Cour fédérale Federal Court

Date: 20230403

Dockets: T-148-19
T-149-19
T-150-19

Citation: 2023 FC 432

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 3, 2023

PRESENT: The Honourable Associate Chief Justice Gagné

Docket: T-148-19

BETWEEN:

9616934 CANADA INC.

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

Docket: T-149-19

AND BETWEEN:

9501894 CANADA INC.

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

Docket: T-150-19

AND BETWEEN:

9849262 CANADA INC.

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The *Income Tax Act*, RSC 1985, c 1 (5th supp.) [**ITA**] confers upon the Minister of Canadian Heritage the power to issue certificates that entitle holders to the *Canadian Film or Video Production Tax Credit* with respect to television productions.

[2] This application concerns the Minister's refusal to issue such certificates for three productions entitled *Croisières de rêve 4*, *Soleil tout inclus 8* and *Soleil tout inclus 9*, on the grounds that they constitute "advertising", a type of production excluded from the tax credit by the *Income Tax Regulations*, CRC c 945 [**Regulations**].

[3] The applicants are related companies, created solely for the purposes of the television productions in question. Their applications for judicial review are essentially based on the same facts and raise the same legal issues; they have therefore been joined to be heard together.

II. Facts

[4] To encourage and stimulate the development of the domestic production sector, Canada offers tax credits to Canadian producers. The Canadian film or video production services tax credit at issue in this case is granted for Canadian labour hired to work on Canadian television productions.

[5] Access to this tax credit is restricted by the definition of "film or video production" found in subsection 125.4(1) of the ITA, which sets out that certain productions, listed in subsection 1106(1) of the Regulations, are not eligible.

[6] The Minister determines eligibility for the tax credit on the basis of information provided by the producer and the recommendation made by the Canadian Audio-Visual Certification Office [**CAVCO**], a unit of the Department of Canadian Heritage specializing in the implementation of these programs. The final decision is then made on behalf of the Minister by a Department executive.

[7] If a production is eligible, the Minister issues a *Canadian Film or Video Production Certificate* (known as a Part A certificate), the filing of which is one of the requirements for a company to qualify for the tax credit.

[8] Subsection 125.4(1) of the ITA provides the following:

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

[9] Subsection 1106(4) of the Regulations provides that such a production is one that is not an excluded production within the meaning of subsection 1106(1) of the Regulations, which reads in part as follows:

> ***excluded production*** means a film or video production, of a particular corporation that is a prescribed taxable Canadian corporation,
>
> . . .
>
> (**b) that is**
>
> (i) news, current events or public affairs programming, or a programme that includes weather or market reports,
>
> (ii) [Repealed, SOR/2016-262, s. 1]
>
> (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. (*production exclue*)
>
> (Emphasis added.)

[10] A production that constitutes advertising is therefore not a Canadian film or video production eligible for the tax credit.

[11] In addition, subsection 124.5(7) of the ITA allows—or rather seems to require—the Minister to publish guidelines to set out the conditions for issuing a certificate:

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

A. *Facts prior to the applications leading to the impugned decisions*

[12] To fully understand some of the arguments raised by the applicants, it is necessary to provide a brief history of the position taken by the Minister with respect to the definition of advertising for the purposes of the exclusion provided for in the Regulations.

[13] First, in the Minister's guidelines published in April 2012 [**2012 Guidelines**], the following definition is proposed:

> (i) **Advertising**: A production which includes:

> (a) any commercial intended to sell or promote goods, services, natural resources or activities and includes an advertisement that mentions or displays in a list of prizes the name of the person selling or promoting these goods, services, natural resources or activities (also "commercial message");
>
> (b) any infomercial, promotional, or corporate video program exceeding 12 minutes which combines information and/or entertainment with the sale or promotion of goods or services into a virtually indistinguishable whole. This includes videos and films of any length produced by individuals, groups and businesses for public relations, recruitment, etc.
>
> Advertising also means any commercial message and programming that promotes a station, network or program, but does not include:
>
> (a) a station or network identification;
>
> (b) the announcement of an upcoming program that is voiced over credits;
>
> (c) a program that consists exclusively of classified announcements, if the program is broadcast not more than once during a broadcast day and lasts not more than one hour; or
>
> (d) a promotion for a Canadian program or a Canadian feature film, notwithstanding that a sponsor is identified in the title of the program or the film or is identified as a sponsor of that program or that film, where the identification is limited to the name of the sponsor only and does not include a description, representation or attribute of the sponsor's products or services.

