Federal Court  Cour fédérale

Date: 20191217

Docket: T-1803-16

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[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 17, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

PRODUCTIONS GFP (III) INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Productions GFP (III) Inc. (GFP) of two decisions made on behalf of the Minster of Canadian Heritage (the Minister) denying the application for a Canadian film or video production certificate made by the applicant for the pilot

and first season of a production entitled “Sur Invitation Seulement” (the Production). Without these certificates, the applicant cannot obtain the Canadian production tax credit.

[2] The *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act] confers on the Minister the power to issue certificates that entitle holders to the Canadian Film or Video Production Tax Credit (CPTC) with respect to television productions, as long as these are not in an excluded genre of production. The excluded genres are defined in section 1106 of the *Income Tax Regulations*, CRC, c 945 [the Regulations].

[3] GFP’s application for a production certificate was denied on the ground that the Production is “a production in respect of a game, questionnaire or contest” and thus an excluded production within the meaning of subparagraph 1106(1)(b)(iii) of the Regulations.

[4] The applicant claims that the decisions denying the certificate are unreasonable because the Minister made the decisions based on a new interpretation of the Regulations without prior notice. It is unreasonable for the Minister to deny the certificates after allowing the applicant to request a preliminary opinion for the production. In addition, the new interpretation of the Regulations was applied in an arbitrary and discriminatory manner.

[5] For the reasons that follow, I dismiss the application for judicial review.

II. The facts

[6] The CPTC is a program aimed at encouraging Canadian programming and stimulating the development of a national production sector by granting a tax credit for Canadian workers hired to work on Canadian television productions. The CPTC is administered jointly by the

Department of Canadian Heritage and the Canada Revenue Agency (CRA). The Canadian Audio-Visual Certification Office (CAVCO) is the body within the Department of Canadian Heritage that administers the CPTC.

[7] Under the Act, a Canadian corporation that meets the requirements in the Regulations may claim a CPTC equal to 25% of its qualified Canadian professional labour expenditure in respect of an "eligible" production. Under section 125.4 of the Act, to receive the CPTC, a qualified corporation must file with the CRA a Canadian film or video production certificate.

[8] In practice, it is CAVCO that determines whether a production meets the requirements of the Act and the Regulations and issues certificates on behalf of the Minister. To benefit from the CPTC, producers must apply for a Canadian Film or Video Production Tax Credit to CAVCO to obtain from the Minister a Part A certificate as well as a certificate of completion, a Part B certificate. The Part A certificate may be obtained before a production is begun or completed. The Part B certificate is issued only after the production has been completed and after the Minister has been able to watch it.

[9] The definition of a Canadian film or video production in the Regulations limits access to the CPTC. Productions of a genre excluded under subsection 1106(1) of the Regulations are ineligible for the CPTC. Productions of an excluded genre include those "in respect of a game, questionnaire or contest (other than [productions] directed primarily at minors)". This is the type of excluded production at issue here.

[10] The Department of Canadian Heritage has issued the *CPTC Program Guidelines* (Guidelines), published by CAVCO, to clarify the administration of the program. The Guidelines

define the excluded genres, including at paragraph 3.03(c), which describes the genre at issue here:

> Production in respect of a game, questionnaire or contest (other than a production directed primarily at minors): A program featuring games of skill and chance, as well as quizzes.

[11] The applicant, GFP, is a production subsidiary of Groupe Fair-Play Inc. (Fair-Play), a television production company. Since its creation, Fair-Play has produced thousands of hours of television and positions itself as one of the leading television and film producers in Quebec. Since their offices opened in 1999, GFP and Fair-Play have filed more than 200 CPTC applications and have never had a denial: all of their CPTC applications have been granted by the Minister.

[12] On January 6, 2014, before starting to film the Production, Fair-Play requested a preliminary opinion of eligibility from CAVCO, as permitted by section 1.12 of the Guidelines. The request for a preliminary opinion included a synopsis of the Production describing it as [TRANSLATION] "a modern and innovative variety show of a new genre". Since the synopsis is central to the issue, it will be discussed in more detail below. For now, it is sufficient to say that it includes a description of the program's format, which clearly indicates that it will involve performances by artists and personalities that will be split into two competing teams. The synopsis presents the contest as a pretext for the guests' amusing performances, which are the main purpose of the show. On January 9, 2014, three days after the request was filed, CAVCO sent a preliminary opinion to GFP, stating the following:

> [TRANSLATION]
>
> Based on CAVCO's preliminary assessment, the production SUR INVITATION SEULEMENT does not seem to be a genre that is

> ineligible for the CPTC. This preliminary assessment is not indicative of CAVCO's final recommendation to the Minister of Canadian Heritage for certification for the CPTC. We will require a copy of the final version of one or several episodes of the series to be filed with your **application for Part A or Part A/B** in order to make a final decision on the production's eligibility for the CPTC with respect to its genre.
>
> (Emphasis in the original.)

