Federal Court of Appeal | Cour d'appel fédérale

Date: 20160927

Docket: A-60-16

Citation: 2016 FCA 242

[ENGLISH TRANSLATION]

CORAM: **TRUDEL J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ZONE3-XXXVI INC.

Respondent

Heard at Montréal, Quebec, on September 14, 2016.

Judgment delivered at Ottawa, Ontario, on September 27, 2016.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal and a cross-appeal against a decision by a Federal Court judge (the Judge) allowing the respondent's application for judicial review in part. The Judge set aside the decision rendered by the Minister of Canadian Heritage (the Minister) refusing to issue a Canadian Film or Video Production Certificate (the Certificate), but refused to order the Minister to grant the Certificate or to issue it himself; he instead referred the case back to the Minister for reconsideration.

[2] After reviewing the record and hearing the submissions from each party's counsel, I am of the view that the principal appeal must be allowed and that, accordingly, it is not necessary to render a decision on the cross-appeal. In my opinion, the decision rendered by the Minister was reasonable with respect to the relevant legislative and regulatory provisions, and the decision-making process met the requirements of procedural fairness in this case.

I. Facts

[3] On September 25, 2013, the respondent filed an application with the Minister of Canadian Heritage to obtain a certificate allowing it to obtain a tax credit for one of its television productions. The respondent, Zone3-XXXVI Inc. (Zone3), is a corporation created under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[4] The Canadian Film or Video Production Tax Credit (CPTC or Tax Credit) is one of the incentive programs administered through the income tax system aimed at encouraging and stimulating the development of the television production industry. The credit amounts to 25% of the qualified labour expenditures of a Canadian-controlled production corporation and applies to films with a high level of Canadian content.

[5] Under subsections 125.4(1) and (3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), a qualified corporation may claim a CPTC for a "Canadian film or video production" described in subsection 1106(4) of the *Income Tax Regulations*, C.R.C. c. 945 (the Regulations). According to the latter provision, a "Canadian film or video production" means a production in respect of which the Minister has issued a certificate attesting that it meets a certain number of

the conditions listed in that subsection. However, excluded from certificate eligibility are 11 production types listed under the definition of "excluded production" in the Regulations, specifically, "a production in respect of a game, questionnaire or contest (other than a production directed primarily at minors)." The relevant provisions of the Act and Regulations are attached hereto as an appendix.

[6] In accordance with the Regulations, it is the Minister's responsibility to assess the CPTC eligibility criteria of a production. This assessment is done on the basis of information provided by the producer and on the recommendation of the Canadian Audio-Visual Certification Office (CAVCO), a unit of the Department specializing in implementation of this type of tax credit. Once it has been determined that a production meets all of the requirements of the Act and Regulations, the Minister issues a certificate that will allow the production company to claim the tax credit when they file their income tax return with the Canada Revenue Agency (CRA).

[7] The Act and Regulations are supplemented by Guidelines adopted by the Minister pursuant to subsection 125.4(7) of the Act. Under that provision, the Minister is allowed to adopt Guidelines "respecting the circumstances under which the conditions in the definition Canadian film or video production certificate" are satisfied. It also states that these Guidelines are not statutory instruments as defined in the *Statutory Instruments Act*, R.S.C., 1985, c. S-22.

[8] On April 2, 2012, the Minister published a 58-page guide (CPTC Program Guidelines), to help producers submit a CPTC application to CAVCO. It contains a summary of the requirements for a production to qualify and also explains how the program is administered by

CAVCO; it includes clarifications on the documents and information required and definitions of the various types of productions. Specifically, it states the scope of a "production in respect of a game, questionnaire or contest (other than a production directed primarily at minors)" in the following terms:

> A program featuring games of skill and chance, as well as quizzes. **Note:** Productions of this genre directed at minors are eligible; however, programming that uses or features copyrighted and commercially available goods, such as games or other products directed primarily at minors, whether sponsored or not, are ineligible.
>
> Guidelines, Appeal Book, vol. 2, at page 392 (the English version of this provision is reproduced in the appendix) [bold in the original]

[9] On September 25, 2013, Zone3 submitted an application to CAVCO to obtain a certificate for the production "On passe à l'histoire" [Going Down in History] (the Production) to be eligible for the CPTC. In its application, Zone3 describes the Production as being in the "magazine" genre. The accompanying synopsis describes the Production in the following terms:

> Hosted by Chantal Lamarre, On passe à l'histoire 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.
>
> 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.
>
> Synopsis, Appeal Book, vol. 2, at page 442.