[14] Their titles indicate that each of the three productions at issue belongs to a series. Productions from the same series preceding those at issue were certified by the Minister and benefitted from the tax credit.

[15] However, in August 2014 and February 2016, CAVCO notified the applicants of its determination that the television series *Croisières de rêve* and *Soleil tout inclus* constituted

excluded advertising and that the prior certificates had been issued in error. The applicants were notified that any future productions based on the same concept would be excluded.

[16] In February 2016, the Minister published a public notice proposing certain amendments to the definition of advertising in the 2012 Guidelines, in which the comments of industry players were solicited. The proposed definition reads as follows:

> **(ix) Advertising**
>
> A production that:
>
> - includes a call to action to the viewer to take an action (e.g., to call, to visit a store, to visit a brand or retail website);
> - includes a brand name in the title; or
> - exceeds the maximum permissible time on screen of brand logos and/or positive references to a brand.
>
> [1] CAVCO is seeking comments with regards to qualifying "maximum permissible time on screen"

[17] In March 2017, the Minister issued a new public notice replacing the definition of advertising contained in the 2012 Guidelines by the following [**2017 Guidelines**]:

> **Advertising:**
>
> A production:
>
> • that is a commercial or infomercial;
>
> • that includes a call to action soliciting the viewer to purchase a good or service (e.g., directing the viewer to a store or website other than the production's website);
>
> • that promotes broadcast schedules or programming; or
>
> • **where more than 15% of the running time consists of:**

> **- extolling the virtues of one or more products, services, events, organizations or businesses, and/or**
>
> - logos or other brand identifiers.
>
> (Emphasis added.)

B. *The certification applications*

[18] In June 2016 (after the 2016 Public Notice but before the 2017 Guidelines), the applicants filed their applications for certification of the productions *Croisières de rêve 4* and *Soleil tout inclus 8*; they allege that they changed the content of these productions in relation to the previous seasons to take into account the notices received from CAVCO.

[19] In April 2017, the applicants filed their application for certification of the production *Soleil tout inclus 9*.

[20] Some back and forth followed between the applicants and the CAVCO officers responsible for the three applications. The officers reviewing the productions in light of the 2017 Guidelines required additional videos to determine what percentage of certain representative episodes “extoll[ed] the virtues” of the featured cruises or sun destinations.

[21] A CAVCO officer in each file produced a compliance memo containing a recommendation to deny certification. A compliance committee of six or seven CAVCO officers then met to discuss the case and decided to uphold the recommendation.

[22] In December 2017, CAVCO sent the applicants advance notices of denial regarding the productions *Soleil tout inclus 8* and *Soleil tout inclus 9*. The notices stated that the episodes submitted to CAVCO with the applications contained infomercials based on the promotion of various hotels and tourist destinations. Here is how CAVCO describes the concept of the show:

> [TRANSLATION]
> The production SOLEIL TOUT INCLUS *[8 or 9 as applicable]* is structured so as to give a detailed picture of hotels and destinations, with an emphasis on their advantages and positive features. The production extols the virtues of a panoply of sites, facilities, packages, activities and services, including accommodations and food services. In each episode, the host visits various hotels and describes all of the advantages a consumer can find there (see the examples described in the Schedule). This content taken together represents considerably more than 15% of the total running time of the production.

[23] CAVCO did, however, invite the applicants to send it any new information that might influence its assessment of the file, which the applicants did on February 22, 2018. I will return to the arguments raised in their response, as they essentially go to the heart of this debate.