[13] Based on the preliminary opinion, GFP began producing a pilot episode of the Production as well as ten episodes of the first season, which were produced between May 27 and November 26, 2014. On September 26, 2014, GFP filed with CAVCO two applications for Part A certificates for the pilot and first season of the Production. On July 8, 2015, at CAVCO's request, GFP sent a DVD of the pilot and episodes 2 and 3 of the first season of the Production. (I note in passing that GFP also produced ten episodes of the second season of the Production in 2015 and filed another application for a Part A certificate, but, at the time of the hearing, GFP had not received a response from CAVCO to that application.)

[14] GFP's two applications were entrusted to a tax credit officer, who analyzed them after watching the Production DVD. The officer noted that the Production had the features of a game. The officer's analysis was reviewed by the CAVCO Compliance Committee. The Committee is comprised of CAVCO managers and senior analysts. Files for which CAVCO intends to recommend that the certificate be denied are automatically reviewed by the Compliance Committee.

[15] In this case, the Committee met three times to examine GFP's application, and, in the end, the Committee confirmed the officer's analysis and expressed the opinion that the Production involves games or challenges that give rise to objective results and that the

Production is of an excluded genre. On July 26, 2016, GFP received from CAVCO two preliminary opinions of denial for the pilot and the first season stating that CAVCO was of the opinion that the Production was ineligible because it had the features of a "game, questionnaire or contest" and was therefore an excluded production within the meaning of subparagraph 1106(1)(b)(iii) of the Regulations. The preliminary opinion explains CAVCO's reasoning, which is essentially the same for the pilot and the first season:

> [TRANSLATION]
>
> Your production company filed a document describing the production process (hereinafter the synopsis). The synopsis insists on the *performance* aspect of the Production stating that the Production does involve games and a point-tallying system, but that they are used as a pretext for performances by various artists invited to take part in the program. However, from watching the production **SUR INVITATION SEULEMENT (PILOT)**, CAVCO gathered that the scenarios described in the synopsis are not reproduced as a pretext for guests to perform, but that the games are actually the main object of the program. Thus, the pilot episode that CAVCO watched features a contest where two teams face off in games of skill and chance as well as quizzes in order to win.

[16] On August 2, 2016, GFP responded to the advance notice of denial. It maintained that the Production was not an excluded genre of production and that CAVCO's interpretation of subparagraph 1106(1)(b)(iii) was contrary to the traditionally applied interpretation and industry practices established over the years. In its response, GFP stated that the Production is not a game, questionnaire or contest:

> [TRANSLATION]
>
> As apparent from watching the production, there is no "confrontation" between participants. The program brings together artists, who showcase their wit and personality in a fun and festive atmosphere to give viewers exclusive, intimate access to goofy performances. There are almost no rules for these performances, and points are given subjectively and arbitrarily. In addition,

> participants do not face off to "win" since no prize is attributed to the "winning" team; only the participant's honour is at stake and the chance to make one more joke about the opposing team or a fellow artist.

[17] GFP asked CAVCO to recommend to the Minister to issue the Part A certificates, given the preliminary opinion, the history of access to the CPTC for this type of program, the unexplained two-year delay in processing the application and the financial consequences resulting from the refusal to acknowledge that the Production is eligible for the CPTC.

[18] On September 23, 2016, GFP received two notices of denial informing it that the Production is a production in respect of a game, questionnaire or contest, that it is excluded from the CPTC and that no certificate can be issued for a production that does not meet the requirements of the Act and the Regulations.

[19] GFP is seeking judicial review of these decisions.

III. Issues

[20] There are three issues in this case:

A. Is the new evidence filed by GFP admissible?

B. Are the Minister's decisions reasonable?

C. Were the rules of procedural fairness respected?

[21] The rules regarding the admissibility of new evidence in a judicial review are established by judgments of the Federal Court of Appeal and this Court, and there is no question of standard of review.