[10] After watching the DVD of the Production, the CAVCO officer responsible for the assessment felt that it was an excluded production because it included a quiz show. Applying the usual procedures as set out in the affidavit of Johanne Mennie, Director of CAVCO (See Appeal Book, vol. 2, at page 372), the file was sent to the Advisory Committee, whose 10 members agreed with the officer's finding. The file was then brought to the attention of CAVCO's Compliance Committee, comprised of four senior analysts and managers, who also unanimously adopted the officer's recommendation that the Production be excluded since it includes a game, questionnaire or contest.

[11] On August 25, 2014, an advance notice of denial was sent to the respondent to advise that CAVCO's intentions were to recommend that their application for a certificate be denied. That decision was justified as follows:

> CAVCO's viewing of the production **ON PASSE À L'HISTOIRE (I)** revealed that each episode follows a game show format with a historical theme. The host of the show introduces the contestants, who compete against each other by answering a series of questions on the topic(s) chosen for the episode. In addition, **ON PASSE À L'HISTOIRE (I)** is associated with a "quiz"-type computer application that viewers can use to play along with the contestants at home while watching the series.
>
> Advance notice of denial, Appeal Book, vol. 2 at pages 469–470 [emphasis in original]

[12] Using the option provided for in the Guidelines to submit new information that may influence the assessment of the file, the respondent's representative sent CAVCO an elaborate argument to show that the Production was a "magazine" type show, characterized by [TRANSLATION] "its strong informative content, which is presented in a fun and upbeat manner" (Appeal Book, vol. 2, at pages 572–577). It is argued therein that the exclusion set provided for in the Regulations essentially means productions with the primary goal of presenting a game

show, not productions such as this one in which the use of a "game," "questionnaire" or "contest" formula is not the primary objective of the Production and merely served as a pretext or tool for making the informational content of the Production more amusing. It is alleged that the informative content is so substantial that the Société de développement des entreprises culturelles (SODEC)—that plays a role in Quebec is similar to that played by CAVCO—described the Production as a "documentary series."

[13] The CAVCO Compliance Committee examined these submissions and asked the respondent for clarifications on other allegedly similar productions mentioned by its representative, which were allegedly granted a CPTC. After examining the synopsis of these productions, the Committee maintained its position and CAVCO consequently forwarded its recommendation to the Minister to refuse to issue the certificate for the Production. The Minister's decision was sent to the respondent on February 2, 2015.

[14] In his notice of denial, the Minister stated his agreement with CAVCO's recommendation, according to which the Production in question is a production that includes a game, questionnaire or contest under subparagraph 1106(1)(b)(iii) of the Regulations, for the reasons set out in the advance notice of denial. In what appears to be a reply to the arguments raised by the respondent's representative following the advance notice of denial, the Minister added that: (a) the fact that the production is described as a "general entertainment" program or that the contestants are celebrities does not change the fact that the production does in fact include a game, a quiz or a contest; (b) how SODEC qualifies this production is irrelevant; and (c) each application under the CPTC Program is decided on its own merit.

[15] As previously mentioned, the appellant filed the CAVCO Director's affidavit in support of its defence in Federal Court. Following her examination on affidavit, an untranslated working tool entitled "Decision Tree," which she had mentioned in her responses, was produced by the appellant. According to the Director, that working tool is for internal use only and is used to ensure a certain degree of consistency among the employees called upon to determine whether a production includes a "game, questionnaire or contest" within the meaning of the Regulations (Affidavit of Johanne Mennie, Appeal Book, vol. 2, p. 370 at paragraphs 40–41).

[16] For the purposes of this analytical framework, three questions appear to be determinative: (a) Do the contestants compete to win? In the affirmative, a second question must be asked: (b) Is the same group of contestants kept for the duration of the series? If the answer to this second question is negative, we move on to the third question: (c) Do the tasks or games have objective results (true or false)? If there is an objective answer to the questions asked, then we are faced with a production including a game, questionnaire or contest, which is eligible only if it targets minors and does not use or present games or other products mainly designed for minors. Moreover, a footnote states the following: "If there are non-game show/contest elements then we need to determine whether it is 'primarily' a game show/contest or not. Prolonged set-up to a challenge should still be considered part of the challenge."

