Federal Court  Cour fédérale

Date: 20130424

Docket: T-1769-12

Citation: 2013 FC 423

Ottawa, Ontario, April 24, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

OLA DISPLAY CORPORATION

Applicant

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the National Research Council of Canada [NRC], rendered August 24, 2012, to deny the applicant's request for funds from the Industrial Research Assistance Program [IRAP].

THE IRAP

[2] The IRAP provides financial support to eligible small and medium-sized enterprises in Canada to help them undertake technology innovation. To apply for funds, potential "clients" must

contact an IRAP Industrial Technology Advisor [ITA]. The ITA will determine whether the firm is eligible for IRAP financial support.

[3] The IRAP in the Québec Region has refined instructions for the evaluation of a firm's eligibility in the case of funding requests that exceed $100,000. First, the ITA meets the firm to learn more about it and its project. If the ITA decides that the project is interesting, the ITA fills out a Firm Eligibility Form that gives an overview of the strengths and weaknesses of the firm. If the ITA concludes that the firm has the necessary resources and that the project for which the firm would like to obtain IRAP funding is sufficiently well-defined to submit a formal request, the ITA completes a Project Eligibility Form. This form gives an overview of the project that the firm wants to carry out. The Director of NRC-IRAP in the Québec Region will consider the information in the two forms and the ITA's recommendation on the eligibility of the firm, discuss it with the ITA, and decide if the firm and the project are eligible. If the Director concludes that the firm is not eligible, the process ends there and the ITA advises the firm of the decision. The Executive Director of the NRC Québec Region is also involved in the decision regarding the firm's eligibility if the firm requests over $350,000 in funds.

BACKGROUND

[4] Mr. Raja Tuli is the president of the applicant. He is also president of Technologies Novimage [Novimage] and Datawind Research Inc. [Datawind] and both these companies have received contributions from the Technology Partnerships Canada [TPC] program. The agreements made under this program are now administered by NRC-IRAP.

[5] On May 28, 2012, Mr. Tuli met with an ITA at the NRC for the Québec Region. The ITA affirms that at this meeting he mentioned that there would be no new participation by the NRC in Mr. Tuli's companies' projects if he was not willing to resolve the issues with his previous projects, including paying back in full the repayable contributions, which neither company had done.

[6] Mr. Tuli and the ITA discussed new projects at this meeting and the ITA requested more information about the capacitive touch screen project Mr. Tuli proposed for the applicant.

[7] On June 1, 2012, Mr. Tuli sent the ITA what he considered to be the applicant's application for IRAP funding. Mr. Tuli was invited to meet with NRC representatives to explain the applicant's project.

[8] The NRC sent Mr. Tuli emailss dated July 6, 2012, August 14, 2012 and August 21, 2012, regarding the need for him to fulfill certain financial reporting obligations on behalf of Novimage. The record does not indicate that any of the requested documents were provided.

[9] On July 26, 2012, the ITA completed the Firm Eligibility Form for the applicant and he subsequently modified it on August 14, 2012. He completed the Project Eligibility Form on August 14, 2012 and subsequently modified it on August 24, 2012.

[10] In August 2012, Mr. Richard O'Shaughnessey, a Director at the NRC for the Québec Region [the Director] searched the internet for information on Datawind UK, another company in which Raja Tuli was involved and which would initially be the only client for the applicant's new

capacitive screen. The Director found that the present and future success of that company was uncertain.

[11] A few days before August 24, 2012, Marie Szaszkiewicz, Regional TPC Coordinator, met with Claude Attendu, the Executive Director of the NRC Québec Region [the Executive Director], to discuss her files on the repayable contributions from TPC to Novimage and Datawind. She explained how it had been difficult to obtain collaboration from these firms when it came to reporting and repayment obligations set out in the contribution agreement with the NRC.

[12] On August 17, 2012, Mr. Tuli called the ITA. The ITA mentioned that he did not yet have feedback from NRC-IRAP management on the applicant's project, that there was no guarantee management would accept to fund the project and negotiations would need to take place to solve issues arising from previous projects.