[22] The standard of review that applies to the second issue is that of reasonableness: *Canada (Attorney General) v Zone 3-XXXVI Inc*, 2016 FCA 242 at para 26 [*Zone 3*].

[23] The key question in a judicial review based on the reasonableness standard is summarized in *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38, [2016] 2 SCR 80:

> [18] Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal's reasons is not on its own a discrete basis for judicial review, the reasons should "adequately explain the bases of [the] decision": *Newfoundland Nurses*, at para. 18, quoting from *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev'd 2011 SCC 57, [2011] 3 S.C.R. 572.

[24] With respect to the issue of procedural fairness, it is common ground that "correctness" is the applicable standard of review: *Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at paras 34 to 36 [*CPR*]. I adopt the clarifications of Justice Gascon in *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935, in this regard:

> [16] In *CPR*, the Federal Court of Appeal instead emphasized that "correctness" in the context of procedural fairness should be approached from a different angle, an angle somewhat detached from the usual standard of review analysis. In this particular setting, "correctness" simply means that a reviewing court must be satisfied that the duty to provide procedural fairness has been met. The Court stated that where the duty of an administrative decision-maker to act fairly is questioned, assessing a procedural fairness argument requires to verify whether the procedure was fair having regard to all of the circumstances (*CPR* at para 54), including the

> five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 25-26). It is up to the reviewing court to make that determination and, in conducting this exercise, the court is called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). In other words, it requires the court to determine whether the administrative process followed by the decision-maker achieved the level of fairness required by the circumstances of the matter (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 21). As the Federal Court of Appeal eloquently expressed it in *CPR*, "[n]o matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56).
>
> [17] Therefore, the true question raised when procedural fairness and the duty to act fairly are the object of an application for judicial review is not so much whether the decision was "correct", but rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered to the affected parties a right to be heard and the opportunity to know and respond to the case against them (*Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35).

[25] In the case at bar, the arguments based on the reasonableness of the decision and the breach of procedural fairness overlap. I will deal with them together, in the summary of the parties' positions and in the analysis.

IV. Analysis

A. *Preliminary issue on the admissibility of evidence*

[26] The respondent objects to GFP's filing of evidence that contains arguments because it was not before the Minister when she rendered the impugned decision, and it is completely

irrelevant to this dispute. Specifically, the respondent asks the Court not to consider a few paragraphs of Guy Villeneuve's affidavit filed by GFP as part of the application for judicial review.

[27] Generally speaking, filing new evidence in a judicial review proceeding is prohibited: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263. As explained by Justice Near in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 [*Sharma*], this rule "respects the differing roles played by judicial review courts and administrative decision-makers". Justice Near also affirmed the purpose of the exceptions to this rule at paragraph 8:

> The three enumerated exceptions for when new evidence can be introduced in a judicial review proceeding respect these differing roles—as must any potential additional exceptions. New evidence may be admitted where (1) it provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits (2) it highlights the complete absence of evidence before the administrative decision-maker on a particular finding, or (3) it brings to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker: *Access Copyright* at para. 20; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116. As this Court explained in *Access Copyright* at paragraph 20, "[i]n fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker".

[28] The respondent's objections target three types of evidence: the evidence that was not before the decision-maker, evidence containing arguments and evidence concerning letters to the Minister from third parties.

[29] GFP claims that most of these documents are admissible to provide background or because they were sent to the decision-maker by third parties. The fact that other bodies did not treat the Production as a game, but rather labelled it a [TRANSLATION] "performance" is relevant. The fact that CAVCO undertook a public consultation is relevant regarding its point of view on the procedural fairness applications in this context. Finally, the fact that third parties had sent letters to the decision-maker expressing their fears regarding the new interpretation of excluded genres adopted by CAVCO is also relevant with respect to the decision-making context.

[30] I agree with the respondent that the evidence containing arguments as well as that concerning the letters sent to the Minister by third parties should not be admitted because it does not fall under any exception recognized in *Access Copyright* or *Sharma*. However, I do not agree with respect to the other evidence filed in Mr. Villeneuve's affidavit. To the extent that the evidence establishes the basis of GFP's argument that there was a breach of procedural fairness, it falls under the exceptions to the rule and may be useful to the Court.

[31] Accordingly, I will not rely on any evidence related to the parts of the affidavit that contain arguments or refer to the letters submitted to the Minister by third parties. Since evidence regarding the approval of the Production by other bodies and CAVCO's opinion regarding the interpretation of the rules may be relevant to the argument on procedural fairness, it is admissible.