II. The impugned decision

[17] The Federal Court held that CAVCO and the Minister had broken their duty of procedural fairness towards the respondent, and that the reasons for denial were themselves "seriously inadequate," thereby overturning the decision rendered on February 2, 2015, refusing

to grant the certificate for the Production, a necessary element for obtaining a CPTC. Conversely, the Court refused to order the Minister to grant the certificate, expressing the view that it was preferable to refer the matter back to the Minister for reconsideration.

[18] On the merits, the Federal Court determined that the advance notice and notice of denial were fundamentally flawed since the reasons do not include a serious analysis of the true nature or the main feature of the Production, and do not address the arguments formulated by the respondent in its submissions to CAVCO. Paragraph 60 of the decision under appeal provides a good summary of the Judge's reasoning with respect to the reasonableness of the reasons:

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

[19] Moreover, the Judge criticized the Minister for having tried to fill any gaps in the reasons for denial given to the respondent by invoking clarifications provided by CAVCO's Director in her affidavit and, more specifically, regarding the "Decision Tree." In the Judge's view, the justification provided *a posteriori* do not appear in the reasons for the impugned decision and would even contradict some important aspects therein. Given that this is not a simple working tool to the extent that the document refers to additional and new criteria not found in the Regulations, nor in the Guidelines, the respondent had, in its opinion, a legitimate expectation

that the advance notice of denial list the criteria to allow it to make relevant representations. This breach of procedural fairness tainted the legality of the ministerial denial and, to the Judge, therefore constituted a second basis for justifying the Court's intervention.

III. Issues

[20] The principal appeal raises the following two questions:

a) Was the Minister's decision not to issue a certificate to Zone3 on the grounds that the series includes "a game, questionnaire or contest" reasonable?
b) Did the process followed by the Minister and CAVCO to render the decision meet the applicable requirements of the duty of procedural fairness in the circumstances?

[21] Additionally, the cross-appeal filed by the respondent raised the issue of whether the Judge erred in refusing to issue an order to require the Minister to grant Zone3 a certificate. In the light of the manner in which I suggest disposing of the principal appeal, the cross-appeal becomes moot and it is therefore not necessary to answer that question.

[22] The appellant raised another question in his appeal, related to the examination of the motion to strike he had filed at the opening of the hearing on the merits of the application for judicial review. In a separate order issued on January 5, 2016 (2016 FC 7), the Judge dismissed a motion to strike most of the paragraphs in the affidavit of the president of the production corporation-respondent, as well as the affidavits of various heads of other production corporations aimed essentially at filing DVDs of episodes of allegedly similar productions that had received a CPTC in the past. However, he reserved the right to conduct further investigation into the admissibility as evidence, the relevance or the weight to lend to these pieces of evidence.

In the decision under appeal, the Judge dismissed any preliminary objection by the appellant as to the admissibility or relevance of any piece of evidence it considers in his reasons, and applied *mutatis mutandis* the criteria and reasons mentioned in his previous decision.

[23] Indeed, as a general rule, an application for judicial review must be assessed on the basis of the file that was before the original decision-maker. However, there are certain exceptions to this rule, in particular, when an affidavit provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the dispute, or even when an affidavit is necessary to bring to the attention of the reviewing court procedural defects (such as bias) that cannot be found in the certified tribunal record (see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paragraphs 17–19, [2012] F.C.J. No. 93 [*Access Copyright*]; *Delios v. Canada (Attorney General)*, 2015 FCA 117, at paragraphs 41–46, [2015] F.C.J. No. 549).

[24] In this case, I have not been convinced that the Judge made a palpable and overriding error in exercising his discretionary power by dismissing the motion to strike submitted to him by the appellant. The Judge clearly identified the applicable legal principles and justified his decision on the argument that the evidence referred to in the motion to strike was helpful in shedding relevant light on application of the factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*], and, more specifically, regarding the legitimate expectations the respondent may have had in having the Production certified by the Minister. As regards the Judge's comments on the late filing of the motion, I am of the view that they were not determinative factors in exercising his discretion.

Nor should they be, particularly when the adverse party was not caught by surprise, as was the case here, insofar as the doctrine of this Court and the Federal Court holds that preliminary motions should be discouraged and left up to the trial judge to decide issues of admissibility of evidence whenever possible (see in particular *Access Copyright*, at paragraph 11; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013, at paragraph 37, 141 A.C.W.S. (3rd) 5).