[24] On April 17, 2018, CAVCO informed the applicants that it would provide them with its decision about the three applications after this Court rendered its decision in file T-1483-16, which involved a television series called *Villas de rêve*. Ironically, the Court's decision was issued the very next day in *Serdy Vidéo II Inc. v Canada (Heritage)*, 2018 FC 413. I will also return to this decision later.

[25] In June 2018, CAVCO sent an advance notice of denial with respect to the production *Croisières de rêve 4*, the content of which was similar to the previous production.

[26] Also in June 2018, the applicants filed additional comments with CAVCO regarding the productions *Soleil de rêve 8* and *9*, accompanied by a USB key containing episodes from the productions *Soleil de rêve 6* and *7*, as well as episodes of the production *Villas de rêve*, which was addressed by the Court in *Serdy*. The applicants commented on the decision and reiterated that they had adjusted their concept in light of the notices received in 2014 and 2016 regarding the series *Soleil tout inclus*. It should be noted that the CAVCO officer acknowledged receipt of this missive, but he informed the applicants that the USB key did not work; he asked them to send another one. The applicants also submitted additional annotated transcripts accompanied by detailed calculations showing that many shows that did not respect the definition of advertising set out in the Public Notice were nevertheless certified.

[27] On August 7 and 8, 2018, the applicants responded in two separate letters to the advance notice regarding *Croisières de rêve 4*. The two letters contained a postscript indicating that a USB key had been sent separately to CAVCO on the same day. It should be noted that CAVCO states that it received a single USB key, not two.

[28] On August 30, 2018, the compliance committee met again to discuss the response to the advance notice of denial; it maintained its initial position. A memo recommending that the application be denied was sent to a CAVCO official acting on behalf of the Minister.

[29] On December 21, 2018, the Minister sent the applicants the notice of denial with respect to the three applications under consideration. That decision is the subject of this application.

C. *The productions and production budgets*

(1) Croisières de rêve 4

[30] The applicants argue that this series is about dreaming; it allows viewers to travel the world aboard cruise ships while sitting comfortably in their living rooms. The synopsis of the show reads as follows:

> [TRANSLATION]
> It is often said that a stay on a cruise ship is a destination in itself! But in addition to the pleasure of enjoying the assets of these ships, cruises allow you to discover several destinations in the course of a single stay. In short, cruise vacations offer the best of all worlds.
>
> Alaska, Myanmar, the African coasts, the Caribbean and the Elbe in Central Europe are just some of the renowned destinations featured in this series. We'll take advantage of stopovers in famous destinations to visit mythical places, make historical discoveries and engage in some physical activities, all the while discovering the country.
>
> The series *Dream Cruises 4* is a vibrant exploration of life aboard these floating palaces. Get ready to experience luxurious details, special touches, majestic shows, luxurious cabins and exciting excursions.
>
> *Dream Cruises 4* is the leading show bringing you the experience of cruise ship travel, with 13 episodes featuring the discovery of breathtaking ships and the exploration of the world's most beautiful destinations.

[31] This production has no host, but instead uses a narrator who describes the experience as lived by the passengers. A camera operator follows passengers every step of the way, from the activities offered on the ship to the excursions from the ports of the various countries visited.

[32] It is broadcast on Canal Évasion, a French-language channel specializing in programs on travel, tourism, adventure and gastronomy.

[33] According to a 2016 document entitled [TRANSLATION] “Financing Structure”, the production budget for *Croisières de rêve 4* is $1,055,771, and it breaks down as follows:

> Canal Évasion: $208,000
>
> Provincial tax credit: $168,923
>
> Federal tax credit: $133,027
>
> Producer’s share: $545,820

(2) Soleil tout inclus 8 and 9

[34] In this production, also broadcast on Canal Évasion, the spectator follows a host to various sun destinations. Once again, the applicants claim that this series allows viewers to travel at no cost, in the comfort of their own living rooms. The synopsis in the CAVCO Report describes the production as follows:

> [TRANSLATION]
> Soleil tout inclus . . . features all-inclusive vacation destinations. From the Dominican Republic through Mexico, Roatan, Cuba, Jamaica and Haiti, we will visit hotels that suit every budget and every type of vacationer. Several excursions are on the program to explore the hidden secrets of these destinations where sun, sea, beach and dreams are… all included! Grab your sunscreen and your straw hat and come with us to the Sun . . . All Inclusive!