B. *Parties' arguments*

(1) GFP

[32] GFP alleges that the decisions are arbitrary and therefore unreasonable because CAVCO changed its usual interpretation of this excluded genre without notice; the preliminary opinion is based on the synopsis, which clearly states that aspects of a game feature in the Production; and it is unreasonable to give approval-in-principle through a preliminary opinion and to then refuse to grant the Part A certificate given that the Production is substantially similar to that described in the synopsis. In addition, CAVCO retroactively applied the new definition that it announced as part of its consultation on changes to the Guidelines. Based on past practices, CAVCO considered that the exclusion provided for productions with respect to a game, questionnaire or contest was for "quizzes", where the rules of play are followed closely and are essential, participants are normally members of the public and prizes that participants can win are particularly important. In the decision at issue, CAVCO applied a radically different, new interpretation of the excluded genre using the so-called Decision Tree.

[33] It was not until January 2016 that GFP learned, through another Federal Court judgment involving another CAVCO decision, that a Decision Tree existed that CAVCO uses to determine whether a production is "a production in respect of a game, questionnaire or contest" within the meaning of the Regulations (*Zone 3*). In February 2016, CAVCO solicited through a public notice comments from the industry regarding proposed modifications to the definitions of genres ineligible for the CPTC. In the public notice, CAVCO proposes to amend the definition of "a production in respect of a game, questionnaire or contest", and the new definition fully matches that in the Decision Tree.

[34] GFP's argument on this issue is described in the written submissions filed in this case:

> [TRANSLATION]
>
> It is unfair, unjust and unreasonable to decide in 2016 that the Production, the filming and broadcasting of which ended in 2014 and which was the subject of a favourable preliminary opinion, is ineligible for the CPTC based on a proposed revised definition made public in 2016, especially as the Public Notice expressly states that, if the revised definitions are adopted, they will come into force at a later date based on the start date of principal photography.

[35] Furthermore, GFP claims that the decision is unreasonable because the synopsis clearly shows the presence of aspects that CAVCO is relying on to conclude that this is "a production in respect of a game, questionnaire or contest". The synopsis showed that each program of the Production had two teams who were going to play four rounds of a game, that some of the games would have objective results and that a winning team would be named at the end of the program. It is unreasonable for CAVCO to base its refusal on aspects that were clearly identified in the synopsis.

[36] Finally, GFP states that the decision was made in an arbitrary and discriminatory manner. The Production was recognized as a [TRANSLATION] "variety show" by the Société de développement des entreprises culturelles (SODEC), the Canada Media Fund, the Canadian Radio-television and Telecommunications Commission (CRTC) and the Academy of Cinema (Gemini). Although these other specialized bodies' decisions are not binding on the Minister, they are important in analyzing the nature of the Production. CAVCO is the only body that considered the Production to be a "game, questionnaire or contest".

[37] GFP notes that the Federal Court of Appeal decision in *Zone 3* encourages those who wish to take advantage of the CPTC to file a request for a preliminary opinion to obtain the Minister's point of view before filming a production. Since the Minister chose to adopt this administrative tool, some importance should be attributed to it. It is unreasonable to give no weight to the preliminary opinion. The decision-making process cannot be the same as when a producer does not request a preliminary opinion.

[38] The law requires discretion to be exercised in the legislative context with consistency and in good faith. In taxation matters, as in this case, the case law is consistent regarding the importance of predictability for accountants: *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601 at p 609; *Altus Group Ltd v Calgary (City)*, 2015 ABCA 86 at para 28. In addition, there is a presumption against retroactively applying a new interpretation of a taxation statute (*Sous-ministre du revenu du Québec c Ciba-Geigy Canada Ltd*, [1981] RDFQ 156 (QCCA) at p 8), or the effects of subordinate legislation (*Bell Canada v Canadian Telephone Employees Association*, [2003] 1 SCR 884 at para 47).

[39] The decision is unreasonable because CAVCO made it in an arbitrary and discriminatory manner by applying a new interpretation of the definition of excluded genre retroactively.

[40] GFP also states that CAVCO did not comply with the rules of procedural fairness in applying a new interpretation to completed productions or those in progress. As indicated in the Decision Tree, which is their working tool, CAVCO decided to apply a limited definition and it is bound by that approach.