[13] The ITA gave Mr. Tuli access to the IRAP Client Portal so he could complete the project proposal before a decision was made on the firm and project eligibility. The ITA affirms that he gave Mr. Tuli this access because the project had strong technical merits with positive feedback from the NRC representatives from the Printable Electronic Program who were present at the July 5, 2012 meeting.

[14] The respondent admits that it was contrary to the procedure set out in the additional instructions for the NRC Québec Region for the applicant to complete the IRAP Client Portal project proposal before a decision on the eligibility of the firm was rendered.

[15] On August 23, 2012, the ITA met with Mr. Tuli. The ITA affirms that they discussed Mr. Tuli's previous projects with the NRC, including the reimbursement of Datawind's repayable contribution, as well as Mr. Tuli's proposed project for the applicant. Mr. Tuli asked to be present at a meeting scheduled for the following day, involving the ITA and NRC-IRAP management, but the ITA informed him that his presence was not required and it was not standard procedure for clients to be present at such meetings. Later that day, Mr. Tuli emailed the ITA a three-page document regarding OLA and Datawind.

[16] On August 24, 2012, the ITA met with the Director and the Executive Director to discuss the project. The ITA recommended to the Director and the Executive Director that the applicant's funding request to the IRAP should proceed.

THE IMPUGNED DECISION

[17] The Director and Executive Director, who were the NRC-IRAP management responsible for the decision, disagreed with the ITA's recommendation. Therefore, on August 24, 2012, the ITA informed the applicant that it was not eligible for IRAP funding. The ITA communicated the decision to Mr. Tuli by telephone and by two emails. The first email stated the following:

> Dear Raja,
>
> The conclusion of the meeting today with my management is the following: you need to clear any outstanding issues with IRAP before we can support additional projects. As of Novimage, the agreement will be terminated immediately. Marie Szaszkiewicz in cc will invoice the remaining amount.
>
> If you have any question [*sic*], please do not hesitate to contact me.
>
> Pierre Lamarre

[18] Mr. Tuli responded with some questions and the ITA provided the following further information to him by email:

> Dear Raja,
>
> Following your specific question about IRAP interest in assessing further your projects (capacitive touch screen solar concentrator…) in the (near) future, when your files are in order, the answer is 100% no. I did double check with my management. IRAP would not pursue any additional association with your companies, in the context of financial contribution.
>
> That being said I encourage you to pursue your innovative screen project, with or without the NRC printable electronics group. I wish you great success with your endeavors and patents' filing.
>
> I take solely on me to say that a conclusive commercial success of your new Ubislate tablets in Asia in months to come (after so many years of effort including the difficult first product introduction) might convince IRAP management to bet on you once more.
>
> Best regards,
>
> Pierre Lamarre
> IRAP-NRC

[19] The Director and Executive Director affirm in their affidavits that in disagreeing with the ITA's recommendation, they considered the problematic history between the NRC and Mr. Tuli's other companies, mainly Novimage and Datawind, and that they also found it problematic that the applicant's new capacitive touch screen project was fully dependent on a successful launch of the new tablet by Datawind UK in India, which would be its only client to start the project.

ISSUES

[20] This application for judicial review raises the following issues:

1. Was the applicant's right to procedural fairness breached?

2. Was the decision to deny the applicant's request for funding reasonable?

STANDARD OF REVIEW

[21] The standard of review for questions of procedural fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 19).

[22] There is no jurisprudence dealing with the applicable standard for reviewing a decision to deny a funding request under the IRAP. Thus, this Court must undertake the analysis set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 52 to 62 in order to determine the applicable standard in the case at hand.

[23] In the context of reviewing the substance of a decision to deny funding under the IRAP, the expertise of the NRC and its decision-makers indicates that deference is warranted. Moreover, the issue of whether the decision was well-founded is a question of mixed fact and law requiring a strong understanding of the facts in the file, which suggests that the reasonableness standard applies.