IV. Analysis

[25] When it is seized of an appeal from a judgment pertaining to a judicial review proceeding, the role of this Court is to determine whether the trial judge correctly identified the applicable standard of review and that he applied it appropriately. In other words, this Court must, for all practical purposes, step into the shoes of the trial judge and examine the impugned administrative decision in accordance with the relevant standards of review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 46, [2013] 2 S.C.R. 559).

[26] In this case, there is no doubt (and the parties agree) that the reasonableness standard of review applies to decisions rendered by the Minister under the authority of sections 125.4 of the Act and 1106 of the Regulations. This was also the doctrine propounded by the Federal Court when it was called upon to decide such issues (see *Productions Tooncan (XIII) Inc. v. Canada (Minister of Canadian Heritage)*, 2011 FC 1520, at paragraph 40, 404 F.T.R. 19, citing *Tricon Television29 Inc. v. Canada (Minister of Canadian Heritage)*, 2011 FC 435, at paragraph 31, [2011] F.C.J. No. 547). These cases involve questions of mixed fact and law, and the role of the judicial review judge is not to decide whether he would have rendered the same decision, but

rather to assess the justification of the decision, the transparency and the intelligibility of the decision-making process, and to also ensure that the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47, [2008] 1 S.C.R. 190).

[27] The same does not hold true for questions involving the application of the rules of procedural fairness. These issues must be reviewed according to the standard of correctness, as per the unequivocal doctrine of the Supreme Court in that regard (see in particular *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 43, [2009] 1 S.C.R. 339; *Mission Institution v. Khela*, 2014 SCC 24, at paragraph 79, [2014] 1 S.C.R. 502).

[28] Since the Judge correctly identified these standards of review, the only question before this Court is whether he correctly applied them in the light of the evidence before him. That is the point that I will now examine.

A. *Was the Minister's decision not to issue a certificate to Zone3 on the grounds that the series includes "a game, questionnaire or contest" reasonable?*

[29] The question for the Judge to answer was whether the decision rendered by the Minister is based on a rational justification and falls within the range of possible acceptable outcomes, in view of the Act and Regulations. In taking this approach, a judge must show deference and avoid substituting the decision he would have made for that of the administrative decision-maker. As my colleague, Justice Stratas, reiterated in *Exeter v. Canada (Attorney General)*, 2011 FCA 253, at paragraph 15, 423 N.R. 262:

> Under reasonableness review, the Court is not permitted to make its own decisions and substitute its views on these matters for those of the Tribunal. In particular, the Court is not permitted to draw new findings of fact nor to exercise its own fact-based discretion. Rather, the Court is limited to considering whether the decisions of the Tribunal fall within a range of possible outcomes that are defensible on the facts and the law: *Dunsmuir*, *supra* at paragraph 47. Put another way, the Tribunal is entitled to a "margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir*, *supra* at paragraph 47. In practice, this Court can interfere only where the Tribunal has erred in a fundamental way.

[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.

[32] Now, what does precisely provide subparagraph 1106(1)(b)(iii) of the Regulations? It refers to the exclusion of a production "in respect of" a game, questionnaire or contest. 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.

[33] The respondent does not dispute that the Production includes a game, questionnaire or contest component. Moreover, the respondent would be hard-pressed to argue the contrary, considering that the synopsis provided in support of its application described the Production as a "new general knowledge quiz." At the hearing, counsel for Zone3 argued that this was an error made by a new employee. Not only does the file contain no evidence to that effect, what is more, the alternative description of the Production, which the respondent tried to present in response to the advance notice of denial, was of no help. Even assuming that the quiz was a backdrop for presenting informative content (rather than the opposite, as the synopsis suggested), it would not follow that the Minister's decision to exclude the Production under subparagraph 1106(1)(b)(iii) is flawed. The exclusion of a production in respect of a game, questionnaire or contest is broad enough to include the Production in this case, regardless of the relative importance accorded to the quiz aspect compared to the historical or informative content.

[34] In that regard, counsel for the respondent argued that it would be unreasonable for the Minister to exclude a production on the mere fact that it includes a game, questionnaire or contest. The Judge seems to have accepted that argument, expressing the view that the "fundamental flaw" of the advance notice and notice of denial stems from the fact that the reasons do not include any serious analysis of the "true nature" or "main feature" of the Production. With all due respect, I am of the view that this conclusion is without merit.