[35] According to a 2016 document entitled [TRANSLATION] “Financing Structure”, the production budget for *Soleil tout inclus 8* is $540,785, which breaks down as follows:

> Canal Évasion: $112,000
>
> Producer’s share: $267,226
>
> Provincial tax credit: $94,637
>
> Federal tax credit: $66,922

[36] According to a 2016 document entitled [TRANSLATION] “Financing Structure”, the production budget for *Soleil tout inclus 9* is $1,008,655, which breaks down as follows:

Canal Évasion: $240,500

Producer’s share: $161,745

Provincial tax credit: $161,385

Federal tax credit: $127,091

Filmoption International Inc.: $130,000 (distribution rights)

Transat Tour Canada Inc.: $187,935 (sponsorship)

III. Impugned decision

[37] In three separate but very similar letters, the Minister essentially reiterates the position set out in the notices of denial, adding that this position had also been validated by this Court in *Serdy*.

[38] The Minister is of the view that the productions are infomercials promoting various cruises, sun destinations and tourist activities. In this context, it is the Minister’s opinion that the productions combine information and/or entertainment with the sale or promotion of goods or services into a virtually indistinguishable whole. The Minister notes that well over 15% of the productions’ running time consists of logos, and segments emphasizing the advantages and positive points of the cruise or resort features, their attractions and the activities and services offered.

[39] The Minister is thus of the opinion that these productions are advertising and are therefore excluded productions under paragraph 1106(1)(b) of the Regulations.

IV. Issues and standard of review

[40] The following issues arise in the applications for judicial review:

A. *How did the Court orally dispose of the preliminary motions submitted at the start of the hearing?*

B. *Did the Minister err in his interpretation of subsection 1106(1) of the Regulations?*

C. *Did the Minister breach his duty of procedural fairness in handling these applications?*

[41] The parties' submissions were received prior to the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 69 [*Vavilov*]. However, they both commented on the impact of *Vavilov* on this case in their oral submissions.

[42] It is therefore undisputed that the standard of review applicable to the Minister's decision of whether to issue a film production certificate is that of reasonableness.

[43] As for whether the rules of procedural fairness have been respected, the applicable standard of review is more akin to the standard of correctness (*Serdy* at para 26; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34).

V. Analysis

A. *How did the Court orally dispose of the preliminary motions submitted at the start of the hearing?*

[44] At the start of the hearing, two preliminary motions were brought before me: a motion from the applicants to file a supplementary record and a motion from the respondent to strike certain paragraphs of Paul Cadieux's affidavits and supporting exhibits.

[45] I granted the first and allowed a USB key to be filed containing recordings of episodes of television shows produced by third parties such as *Alimentaire mon cher Bryan, Donnez au suivant, Holmes Inspection, La petite séduction* and *Sex Around the World*. These shows are among those for which the Certified Tribunal Record already contains annotated transcripts that the applicants had previously submitted to CAVCO with calculations regarding their content.

[46] In addition, I partially granted the second motion and ordered that the following items be struck, some with the respondent's consent, others not:

> Docket T-148-19: paras 16, 18, 19, 23, 27, 29 to 36 and Exhibits PC-6, PC-7, PC-8, PC-9 and PC-10;
>
> Docket T-149-19: paras 17, 19, 20, 24, 28, 30 to 37 and Exhibits PC-6, PC-7, PC-8, PC-9, PC-10 and PC-11;
>
> Docket T-150-19: paras 17, 19, 20, 24, 28, 30 to 39 and Exhibits PC-9, PC-10, PC-11, PC-12 and PC-13.

B. *Did the Minister err in his interpretation of subsection 1106(1) of the Regulations?*

[47] Two decisions are particularly relevant here: the Federal Court of Appeal's decision in *Canada (Attorney General) v Zone3-XXXVI Inc.*, 2016 FCA 242 [***Zone 3 FCA***], which

overturned this Court's decision in *Zone3-XXXVI inc. v Canada (Attorney General)*, 2016 FC 75 [***Zone 3 FC***], as well as this Court's decision in *Serdy*.