[24] With respect to Parliament's intention, although a privative clause is absent, paragraph 5(1)(e) of the *National Research Council Act*, RSC 1985, c N-15 [the Act] confers a broad discretionary power to the NRC in the exercise of its mandate:

5. (1) Without limiting the general powers conferred on or vested in the Council by this Act, the Council may	5. (1) Dans l'exécution de sa mission, le Conseil peut notamment :
…	…
(e) expend, for the purposes of	e) utiliser, dans le cadre de la

this Act, any money appropriated by Parliament for the work of the Council or received by the Council through the conduct of its operations;	présente loi, les crédits qui lui sont affectés par le Parlement et les recettes tirées de ses activités;
…	…

[25] On the whole, I am of the view that these factors point to a standard of reasonableness in the case at bar. Accordingly, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

ANALYSIS

1. Was the applicant's right to procedural fairness breached?

Applicant's argument

[26] The applicant submits the NRC failed to take into account relevant evidence in considering expectations of the applicant's commercial success or lack thereof, namely the applicant's new submission concerning its commercial prospects submitted on August 23, 2012. The ITA stated that this document was not read by the Director or the Executive Director at the August 24, 2012 meeting. Moreover, this document is not included in the certified record of the material considered by the decision-makers in rendering their decision.

[27] The applicant further contends that the commercial viability of the project is a reason invoked in the affidavits of the Director and Executive Director after the fact as an attempt to bootstrap the decision (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at

para 41 [*Stemijon Investments*]). If this reason is going to be allowed to play a role in the decision, the applicant submits it had a right to have its submission on the issue heard.

Respondent's argument

[28] The respondent contends that assuming without admitting that a duty of fairness was owed under the circumstances, following the Supreme Court's guidance in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27 [*Baker*], the requirements of procedural fairness in the context of a request for public funds to the NRC are limited to allowing firms to present the information to support their request. In the present case, the applicant was afforded communication and in-person meetings that far exceeded the requirements of procedural fairness for this type of decision.

[29] Furthermore, the commercial prospects of the applicant were in no way determinative for the decision-makers and the record and the decision clearly reflect the fact that the decision was based on the past conduct of the applicant's president.

Analysis

[30] The fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness (*Baker*, above, at para 20, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, at p 653; *Dunsmuir*, above, at para 79; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 38; see also *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at para 24 [*Knight*]).

[31] In the circumstances of the case at bar, it is clear that the NRC is a public authority making an administrative decision that affects the interest of firms to receive IRAP funds. As such, the NRC owes IRAP applicants a general duty of fairness.

[32] However, the content of procedural fairness is variable and must be determined in the specific circumstances of each case (*Knight*, above, at para 46; *Baker*, above, at para 21). The factors to consider in determining what procedural rights the duty of fairness requires in a particular context are set out in *Baker*, above, at paragraphs 21 to 28. These five factors are:

a) the nature of the decision being made and the procedures followed in making it;

b) the nature of the statutory scheme;

c) the importance of the decision to the individual affected;

d) the legitimate expectation of the individual challenging the decision; and

e) the choices of procedure made by the agency.

a) the nature of the decision being made and the procedures followed in making it

[33] The decision whether to award IRAP funding is far removed from a judicial decision-making process. It is discretionary and purely administrative, which attracts a minimal duty of fairness.

b) the nature of the statutory scheme

[34] The Act confers a broad discretionary power to the NRC in the exercise of its mandate and NRC-IRAP sets its own procedure to deal with a request for funds. Although the Act provides no

appeal procedure for a rejection of IRAP funding, the Act does not bar an applicant from seeking funding again after being rejected. Therefore, overall, this factor points to a lower duty of fairness.

c) the importance of the decision to the individual affected

[35] In *Baker*, the Supreme Court recognized that the more profound an impact the decision will have on an individual's life, the more stringent the procedural safeguards will be (*Baker* at para 25). For example, a proceeding that can result in an individual's removal from Canada or a proceeding that can result in an individual losing their ability to practice their profession will both attract high procedural protections than the present case. While an IRAP funding request takes time to formulate and can be for a substantial amount of funds, it cannot be said that an IRAP funding decision has a profound impact on a person.

d) the legitimate expectation of the individual challenging the decision

[36] As the respondent points out, the applicant had no right to a financial contribution from IRAP and had no legitimate expectations regarding the outcome or that a certain procedure would be followed.

