornéo*, *Terre des Dragons A.K.A. Retour à Komodo* and *l'Ours à lunettes* reasonable? We will deal with both issues together, since they are intrinsincally linked in this matter.

### **Procedural fairness and reasonableness of the decision**

[90] The sequence of events is of particular importance in this matter as it allows the Court to determine whether the parties fulfilled their respective obligations and respected the rules of procedural fairness.

[91] Article XII of the Canada-France Agreement provides that [TRANSLATION] “the competent authorities of both countries jointly set the procedural rules of the coproduction taking into consideration the existing legislation and regulations in Canada and France.”

[92] On March 1, 2004, Telefilm issued a favourable recommendation to the production *Mission Gibbons à Bornéo*. The productions *Ours à lunettes* and *Terre des Dragons* received similar recommendations. For the last two files, the favourable recommendation or advance ruling was dated October 18, 2004.

[93] On December 20, 2004, the CAVCO issued the certificate (part A), for the production *Mission Gibbons à Bornéo*. The certificates, part A, for the productions *Terre des Dragons* and *Ours à lunettes* were issued on May 25, 2005.

[94] When Telefilm issues a favourable recommendation, certain conditions are imposed on the recipient, i.e. the producer, conditions which must be met in order to receive the certificate, part B.

[95] In fact, in its letter to Espace Vert dated March 1, 2004, Telefilm clearly indicated that the production (*Mission Gibbons à Bornéo*) must be recognized as an official coproduction by the competent authorities in France (affidavit of the Espace Vert representative, Exhibit P-21).

[96] Moreover, the letter contains another disprovision specifying that:

[TRANSLATION]

“any changes to a project that has received an advance ruling is likely to result in the loss of official coproduction status. If changes to the project are needed, prior authorization from the competent authorities must be obtained.”

[97] The evidence in the record leads the Court to conclude that Telefilm learned that Espace Vert had exercised its pre-emptive right on January 7, 2005, or after the advance ruling letter was issued. It is clear the Espace Vert failed to notify Telefilm before exercising its pre-emptive right. In fact, Espace Vert finished exercising its pre-emptive right on October 14, 2004 (affidavit of the Espace Vert representative, Exhibit P-30).

[98] Furthermore, the exercise of the pre-emptive right carried with it irreversible consequences as Espace Vert then became the sole producer. In these circumstances, the respondent cannot be faulted for his decision or the reasons provided in support.

[99] On August 2, 2007, Telefilm sent Espace Vert a letter revoking coproduction status for *Mission Gibbons à Bornéo*, *Les dragons de Komodo* and *Les ours à lunettes*. The letter states:  
[TRANSLATION] “you sent us a copy of an agreement signed on October 14, 2004, between you and Mr. Gay, Judicial Administrator of the Guilgamesh company, in receivership since November 6, 2003. Under this agreement, all of the rights to the documentaries have been assigned to your company. Furthermore, at section 2 of this agreement you acknowledge that you are the sole producer of these documentaries” (affidavit of the Espace Vert representative, Exhibit P-69, see also the agreement in Exhibit P-30). Thus, Telefilm could not maintain coproduction status for the above-mentioned documentaries under the Canada-France Agreement.



[100] In addition, contribution to funding was changed along the way. In the coproduction agreement concluded between Productions Espace Vert VIII and Guilgamesh, on November 19, 2002, section 20.01 states: [TRANSLATION] “the agreement entered into is subject to the approval of the competent authorities of Canada and France for the purpose of the treaty and their agreement that the production complies with the requirements of the Treaty and that the Canadian Group or French Group are thus eligible for the benefits under the Treaty (Certificate in accordance with Rule 317, affidavit of the Espace Vert representative, Exhibit P-14). Section 20.02 of the Agreement also states: [TRANSLATION] “ each group shall submit this agreement and any later amendment to the competent authorities of their country and shall provide the competent authorities with all relevant documents with a minimum of delay”, which Espace Vert failed to do when it exercised its pre-emptive right, in order to obtain the right to *Mission Gibbons à Bornéo*. As Laurent Cormier of the CNC pointed out in his e-mail on January 20, 2005, [TRANSLATION] “for non-completed files, when a production reverts back to the Canadian producer it obviously loses its status as an official coproduction and therefore any access to French funding”. And since France no longer recognized the production as a coproduction, Telefilm had to revoke coproduction status.