[48] In *Zone 3 FC*, Justice Luc Martineau was hearing an application for judicial review of a decision by the Minister to refuse to issue a certificate to the applicant for the television series *On passe à l'histoire*.

[49] Here is how this series is described in the judgment:

> [30] In fact, according to the synopsis provided by the applicant, the Production [TRANSLATION] "is a new general knowledge quiz that is both fun and educational, with each episode dealing with the life and times of a real historical or contemporary figure". However, even though the applicant describes the Production as a quiz, it then states that this is a [TRANSLATION] "pretext":
>
> > [TRANSLATION]
> > The premise is a simple one: the program delves into the story of Cleopatra, Molière or even J.F. Kennedy. . . . This pretext gives rise to 60 minutes of questions covering a range of categories—facts, curiosities and pop culture—about the person chosen and the world in which he or she lived. The three contestants—Quebec stars or celebrities—are lively, witty and funny.
> >
> > To flesh out the educational component of the program, the presenter is supported by a learned historian, who will provide additional insight on a variety of topics. In addition, a multi-instrumentalist will provide musical entertainment by playing music adapted to each episode.
> >
> > [Emphasis added]

[50] At the end of a review proceeding, similar to the one described above, the Minister first issued an advance notice of denial, then a notice of denial, after having allowed the applicant to

submit to him any new information that might influence the decision. After the review, the Minister was of the view that the production was excluded pursuant to subparagraph 1106(1)(b)(iii), a production in respect of a game, questionnaire or contest, other than a production directed primarily at minors.

[51] Justice Martineau allowed the application on the basis that the advance notice and the notice of denial were fundamentally flawed in that the reasons did not include a serious analysis of the true nature or the main feature of the production. Furthermore, the fact that the advance notice was silent with respect to certain parameters considered by the Minister constituted, in his view, a breach of the rules of procedural fairness.

[52] In *Zone 3 FCA*, Justice Yves De Montigny did not share this point of view. He pointed out that the role entrusted to the Minister by this legislation was not to qualify a production, but to ensure that it did not fall into an excluded category.

[53] He located the latitude granted to the Minister in the wording of the exclusion set out in the Regulations. "[Any] production **in respect of** a game, questionnaire or contest" is excluded. The judge analyzed the impact of the use of the phrase "in respect of" (*"comportant"* in French) and held that the exclusion was to be interpreted very broadly:

> [32] … The fact that these terms themselves are very broad in scope is not in dispute. The ordinary meaning of "comporter" [in respect of] implies the notion of "inclure" [to include] or "impliquer" [to involve], "comprendre" [to include] or "contenir" [to contain, include], as evidenced in the definitions of this term in *Le Nouveau Petit Robert*, 2015 and *Le grand Larousse encyclopédique*, 2007. The same is true for the words "in respect of," which the Supreme Court referred to as words of "the widest

> possible scope" and was probably the widest of any phrase intended to convey some connection between two related subject matters (see *Sarvanis v. Canada*, 2002 SCC 28, at paragraph 20, [2002] 1 S.C.R. 921; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 39, 144 D.L.R. (3rd) 193.

[54] The judge noted that the show's synopsis implied that the cultural content served as a pretext for the quiz game, whereas the applicant argued the opposite before the court. However, he concluded that this was not relevant, as the language of the Regulations does not quantify the importance required of the game component, unlike other exclusions set out in the Regulations:

> [36] … This excludes a production that is "produced primarily for industrial, corporate or institutional purposes," as well as a production, other than a documentary, "all or substantially all of which consists of stock footage" (see definition of "excluded production" in subsection 1106(1), subparagraphs (b)(x) and (b)(xi) of the Regulations [emphasis added]). In fact, even the exclusion of a production including a game, questionnaire or contest mentions that it does not apply to a production "directed primarily at minors".

[55] Since it was not for the Court to incorporate into the legislation parameters that were not there, and since the Minister reasonably exercised the broad discretion conferred on him by the Regulations, the Court allowed the appeal and reinstated the Minister's decision.