[25] The legitimate expectation of the applicant would therefore be procedural rights on the lower end of the spectrum.

e) the choices of procedure made by the agency

[37] The Act leaves to the decision-maker the ability to choose its own procedure. Notably, the respondent notes that it is not the practice of the NRC to allow firms to be present and make

representations at a meeting between the ITA and the decision-makers. This choice is to be respected (*Baker* at para 27).

[38] Accordingly, in the Court's view, the requirements of procedural fairness in the circumstances are at the low end of the spectrum.

[39] In *Knight*, above, at para 47, the Supreme Court found that an employee's minimal right to procedural fairness entitled him to know the reasons underlying the termination and to be given an opportunity to be heard.

[40] Similarly, regarding the minimal content of the duty of procedural fairness in the circumstances, I am persuaded that the applicant was entitled to an opportunity to present evidence to support its project. As the requirements of procedural fairness are minimal in the circumstances, in my opinion, an IRAP applicant has no right to an oral hearing, nor a right to formal reasons. However, an applicant ought to know why the decision was made the way it was. Further, a reviewing court should be able to determine whether the conclusion is within the range of reasonable outcomes.

[41] The applicant in the case at bar takes issue with the fact that the commercial viability of the project is a reason invoked by the respondent after the fact in the affidavits of the Director and Executive Director and accordingly, should not be given any weight.

[42] The applicant refers the Court to *Stemijon Investments*, above, where the Court of Appeal was faced with an affidavit by a decision-maker which attempted to shed further light on its decision. The Court of Appeal found at paragraph 41 that this evidence was not admissible on judicial review:

> [41] The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd. reflex*, (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was functus: *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 (CanLII), 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25 (CanLII), 2007 SCC 25, [2007] 2 S.C.R. 267.
>
> [42] In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.
>
> (emphasis added)

[43] Following *Stemijon Investments*, above, the Court will award no weight to the supplementary reason mentioned in the affidavits of the Director and Executive Director regarding the commercial viability of the applicant's proposed project, as this reason was not alluded to in the telephone call and two emails communicated to the applicant following the decision. The reason

communicated was the problematic history of Mr. Tuli's other companies in relation to their obligations arising from contribution agreements.

[44] The respondent submits that the following statement in the second email by the ITA demonstrates that concern over the commercial viability of the project formed part of the decision:

> I take solely on me to say that a conclusive commercial success of your new Ubislate tablets in Asia in months to come (after so many years of effort including the difficult first product introduction) might convince IRAP management to bet on you once more.
>
> (emphasis added)

[45] I disagree with the respondent on this point. Given that the ITA clearly prefaced this statement by indicating that it was his personal opinion and not that of the decision-makers, I fail to see how this statement shows that concern over the commercial viability of the project formed part of the decision.

[46] Accordingly, as I have no admissible evidence that the issue of the commercial viability of the project was relevant to the decision, it is not necessary to examine whether the duty of procedural fairness was violated due to the decision-makers not consulting the applicant's submissions on this issue which he emailed to the ITA on August 23, 2012.

[47] In the Court's view, the procedure that NRC-IRAP followed in coming to its decision more than complied with the duty of fairness owed to the applicant in the circumstances. As emphasized by the respondent, the record shows that in addition to being given the opportunity to present information about the project to the decision-makers and have it considered, the applicant was

warned that the NRC was concerned about the contribution agreements of Novimage and Datawind. The applicant also had two in-person meetings with the ITA to discuss his project and the ITA presented the content of the applicant's August 23, 2012 submission to the decision-makers at the meeting held on August 24, 2012. I cannot find that the applicant was entitled to more procedural protections than the process he was already afforded.

2. Was the decision to deny the applicant's request for funding reasonable?

[48] On the one hand, the applicant submits that the past performance of Mr. Tuli's other companies was an irrelevant consideration for the decision-makers. Mr. Tuli affirms that there is nothing in the practices and procedures employed by the NRC, or the criteria it uses, to allow it to reject a request on the basis of its difficulties with a different firm. In the Firm Eligibility and Project Eligibility Forms regarding the applicant's proposed project, there is no justification for refusing the grant application and the recommendation in the latter form was to proceed with the project quickly, especially in light of the undertakings the applicant was prepared to give.