[41] An indication of that approach is found in the document published by CAVCO in the public consultation on the proposed modifications to the definitions of excluded genres in the Guidelines. The document was published on February 18, 2016, before the final decision in this case. The consultation document contains the following definition:

> **(iii) A production in respect of a game, questionnaire or contest (other than a production directed primarily at minors)**
>
> A production that includes:
>
> - individuals or teams participating in a game, quiz, or contest, or completing a task that has an objective outcome (e.g. right/wrong, complete/incomplete, fastest, highest score) to determine a winner.
>
> For clarity:
>
> - Whether or not a prize is awarded to the winner is not a consideration in determining if a production is eligible.
>
> - Productions that meet this definition but that **also include** character development over the course of a series (e.g., by starting with a group of contestants who are competing against each other and who are eliminated as the series progresses) are generally considered to be eligible.
>
> - Productions that meet the definition but that are directed primarily at minors are also eligible.
>
> Examples of productions that are **ineligible**: Jeopardy, The Price is Right, Who Wants to be a Millionaire?, Family Feud, Let's Make a Deal, Deal or No Deal, American Gladiators, Wipeout, Fear Factor, The Singing Bee, The Dating Game, Des chiffres et des lettres, Tout le monde veut prendre sa place.

(Emphasis in the original.)

[42] The examples given by CAVCO are an indication of their interpretation of a game, questionnaire or contest, and none of these programs are similar to the Production in this case.

[43] In addition, as part of a consultation on modifying the interpretation of another excluded genre (“talk show”), CAVCO acknowledged that the principles of procedural fairness dictate that it should not apply a new interpretation to completed productions or those in progress. The same principle should apply in the case at bar.

[44] Finally, GFP notes that, as part of the program, those who wish to receive the CPTC reasonably expect CAVCO to make decisions relatively quickly because companies must spend their money to begin productions before they are found eligible for the credit. In this case, there was an unreasonable delay. GFP received the positive preliminary opinion from CAVCO a few days after filing its request. Then, GFP filed an application for Part A certificates on September 26, 2014, and received a response from CAVCO (the advance notices of denial) only on July 26, 2016. For the purposes of this program, this is unreasonable. GFP has a legitimate expectation that such a decision be made within a shorter time frame than the one in this case.

[45] For all of these reasons, GFP argues that the decision must be set aside and referred back to the Minister for reconsideration.

(2) The Minister

[46] The Minister argues that the decisions at issue fall within a range of possible outcomes given the provisions of the Act and the Regulations and the case law, specifically, the Federal Court of Appeal decision in *Zone* 3, which also involves a CAVCO decision concerning the interpretation of the same excluded genre.

[47] The decisions at issue are based on the conclusion that the Production is of an excluded genre, namely, “a game, questionnaire or contest”, under subparagraph 1106(1)(b)(iii) of the

Regulations. The provision uses the phrase “in respect of” (in French “comporte”), the scope of which is very broad, as acknowledged by the case law: *Sarvanis v Canada*, 2002 SCC 28 at para 20; *Nowegijick v The Queen*, [1983] 1 SCR 29 at p 39; *Zone 3* at para 32. The provision confirms the discretionary nature of the Minister’s decision, which thus requires a high degree of deference from a reviewing court.

[48] The Minister claims that GFP’s allegations regarding the decision are unfounded. CAVCO did not change its interpretation of the excluded genre. GFP refers to previous decisions on other productions, but that argument was explicitly rejected in *Zone 3*. The Court of Appeal specified that each case must be considered based on its own facts and circumstances.

[49] In that decision, the Federal Court of Appeal also affirmed, at paragraph 44, that the requirements for procedural fairness in the context of an application for the CPTC are minimal. The only fairness requirement that falls to the Minister is to send an advance notice of denial and to grant an opportunity to provide additional information to the producer. That is exactly what the Minister has done here.

[50] Regarding the preliminary opinion, with respect to the law or the facts, the decision at issue is reasonable. The preliminary opinion process is based strictly on the information presented by the producer at that stage. Based on that information, the preliminary opinion gives an indication of how CAVCO may plan to treat the subsequent application for a Part A certificate. A positive response from CAVCO to the preliminary opinion request does not guarantee that a production certificate will later be issued for the production at issue. The Guidelines and the response given in this case specifically state the following: “Note that this opinion is only preliminary, and is based strictly on the information received at the time by

CAVCO. A full application for a production must ultimately be received for CAVCO to provide a final determination regarding its overall eligibility".