[35] The language of the Regulations does not quantify the importance required of the game, questionnaire or contest component for a production to be excluded. Even the Guidelines provide that this exclusion targets programs "featuring" games of skill and chance, as well as quizzes. The Minister therefore had broad discretionary power in this regard, and the CAVCO Director also explained in her affidavit and her examination the efforts that were made to ensure a certain consistency through the "Decision Tree." I will come back to this tool in my analysis of the procedural fairness requirements.

[36] It is not for the reviewing court to incorporate conditions or parameters not found in statutes or regulations. If one had wanted to delineate or limit the Minister's discretion, the Act or Regulations would have so provided. It is also interesting to note that certain exclusions set out in the definition of "excluded production" in the Regulations are accompanied by clear qualifiers. 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" [emphasis again added].

[37] It was therefore not for the Judge, as part of a review on the legality of the Minister's decision, to limit his discretion and to add to the Regulations, by requiring that he rule on the main feature or true nature of the Production. Nothing of that sort is set out in the Act and Regulations, and with no clear indication to the contrary, it is not for the judiciary to take the role of the legislature or to limit the broad discretionary power conferred upon the Minister, except in very rare cases in which it can be demonstrated that the impugned decision was made arbitrarily. That is not the case here.

[38] Even supposing that one can conclude that the wording of subparagraph 1106(1)(b)(iii) of the Regulations, where is found the definition of "excluded production," is ambiguous and opens the door to the more restrictive interpretation that the respondent suggests, the Court should nevertheless exercise deference and resist the temptation to substitute its interpretation for that of the Minister. The reasonableness standard assumes that there can be more than one acceptable outcome. As the Supreme Court noted in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at paragraph 40, [2013] 3 S.C.R. 895:

> The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision-maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at pg. 596), it is the decision-maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation. [Emphasis in the original]

[39] In short, the Minister's decision must stand. It clearly falls within the range of possible, acceptable outcomes, in the light of the broad discretion conferred on the Minister by the exclusion passage, and by the respondent's own description of its production. The Minister's decision is based on a reasonable interpretation of the Regulations, and was rendered following an established decision-making process, under which all authorities recommended that the Production be excluded.

[40] Lastly, I find the decision rendered by the Minister to be perfectly intelligible. Not only do the reasons stated in the letter of refusal provide an understanding of the reasons for which it was determined that the Production included a game, questionnaire or contest and could thus not be issued a certificate, but in addition, the reasons satisfy the arguments raised by the respondent following the advance notice of denial. Even though it was not required to do so, CAVCO considered the other productions certified in the past that the respondent had submitted as evidence and found that they were different from the Production at issue in this case.

[41] In any event, the Minister was justified in not taking into account past assessments of other productions, given that he had a duty to determine whether the Production was considered excluded on the sole basis of the language of the Regulations. That is what he argues when he writes that ". . . each application under the CPTC Program is decided upon its own merit, and the eligibility of each production is determined according to the requirements of the Act and the Regulations" (Notice of denial, Appeal Book, vol. 2, at page 487). That statement is entirely consistent with the case law holding that an administrative decision-maker must take into account the applicable law and specific circumstances of each case, and not consider to what

extent the case under review may resemble a past situation (see *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, at paragraph 6, [2013] 2 S.C.R. 458; *Altus Group Ltd. v. Calgary (City)*, 2015 ABCA 86, at paragraph 16, 599 A.R. 223; Paul Daly, "The Principle of Stare Decisis in Canadian Administrative Law," (2016) 49:1 R.J.T. 757, at pages 767 et seq.) The same specifically holds true when the administrative decision-maker is not exercising a quasi-judicial role, and if the language of the enabling statute accord it broad discretionary powers and do not set out a specific procedure to follow when exercising their decision-making power.

[42] For all of the above reasons, I take the view that the Minister's decision was reasonable and that the Judge erred in finding that the reasons set out in the notice of denial were flawed.

B. *Did the process followed by the Minister and CAVCO to render the decision meet the applicable requirements of the duty of procedural fairness under the circumstances?*

[43] It is not disputed that the requirements arising from the concept of procedural fairness must be adapted according to the specific context of each case. At paragraphs 23–27 of *Baker*, the Supreme Court propounded five factors (that list was not exhaustive) that had to be taken into account to determine what is required by the duty of procedural fairness: (1) the nature of the decision being made and the process followed in making it; (2) nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency.