[101] Moreover, Espace Vert cannot claim that the respondent failed to respect the rules of procedural fairness since Telefilm responded, on several occasions, to the many submissions, questions and applications made by Espace Vert (affidavit of the Espace Vert representative, Exhibits P-41, 42, 43, 45,49,56,57 and 59). Brigitte Monneau, from Telefilm, met with Espace Vert’s representatives on January 31, 2005, in order to clarify Telefilm’s position following the signing of the agreement with the judicial administrator on October 14 which resulted in the projects

losing their official coproduction status. Ms. Monneau was of the same view as the CNC. She noted in Espace Vert's file that [TRANSLATION] "P. Cadieux does not understand why the CNC did not warn him of this risk when they met in August 2004". She wrote that she mentioned to Mr. Cadieux that he was required [TRANSLATION] "according to the coproduction contracts, to notify us of any assignment of projects, which he did not do (we told him that had he done so we would have been able to warn him that there was a problem)". She further wrote that she told Mr. Cadieux that "the correspondence from CNC was clear with respect to the consequences of the assignment, but that we were waiting for official correspondence". She further added that she indicated to Mr. Cadieux that Telefilm would "have no choice but to revoke the advance rulings if the CNC did so because coproduction decisions are necessarily bilateral ones".

[102] Espace Vert further argues that the CNC acted in a manner which contradicted some of the positions jointly adopted by Telefilm and the CNC, with regard to the possibility of proceeding with reassignments. The Court cannot accept this argument for the following reasons. First, there is no obligation under the Agreement, for either Telefilm or the CNC, to modify their respective policies and processes, to accommodate a producer who proceeded to conduct transactions without first notifying the key stakeholders, namely, the CNC and Telefilm. Second, the fact that the CNC amended parts of their coproduction clauses subsequent to these files does not in itself constitute an admission of error. It strikes the Court as being perfectly normal to want to avoid repeating the same situation in the future by adding more specific provisions to the contract.

[103] Espace Vert also claims that the legal opinion it received from its French lawyer, Mr. Pascal, stated that since the provisions of the French *Code de la propriété intellectuelle* were public policy,

the pre-emption of Guilgamesh's rights became binding on the CNC and on Telefilm, notwithstanding the contractual rules they cited in their defence. Espace Vert ought to have undertaken the necessary procedures before the French courts to express this point of view in opposition to the CNC. That provision of the French Code is certainly not binding on Telefilm and cannot relieve Espace Vert of its obligations under the ITA and its regulations, which grant no discretion to the Minister. The time limits found in the ITR, particularly the provisions in subsection 1106 (1) are mandatory. Moreover, the Minister cannot be bound by an approval given when the conditions prescribed by the Act were not met (see *Canada (Minister of National Revenue) v Inland Industries Ltd* [1974] SCR 514 p 523).

[104] Lastly, Espace Vert also criticizes Telefilm's refusal to convene a meeting of the Joint Commission discuss these files. Telefilm is under no obligation to do so under the terms of the Agreement, and its duty of procedural fairness does not extend that far, as this is a very specific case.

[105] The coproduction agreement between France and Canada is clear, as are the procedure to be followed.

[106] The respondent did not breach his duty of procedural fairness and his decision to revoke his advance rulings is reasonable and justified. Under these circumstances, the Court's intervention is not warranted, and the Minister's decision is reasonable and consistent with the Act.

[107] The application for judicial review must be dismissed, with costs. This decision applies *mutatis mutandis* to dockets T-2060-07 and T-2061-07 and shall be placed in each of the dockets.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed, with costs. This decision applies *mutatis mutandis* to dockets T-2060-07 and T-2061-07 and shall be placed in each of the dockets.

“André F. J. Scott”

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Judge

Certified true translation

Seabsatian Desbarats, Translator



## Annex

- **Section 125.4 of the *Income Tax Act*, R.S.C 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**

**DOCKETS:** T-1841-07, T-2060-07 and T-2061-07

**STYLE OF CAUSE:** LES PRODUCTIONS ESPACE VERT VIII INC  
v  
MINISTER OF CANADIAN HERITAGE

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 2, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** December 28, 2011

**APPEARANCES:**

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