[51] The main point of the Minister's submissions is summarized in her memorandum::

> [TRANSLATION]
>
> [A]lthough the series concept presentation document provided in support of the request for preliminary opinion included some indications that the program involved games, it still presented the program first and foremost as a variety show. It emphasized the performance aspect. Even though it indicates that the production includes scenarios, it states that they are used as a pretext for performances by various guest artists throughout the program.
>
> It is based on these representations that paint the production as first and foremost a variety show and insist on the performance aspect that CAVCO representatives decided, on a preliminary basis and without the benefit of watching DVDs of the program, that the production did not seem to be of an excluded genre.

[52] The Minister points out that the decision at issue is based on very broad discretion involving an assessment of the facts and the application of the Minister's expertise. This is a situation that generally calls for a high degree of deference from the reviewing court: *Zone 3*, at para 29. The Minister is relying on the approach indicated in the Decision Tree, just as CAVCO did in the matter in *Zone 3*. This is not unreasonable, and it is not a retroactive application of a new interpretation.

(3) Discussion

[53] At the outset, it should be pointed out that this is an application for judicial review. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47,

> [a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

> process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[54] To determine whether the decision at issue falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, the Court must begin by examining the legal framework, followed by the Minister's factual analysis. It should be noted that the goal of this exercise is not for the Court to conduct its own analysis, but rather to apply the standards of review to the outcome in the case at bar: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

(a) *The legal framework*

[55] The decisions in this case are based on the conclusion that the productions at issue are of a genre that is excluded under subparagraph 1106(1)(b)(iii) of the Regulations:

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 :
. . .	. . .
(b) that is	**b)** est une production qui est, selon le cas :
. . .	. . .
(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,

[56] The Federal Court of Appeal very recently dealt with the interpretation of this provision in *Zone 3*, a case involving a similar factual background to the one in this case. That decision therefore has to be examined in some detail.

[57] In *Zone 3*, the producer filed an application with CAVCO to obtain a certificate for the production "On passe à l'histoire", which it described as a "magazine" and [TRANSLATION] "a new general knowledge quiz". After watching the production and having some internal discussions, CAVCO issued an advance notice of denial. It was of the opinion that the production was excluded because it was in respect of a game, questionnaire or contest. In response to the advance notice, the producer submitted an argument that the production was a "magazine" type show, characterized by [TRANSLATION] "its strong informative content, which is presented in a fun and upbeat manner" (Zone 3, at para 12). After examining those submissions, the Minister nonetheless decided that the production was of an excluded genre.

[58] The producer filed an application for judicial review. It was allowed by the Federal Court, but the Federal Court of Appeal set aside that decision.

[59] The Court of Appeal began its analysis by calling attention to the structure of the provisions of the Regulations:

> [30] As indicated previously, the Regulations do not specify what types of productions may be granted a CPTC; rather, it uses an exclusion approach. Under subsection 1106(4), a "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 has issued a certificate. Moreover, subsection 1106(1) defines the concept of "excluded production" and paragraph (b) of that definition lists 11 types of productions that fall under that category.

> [31] In view of the architecture of the Regulations, the Minister was not required to inquire as to whether the Production could be treated as a "documentary" or a "magazine," much less take into consideration how SODEC treated this Production. Not only are the underlying reasons for this decision and the applicable statutory and legal instruments not in evidence, but in addition, the Minister was not bound by that decision, as the Judge also acknowledged at paragraph 61 of the decision under appeal. What is more, and at the risk of repeating myself, the Minister's role was not to qualify the Production, but rather to ensure that it did not fall under one of the excluded production categories in the Regulations.

[60] Referring to the wording of the Regulations, the Court of Appeal notes that the exclusion of a production "in respect of" (in French "comportant") a game, questionnaire or contest has a very broad scope, since "in respect of" "was probably the widest of any phrase intended to convey some connection between two related subject matters" (*Zone 3*, at para 32). In this statutory context, the Minister has broad discretion, and it is not the role of a reviewing court to limit the scope of that discretion.

[61] The Court of Appeal found that the Minister's decision was intelligible and that the analysis in the decision responded to the arguments raised by the producer. In addition, the process complied with the applicable procedural fairness requirements, which the Court of Appeal described as "minimal" given that the decision was purely administrative in nature and involved economic interests (at para 44). The Court of Appeal notes in its analysis that the producer "could have applied for a preliminary notice of entitlement, in accordance with section 1.12 of the Guidelines. With that type of notice, had it been sought, the respondent would have known the Minister's position prior to investing funds into the Production" (at para 44).