[44] In this case, applying these criteria can only lead us to conclude that the imposed by the principle of requirements for procedural fairness were minimal. The decision in issue is purely administrative in nature, and the process established by the Act and Regulations has none of the characteristics of a quasi-judicial procedure. Moreover, the tax credit available upon the issuance of a certificate merely calls into play economic interests. Without downplaying the importance of the amounts at issue (especially given the fact that the Minister's decision will no doubt be the same for the application regarding the Production's second season), the fact does remain that this case is a far cry from the type of law at issue in *Baker* (i.e. the right to remain in Canada on humanitarian and compassionate grounds). Moreover, I note that the respondent 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.

[45] As regards the legitimate expectations the respondent corporation may have had, they could only be procedural in nature, as the Judge also acknowledged (see *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at paragraphs 68 et seq., [2011] 2 S.C.R. 504 [*Mavi*]). In this case, neither the Act nor the Regulations require that the Minister follow a specific procedure in exercising the discretion conferred upon him as to whether to issue a certificate. Only the Guidelines provide for the sending of an advance notice, and the possibility that a qualified production corporation can make representations in response to that advance notice. In this case, that procedure was followed.

[46] I therefore am of the view that the requirements of procedural fairness were minimal in the treatment of the file submitted to the Minister by the respondent for the purpose of obtaining a certificate to qualify for a tax credit. The Minister's sole duty consisted of sending an advance notice of denial to the respondent and to allow it the opportunity to provide additional information that might change the assessment of the application, under section 1.16 of the Guidelines. The Minister met that requirement. Not only did he provide the reason why he considered the Production to be a game show, but the evidence shows that the respondent's reply was duly considered. As regards the reasons propounded in support of the decision itself, they were clear enough for the respondent to understand why the certificate had been denied. Considering the absence of any right to appeal and the minimal level of procedural fairness that the respondent was entitled to expect, the reasons did not need to be exhaustive or detailed; in this case, they were more than sufficient to satisfy what might be legitimately expected by a production corporation seeking to obtain a tax credit.

[47] The respondent argued that the Minister had broken his duty of procedural fairness by not informing the respondent in the advance notice of denial of the existence of the "Decision Tree" to which I have already alluded. I cannot accept this argument. On the one hand, the Minister is not bound by that working tool, and the reasonableness of his decision must be assessed only in accordance with the Act and Regulations (and peripherally with the Guidelines). The respondent certainly could have challenged the criteria adopted in the "Decision Tree" or proposed others to determine whether a production is a "game, questionnaire or contest;" but once again, it is not the adequacy of the working tools the Minister can equip himself with to make his recommendations that is under judicial review, but solely the final decision rendered by the

Minister in exercising the power conferred upon him by the Governor in Council by way of regulation.

[48] On the other hand, the CAVCO Director testified to the effect that the purpose of that document is to promote consistency in the processing of files that various CAVCO analysts are called on to treat, with respect to productions for which a *prima facie* case has been established that they include a game, questionnaire or contest (Affidavit of Johanne Mennie, Appeal Book, vol. 2, page 370, at paragraphs 40–41). Moreover, a brief review of the "Decision Tree" confirms that the purpose of its application is usually to promote producers given that it limits the scope of the exclusion set out in the Regulations. The situation would no doubt be different had that tool expanded the scope of exclusion related to games, questionnaires and contests; in the event that the application of an overly restrictive internal tool would result in a decision that is not within the range of possible, acceptable outcomes with respect to the Regulations, that decision would be deemed unreasonable.

[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 (*Mavi*, at paragraphs 68 et seq.; *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283, at paragraph 191, 260 D.L.R. (4th) 45; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at page 1204, 75 D.L.R. (4th) 385). 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.

[50] With all due respect, I am therefore of the opinion that the trial judge could not conclude, on the sole basis of the respondent's perception and on his own view of a few productions submitted in evidence, that "CAVCO and the Minister decided to unilaterally change their practices and to differently interpret which productions qualify for the CPTC Program" (Decision under appeal, at paragraph 52). Such a conclusion not only disregards the testimony to the contrary by the CAVCO Director, but also does not take into account the fact that the productions presented as evidence as part of the judicial review procedure represent only a selective sample of productions assessed by CAVCO, that each production must be assessed based on its unique characteristics, that determining what constitutes a game, questionnaire or contest is not an exact science, and that the Minister could have made a mistake in the past.