[56] A few years later, this Court heard the application in *Serdy*. The Minister's revocation of a certificate for the production *Villas de rêve* was being challenged on the ground, as in this case, that it constituted advertising.

[57] I note first that the decision in *Serdy* predates the 2017 Guidelines. This is important because, in this case, the decision is essentially based on a calculation of the percentage of

episodes viewed by CAVCO that "extol[s] the virtues of one or more products, services, events, organizations or businesses". In *Serdy*, the Minister's decision is summarized in two paragraphs:

> [18] The Decision states that *Villas de rêves* is "advertising", which is an excluded production within the meaning of subparagraph 1106(1)(b)(ix) of the Regulations. It asserts that each episode of *Villas de rêves* that had been submitted to CAVCO for viewing is composed entirely of video images that promote a particular vacation destination, with everything that the location has to offer vacationers during their stay, and that the primary objective of the production is therefore to promote the goods, services or activities offered by the various tourist destinations. Thus, the production has all the characteristics of an infomercial; the aspects aimed at selling or promoting the services of the seaside resorts form a whole that is practically indistinguishable from the production's information content. To make this finding, the Decision was based on the definition of "advertising" in the CPTC Program Guidelines, published by CAVCO on April 2, 2012, in accordance with subsection 125.4(7) of the ITA [Guidelines].
>
> [19] The Decision states the following: [TRANSLATION] "Thus, any production that, like VILLAS DE RÊVES, (I) offers i) a detailed description of the services, activities or products of any provider; ii) a detailed description of the main features of the services, activities or products of the provider in question; and iii) laudatory comments regarding those services, activities or products of such a provider, is considered by CAVCO to be a production that constitutes 'advertising,' a category that is ineligible for the CPTC. This description is . . . based on the intrinsic characteristics of the production as they were noted, generally during the viewing of the episodes submitted by the producer".

[58] Justice Richard Bell began by finding that the only obligation of procedural fairness incumbent on CAVCO was to send the advance notice, a requirement that had been met in the case before him. As for the merits of the Minister's decision, he held that the definition of advertising used by the Minister (the one found in the 2012 Guidelines) was compatible with certain definitions provided for the term, by the *Larousse* dictionary for example, and that it was

reasonable for the Minister to conclude that the production *Villas de rêve* constituted advertising and was therefore excluded within the meaning of the Regulations.

[59] None of these precedents is strictly applicable to the present case because the production involved is different and the reasoning followed by CAVCO is based on a different premise.

[60] That said, if I apply the logic followed by the Federal Court of Appeal in *Zone 3 FCA* and seek the latitude granted to the Minister in the language of the exclusion in the Regulations, I arrive at a result opposite to that reached by the Court in *Zone 3 FCA*. The scope of the "advertising" exclusion, much like that of the pornography exclusion, is much narrower than the scope of the "game, questionnaire or contest" exclusion. There is no term used here that allows only part of the production to be considered advertising (or pornography).

[61] I find that by using the 15% threshold, the Minister is doing exactly what the Federal Court of Appeal says is not within the Court's jurisdiction; he is incorporating into the legislation parameters that are not there. And in a context in which the "advertising" exclusion does not use terminology similar to that used for a game, questionnaire or contest ((iii) "in respect of"), a production produced for industrial or institutional purposes ((x) "primarily") or stock footage ((xi) "all or substantially all"), it seems to me that this percentage is particularly low.

[62] At the hearing, we viewed excerpts from the productions whose transcripts were included in the applicants' voluminous submissions to CAVCO. One of the final excerpts was from an episode of *Croisières de Rêve 4*, watched by the CAVCO officer.

[63] In a corner of the image a bright dot appeared that changed from green to red when the narrator or host used a laudatory descriptor or when a logo was visible on the screen. In other words, it was a visual exercise in which the applicants attempted to demonstrate CAVCO's application of the criteria for determining whether the proportion of the productions in question that consisted of "extolling the virtues of one or more products, services, events, organizations or businesses" was greater than 15%.