[62] The Court of Appeal rejected the producer's argument that the Minister had breached the duty of procedural fairness in referring to the Decision Tree because that document was never disclosed. The Court noted that that document is only a working tool, which does not limit the exercise of the Minister's discretion. In addition, the Court noted that the purpose of the tool's application "is usually to promote producers given that it limits the scope of the exclusion set out in the Regulations" (at para 48).

[63] Finally, the Court of Appeal did not accept the producer's allegations that it had legitimate expectations because of the favourable decisions rendered by the Minster for similar productions:

> [49] Lastly, I would add that the fate of other productions could not create legitimate expectations for the respondent. As indicated previously, the doctrine of reasonable expectations can only give rise to procedural rights . . . In any event, one cannot assume, on the sole basis of the evidence submitted by the respondent, that CAVCO changed its practices and modified its interpretation of the Regulations. The Minister is clearly not bound by the conclusions that the respondent may draw from the fact that the productions it considers to resemble the one at issue in this case were deemed eligible for the CPTC program. Had the respondent wanted to ensure that its reading of the decisions rendered by the Minister in respect of other productions was correct and qualified it to claim a tax credit for its own production, the respondent simply had to submit a preliminary notice of entitlement. Having not availed itself of that possibility, the respondent cannot now invoke its own assessment of a few past decisions to support the notion that the exclusion of its Production resulted from a change in the Minister's approach.
>
> (Citations omitted.)

[64] With this background in mind, the Court must examine whether the analysis in the decision at issue is reasonable and whether the process respected the applicable procedural fairness standards.

(b) *The decision at issue*

[65] GFP states that the essential issue in this case is determining when a decision becomes arbitrary. GFP followed the Court of Appeal's advice in *Zone 3* by applying for a preliminary opinion of eligibility. After obtaining a positive response, GFP began production of the pilot and first season of the Production. With no reply from the Minister and after having made several follow-ups with CAVCO, GFP continued with the second season of the Production. The key to its argument is that it is arbitrary and unfair for the respondent to follow the same process that was followed in *Zone 3*, with no respect for the impact of the preliminary opinion.

[66] On the other hand, the Minister states that *Zone 3* establishes that the procedural fairness requirements are minimal and that the way other productions were treated is not relevant—each production must be assessed according to its specific circumstances. In this case, CAVCO followed the process, considered the arguments in response to the advance notice of denial and made a reasonable decision. The Court of Appeal decision in *Zone 3* establishes that the Minister has broad discretion under the relevant provisions, that the decision involves the application of specialized expertise to the facts and that the reviewing courts must show deference when considering such decisions.

[67] After carefully considering the parties' oral and written arguments and having reviewed the relevant case law, I am not satisfied that the decision in this case was unreasonable or that there was a breach of procedural fairness. Although I understand GFP's argument, in the end, the law simply does not support a finding in its favour in this case.

[68] First, it is not the role of a court on judicial review to rule on the factual dispute regarding the synopsis. A first review indicates that the two arguments have merit: the synopsis clearly indicates that the program would involve artists split into teams facing off against each other during the show. On the other hand, it is also true that the synopsis presents this as a pretext for the artists to perform. It is a reasonable outcome to consider that this production could be excluded or not, and it is the responsibility of CAVCO and, ultimately, the Minister to make this assessment.

[69] Based on the legal context, it is clear that this is a discretionary administrative decision that involves the application of specialized expertise to a specific set of facts. This draws a high degree of deference from the court in judicial review.

[70] Additionally, although GFP had asked for and obtained a preliminary opinion, it is obvious upon reading the document and the description in the Guidelines that this opinion does not bind the Minister. In the legal context, it is clear that the opinion provides only a preliminary indication, based solely on the information provided by the producer, and that the final decision is based on an assessment of the actual production itself.

[71] It is not disputed that CAVCO conducted an analysis of the Production and compared it to the synopsis GFP submitted in its request for preliminary opinion.

[72] There is nothing in the evidence to suggest that the decision was not made in good faith, that it constituted an abuse of power or that it otherwise violates the objectives of the legislation. As indicated in *Zone 3*, the “architecture” of the statutory scheme requires the Minister to determine whether a production is excluded; this is exactly what was done. In this case, the

evidence shows that CAVCO reviewed the material submitted and that the issue was considered by the CAVCO Compliance Committee, which confirmed the recommendation to exclude the production. This was communicated to GFP in the advance notice of denial, and GFP had the opportunity to make additional arguments before the final decision was made. This process has no signs of an arbitrary or abusive decision.