V. Conclusion

[51] For all of the above reasons, I am therefore of the opinion that the appeal must be allowed and that the decision of the trial judge must be set aside. Rendering the judgment that should have been handed down in Federal Court, I would consequently dismiss the respondent's

application for judicial review, with costs. It is not necessary to rule on the cross-appeal, which is moot in the light of my findings on the principal appeal.

"Yves de Montigny"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Richard Boivin J.A."

APPENDIX I

Applicable Legislation

***Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.)**
Section 125.4	**Article 125.4**
Canadian Film or Video Production Tax Credit	**Crédit d'impôt pour production cinématographique ou magnétoscopique canadienne**
Definitions	**Définitions**
125.4 (1) The definitions in this subsection apply in this section.	125.4 (1) Les définitions qui suivent s'appliquent au présent article.
Canadian film or video production certificate means a certificate issued in respect of a production by the Minister of Canadian Heritage certifying that the production is a Canadian film or video production in respect of which that Minister is satisfied that, except where the production is a treaty co-production (as defined in subsection 1106(3) of the *Income Tax Regulations*), an acceptable share of revenues from the exploitation of the production in non-Canadian markets is, under the terms of any agreement, retained by	**Certificat de production cinématographique ou magnétoscopique canadienne** Certificat délivré par le ministre du Patrimoine canadien relativement à une production et attestant qu'il s'agit d'une production cinématographique ou magnétoscopique canadienne relativement à laquelle ce ministre est convaincu que, sauf s'il s'agit d'une coproduction prévue par un accord, au sens du paragraphe 1106(3) du *Règlement de l'impôt sur le revenu*, une part acceptable des recettes provenant de l'exploitation de la production sur les marchés étrangers est retenue, selon les modalités d'une convention, par:
(*a*) a qualified corporation that owns or owned an interest in, or for civil law a right in, the production;	*a*) une société admissible qui est ou était propriétaire d'un intérêt ou, pour l'application du droit civil, d'un droit sur la production;
(*b*) a prescribed taxable Canadian corporation related to the qualified corporation; or	*b*) une société canadienne imposable visée par règlement qui

est liée à la société admissible;

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

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

. . .

[…]

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

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

. . .

[…]

Tax Credit

Crédit d'impôt

(3) Where

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

(*a*) a qualified corporation for a taxation year files with its return of income for the year

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

(i) a Canadian film or video production certificate issued in respect of a Canadian film or video production of the corporation,

(i) le certificat de production cinématographique ou magnétoscopique canadienne délivré relativement à la production,

(ii) a prescribed form containing prescribed information, and

(ii) un formulaire prescrit contenant les renseignements

(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.

prescrits,

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

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

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*.

Lignes directrices

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

***Income Tax Regulations*, C.R.C., c. 945**

Section 1106

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

***Règlement de l'impôt sur le revenu*, C.R.C., c. 945**

Article 1106

Certificats délivrés par le ministre du Patrimoine canadien

Définitions

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

Schedule II.

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

. . .

(*b*) that is

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

l'annexe II.

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

[…]

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

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

Canadian Film or Video Production Tax Credit -Guidelines

3.03 Excluded Genres

c) 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. **Note:** Productions of this genre directed at minors are eligible; however, programming that uses or features copyrighted and commercially available goods, such as games or other products directed primarily at minors, whether sponsored or not, are ineligible.

Programme du Crédit d'impôt pour production cinématographique ou magnétoscopique canadienne - Lignes directrices

3.03 Genres Exclus

c) Une production comportant un jeu, un questionnaire ou un concours, sauf celle qui s'adresse principalement aux personnes mineures : Émission présentant des jeux d'adresse et de chance ainsi que des jeux-questionnaires. **Note:** Les productions de ce genre à l'intention des mineurs sont admissibles; toutefois, les émissions qui utilisent ou présentent des biens protégés par le droit d'auteur et offerts sur le marché comme des jeux ou d'autres produits conçus principalement pour des mineurs, qu'elles soient commanditées ou non, ne sont pas admissibles.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-60-16
APPEAL OF A JUDGMENT BY MARTINEAU J. OF THE FEDERAL COURT DATED JANUARY 22, 2016, CITATION: 2016 FC 75	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. ZONE3-XXXVI INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 14, 2016
REASONS FOR JUDGMENT:	DE MONTIGNY J.A.
CONCURRED IN BY:	TRUDEL J.A. BOIVIN J.A.
DATED:	SEPTEMBER 27, 2016

APPEARANCES:

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