[49] The applicant also submits that the decision was never the subject of a reasoned explanation. The only reasons for decisions that are not *ex post facto* are in the email communications from the ITA which refer solely to the history of the compliance of other companies with a different program.

[50] On the other hand**,** the respondent submits it was ordinary, proper, and relevant for the NRC, in making its decision, to consider Mr. Tuli's history of failing to comply with previous contribution agreements and that it was unlikely that a trusting relationship could be established in the context of

a new contribution agreement. The respondent maintains that the importance of a trusting relationship between a firm requesting funds and NRC-IRAP is a key factor when evaluating a request for funds and that the existence of a trusting relationship has to be assessed by looking at the relationship with the people associated with an applicant, particularly its management. The fact that a corporate applicant is directed by an individual who has proven himself to place little importance on the corporation's obligations to the NRC is a wholly relevant consideration and NRC could not properly ignore it.

[51] The respondent submits that the importance of a trusting relationship is clear in the NRC's policies and procedures. Section 2.0 the NRC-IRAP Field Manual [the Manual], which was produced in 2009 to assist NRC-IRAP staff in delivering the Program consistently across Canada, sets out the following steps for an ITA in determining the eligibility of a firm for financial support:

> …
>
> b) Ensure a trusting relationship exists or can be developed between the Firm and NRC-IRAP;
>
> …

[52] Section 2.2 of the Manual also sets out what is required from a firm in order to ensure a trusting relationship with NRC-IRAP, including a willingness to provide NRC-IRAP with accurate, reliable and timely information about the firm.

[53] The respondent notes that Mr. Tuli is the main representative for Datawind and Novimage when dealing with the NRC concerning their contribution agreements and the person responsible for their reporting and repayment obligations when it comes to their contribution agreements with the

NRC. Despite being informed early on that the issues in previous contribution agreements with Datawind and Novimage would have a negative impact on his request for funding for the applicant, Mr. Tuli did not remedy the problems identified.

[54] I agree with the respondent's argument. In my view, it was entirely relevant for the decision-makers to consider the failure of Novimage and Datawind to comply with the financial and reporting requirements in their contribution agreements with the NRC. The importance of a trusting relationship between a firm requesting funds and NRC-IRAP is clearly set out in the Manual. Mr. Tuli does not deny the respondent's assertion that the Novimage and Datawind agreements were still active and that he was in charge of ensuring the companies complied with their obligations in the agreements.

[55] Mr. Tuli was also given multiple opportunities to address NRC's concerns with agreements relating to his other companies prior to the decision being made. The ITA affirms that in the May 28, 2012 meeting he had with Mr. Tuli, he addressed the need for Mr. Tuli to resolve issues with previous projects, including paying back in full the repayable contributions, which neither company had done. Moreover, the NRC sent Mr. Tuli three emails over the period of July and August 2012 regarding the need for him to fulfill certain financial reporting obligations on behalf of Novimage. The email dated August 14, 2012 even warned that the signing authority for Mr. Tuli's new proposed project was expected to ask about the status and track record of past NRC-supported projects and that this needed to be cleared up as soon as possible. This email was sent by the Regional TPC Coordinator to the ITA and the record demonstrates that the email was forwarded to

and received by the applicant, as he responded to it on August 16, 2012. The email stated the following:

> Has Raja provided the most recent financial docs for Novimage? I haven't received anything.
>
> I expect the signing authority for [the] new proposed project will be asking about status and track record of past supported projects. We need to have this cleared up ASAP.

[56] As such, despite the very able submissions by counsel, I cannot agree with the applicant that the reasons provided are inadequate, as they allow the Court to understand why the decision-makers made their decision and permit me to determine whether their conclusion is within the range of acceptable outcomes, thereby meeting the threshold set out by the Supreme Court in *Newfoundland Nurses*, above, at para 14.

[57] For these reasons, the application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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