[73] As for the delay in the process, GFP alleges that it suffered considerable financial harm because production on the first and second seasons of the Production had been started based on the preliminary opinion. A timely response to its request for the Part A certificate from CAVCO would have allowed GFP to go about its preparations in another manner. This harm is another indication of the arbitrary and discriminatory nature of the decision in this case.

[74] I do not agree. I accept that in view of the architecture of the system, to use the expression of Justice de Montigny in *Zone 3* at paragraph 31, those who want a certificate must spend money to embark on a production, with no guarantee that they will receive the benefit of a tax credit. Moreover, in the present case, before beginning to pay the fees for the Production, GFP followed the approach the Court of Appeal set out in *Zone 3* by seeking a preliminary opinion, and obtained a “positive” response to its request.

[75] In such a circumstance, it can be expected that CAVCO would process the application for a Part A certificate in a reasonable time, but there is no obligation to do so. As stated in *Zone 3*, the doctrine of legitimate expectations is only procedural in nature, and in this case, there is no deadline—be it explicit or implicit—for CAVCO to process applications.

[76] GFP decided to take the risk of not receiving the tax credit, and the decision was not unreasonable or unfair because of the delay. I note that other production companies have taken the same risk, and the decisions to deny or revoke the certificates were not set aside: see *Tricon Television29 Inc v Canada (Canadian Heritage)*, 2011 FC 435; *Serdy Vidéo II Inc v Canada (Canadian Heritage)*, 2018 FC 413. See also, however, *Productions Tooncan (XIII) Inc v Canada (Canadian Heritage)*, 2011 FC 1520.

[77] It is understandable that GFP would feel aggrieved by this decision in light of CAVCO's past practices and after receiving a positive response in the preliminary opinion. It would be completely different if GFP had ignored a negative response in the opinion.

[78] I agree with GFP that it was the Minister's decision to adopt a process that allows a producer to request a preliminary opinion. However, I cannot agree that this led to legitimate expectations or otherwise limited the Minister's discretion under the Regulations. The Court of Appeal is clear in *Zone 3* that the doctrine of legitimate expectations applies only to the procedure to be followed and, in this case, GFP received an advance notice of denial and had the opportunity to made additional arguments before the Minister's final decision. This is all that procedural fairness requires.

[79] I am also not convinced that the Minister applied a new and different interpretation based on the consultation document related to updating the Guidelines. In this case, as in *Zone 3*, it seems that the public servants involved in the recommendation made to the Minister used the Decision Tree. This in itself is not a breach of procedural fairness because it is only an administrative decision-making tool to help public servants apply the factors in the Regulations consistently. Since the tool seeks to improve the consistency of the decision-making process, it is

difficult to see why GFP would object to it. It should also be noted that this analysis does not bind the Minister and that GFP had the opportunity to file submissions on this issue in response to the advance notice of denial.

[80] The mere fact that CAVCO decided to undertake consultations on their proposal to incorporate the Decision Tree into the Guidelines after it became public through *Zone 3* is not unfair. Thanks to the advance notice of denial, GFP knew the basis of the proposed recommendation and had the opportunity to respond to it. GFP was not taken by surprise, and CAVCO did not apply the proposed modifications to the Guidelines retroactively. The facts simply do not support this conclusion.

[81] I agree that consistency in statutory interpretation, specifically, interpretation of taxation statutes, is a valid and important public policy objective and that it can in some cases influence a decision-maker. However, as noted in *Zone 3*, the Act and Regulations impose on the Minister an obligation to assess each case on its own circumstances. In addition, a legal basis supported by significant evidence would have been needed to enable a court to examine the general consistency of the decision-making process based on decisions made through the same process in the past. Such evidence was not filed in this case in part because the relevant evidence was not before the Minister when the decision was made.

V. Conclusion

[82] I agree that, in light of the facts and the law, the decision falls within a range of reasonable outcomes. The decision itself responds to GFP’s arguments and clearly explains why

the Minister concluded that the Production was excluded. That is what the law requires of the Minister.

[83] For all of these reasons, the application for judicial review is dismissed.

[84] Although the Minister has sought costs, in exercising my discretion under Rule 400 of the *Federal Courts Rules*, SOR/98-106, and considering the circumstances of this case, I will not award costs to the Minister. Each party shall bear its own costs.

JUDGMENT in T-1803-16

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Each party shall bear its own costs.

"William F. Pentney"
Judge

Certified true translation
This 17th day of January 2020

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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