[64] I must say that the exercise struck me as arbitrary. It is true that it is not relevant to consider CAVCO's treatment of other productions in analyzing the reasonableness of the decision under review (*Zone 3 FCA*, at para 41). But the comparative exercise struck me as equally arbitrary.

[65] That said, I can fully understand CAVCO's desire to broaden the scope of the "advertising" exclusion set out in the Regulations in an era when traditional television advertising has lost ground to advertising placements or product placements integrated into television productions, and to the advertising that is invading social media. However, that decision, in my view, belongs to Parliament, not to the Minister.

[66] A further comment is in order regarding the decisions in *Zone 3 FCA* and *Serdy*; both were handed down before the Supreme Court of Canada's decision in *Vavilov*, which emphasizes the importance of reasons and internal rationality. In their communication dated February 22, 2018, the applicants raised important substantive arguments regarding the purpose of the exclusions set out in the Regulations. The applicants argue that the excluded genres are areas in

which broadcasters would not generally turn to independent Canadian producers, which is precisely what the tax credit program seeks to support. Neither the advance notice of denial nor the notice of denial addresses this argument or any of the others raised by the applicants. They are simply applying the rule of the 15% that "extol[s] the virtues of one or more products, services, events, organizations or businesses" to deny certification.

[67] With respect, I find that this is an unreasonable decision the outcome of which is not defensible in respect of the facts, and especially not in respect of the ITA and the Regulations.

C. *Did the Minister breach his duty of procedural fairness in handling these applications?*

[68] The applicants argue that the Minister demonstrated perceived subjectivity, discriminated against them, infringed their legitimate expectations and acted arbitrarily and unfairly. In *Zone 3 FCA*, the Federal Court of Appeal confirmed that, because the discretionary power conferred upon the Minister by the Regulations was purely administrative in nature and the interests at stake were purely economic, the procedural fairness requirements were minimal (*Zone 3,* at para 44). The Minister's sole duty of procedural fairness in the context of an application for certification for the tax credit is to send an advance notice of denial and to allow the opportunity to provide additional information that might change the assessment of the application (*Zone 3,* at para 46).

[69] This requirement is satisfied in this case, and this argument by the applicants must be rejected.

VI. Conclusion

[70] Since I have concluded that the Minister's interpretation of the "advertising" exclusion set out in the Regulations does not fall within the range of possible outcomes that are defensible in respect of the facts and the law and that his reasons are inadequate, this application for judicial review is allowed, and the file will be returned to the Minister for redetermination.

[71] At the Court's suggestion, the parties have adopted a joint position on the costs to be awarded in this case. They have agreed that costs will be assessed according to the data appearing in the middle of column III of Tariff B; costs will be so assessed.

JUDGMENT in T-148-19, T-149-19 and T-150-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;
2. The notice of denial dated December 21, 2018, and sent to applicant 9616934 Canada Inc., the notice of denial dated December 21, 2018, and sent to applicant 9501894 Canada Inc., and the notice of denial dated December 21, 2018, and sent to applicant 9849262 Canada Inc. are set aside;
3. The three files will be returned to the Minister of Canadian Heritage for redetermination;
4. Costs are awarded to the applicants in only one of the files and will be assessed in accordance with the data appearing in the middle of column III of Tariff B.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-148-19, T-149-19 AND T-150-19
DOCKET:	T-148-19
STYLE OF CAUSE:	9616934 CANADA INC. v MINISTER OF CANADIAN HERITAGE
AND DOCKET:	T-149-19
STYLE OF CAUSE:	9501894 CANADA INC. v MINISTER OF CANADIAN HERITAGE
AND DOCKET:	T-150-19
STYLE OF CAUSE:	9849262 CANADA INC. v MINISTER OF CANADIAN HERITAGE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 14–16, 2022
JUDGMENT AND REASONS:	GAGNÉ A.C.J.
DATED:	APRIL 3, 2023

APPEARANCES:

Alexandre Ajami	FOR THE APPLICANTS
Martin Lamoureux Amélia Couture	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Miller Thomson LLP Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS