Federal Court Cour fédérale

Date: 20210520

Docket: T-2066-19

Citation: 2021 FC 478

Ottawa, Ontario, May 20, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

VISIONS ELECTRONICS LIMITED PARTNERSHIP OPERATING AS VISIONS ELECTRONICS BY ITS GENERAL PARTNER, 1706811 ALBERTA LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of officials of Environment and Climate Change Canada [ECCC or the Department] refusing to enter into an Energy Savings Rebate Program [Rebate Program] funding agreement. The application is brought by Visions Electronics Limited Partnership operating as Visions Electronics by its General Partner, 1706811 Alberta Limited [Visions or the Applicant].

Background

[2] In 2018, the Government of Canada developed the Rebate Program to provide funding to retailers selling energy-efficient products in the province of Ontario. In 2019, ECCC published a document titled "*The Low Carbon Economy Fund, Energy Savings Rebate Program, Applicant Guide, Spring 2019*" [Applicant Guide].

[3] The Applicant Guide's stated purpose is to provide detailed instructions to complete and submit an application to the Rebate Program and it outlines key program details and eligibility criteria. The Applicant Guide states that eligible retailers must enter into a funding agreement with the Government of Canada to participate in the Rebate Program. As to eligibility for funding, applicants are required to demonstrate that they meet the three listed criteria, including that "Your entity is incorporated in Canada". The Applicant Guide also sets out how to submit applications, the deadlines for submission and the three key steps to application selection for funding. It also describes notification to successful candidates of approval-in-principle and the next steps in the process, the first of which is the signing of a funding agreement.

[4] On July 23, 2019, Mr. Sun Joo Cho, Product Manager, Visions Electronics, submitted an "Energy Savings Rebate (ESR) Program Application for Ontario", the prescribed Rebate Program application form. In the application, Mr. Cho identified the applicant's full legal name as "Visions Electronics Limited Partnership" and its operating name as "Visions Electronics" [together, Visions Electronics]. ECCC acknowledged receipt of the application by email of July

24, 2019 but indicated that Annex A, a list of locations in Ontario, was incomplete. Mr. Cho revised and resubmitted the application on the same day.

[5] On August 20, 2019 the then Minister of ECCC, The Honourable Catherine McKenna [Minister], signed an "Approval of the Energy Savings Rebate Program Proposals", a memorandum prepared by ECCC that recommended that the Minister approve funding to identified eligible applicants, including Visions Electronics. On the same day, ECCC officials emailed the successful candidates informing them that their organizations had been approved for funding under the Rebate Program. The email advised the successful applicants that by August 22, 2019 they would receive an approval-in-principle letter, along with a funding agreement template.

[6] By letter of August 21, 2019 the Director General, Programs Directorate, Pan-Canadian Framework Implementation Office of ECCC advised Mr. Cho of approval-in-principle for funding for point of sale rebates at Visions Electronics in Ontario under the Rebate Program. The letter states that a funding agreement, when signed, would represent the final step in the federal approval of the point of sale rebates and, would outline the conditions under which federal funding would be provided. Further, that the funding agreement was not subject to negotiation and had to be signed by all parties within thirty (30) business days from receiving the agreement. This letter is attached to an email which refers to the approval-in-principle letter and also states that Canada's contribution was subject to the signing of the funding agreement by both parties and that the funding agreement was not subject to negotiation. The email attaches a template funding agreement and references highlighted sections requiring Visions Electronics' input.

[7] On September 10, 2019, Mr. Cho began corresponding with Ms. Jessica Pinkham at ECCC regarding questions that he had concerning the funding agreement. On September 11, 2019, Ms. Pinkham advised Mr. Cho that he needed insert in the agreement the legislation under which Visions Electronics was incorporated. By reply email of the same date, Mr. Cho stated that “Visions Electronics is a limited partnership company and not incorporated”. By email of September 12, 2019 Ms. Pinkham acknowledged Mr. Cho’s reply. She advised that, as one of the eligibility criteria for funding under the Rebate Program requires that an applicant’s business be an incorporated business in Canada and as Visions Electronics did not meet that criteria, this meant that ECCC could not continue working towards the completion of a funding agreement with Visions Electronics.

[8] Various representatives from Visions Electronics then communicated with Ms. Pinkham in an attempt to explain and rectify the situation.

[9] Mr. Elvin Kruger, Vice-President, Finance, sent an email to Ms. Pinkham on September 13, 2019 explaining that Visions Electronics’ general partner was incorporated and that when Visions had encountered similar circumstances in the past, they were resolved by allowing the contract to be entered into by the general partner. The general partner takes on full authority to act on behalf of the business and accepts full liability of the limited partnership. By email of September 19, 2019 Mr. Kruger attached what he described as a “completed application using an incorporated company”. The attachment is not an application form but is the funding agreement template which Mr. Kruger revised by inserting “Visions Electronics Limited Partnership by its General Partner 1706811 Alberta Limited incorporated under the Business Corporations Act of

Alberta, with its headquarters located at 6009-1A Street SW, T2H 0G5 in the Province of Alberta ('Visions Electronics')" as the recipient party. Mr. Kruger also made related changes to the terms of the funding agreement. On September 23, 2019, Ms. Pinkham responded by email confirming ECCC's position and noting that the Rebate Program was now completely subscribed and the intake for applications had closed.

[10] On October 1, 2019, Visions Electronics' President, Mr. Maurice Rouleau, sent an email to Ms. Pinkham referencing the prior communications of the VP Finance and seeking to appeal the decision. Ms. Pinkham responded by email of October 3, 2019 advising that the eligibility criteria for funding for the Rebate Program required that an applicant's business be an incorporated business in Canada at the time of the application. And, as indicated in the Applicant Guide, decisions are final and there is no appeal process.

[11] On October 18, 2019, Mr. Rouleau sent a letter from Visions Electronics' legal counsel to Ms. Pinkham, which letter Mr. Rouleau describes as clarifying Vision Electronics eligibility as an incorporated business in Canada at the time of the application. The letter from Mr. Frank Sur, Gowlings WLG, states that 1706811 Alberta Limited, as the general partner of Visions Electronics Limited Partnership, "is the true applicant" under the Rebate Program. Under the limited partnership agreement and the Partnership Act (Alberta), 1706811 Alberta Ltd is authorized to carry on the business of Visions Electronics Limited Partnership and has the power to enter into contracts for that entity. Mr. Sur states his view that, accordingly, the eligibility requirements had been met and requested that the decision rejecting Visions Electronics' application be reconsidered.

[12] Ms. Pinkham responded on November 22, 2019 maintaining ECC's position. Visions seeks judicial review of that decision.

Decision Under Review

[13] While the written submissions of the Respondent raised a question as to whether the Applicant was seeking judicial review of the September 12, 2019 letter of Ms. Pinkham, or her November 22, 2019 letter, when appearing before me the Applicant confirmed that it is the November 22, 2019 letter that is the subject of this judicial review.

[14] The November 22, 2019 letter from Ms. Pinkham states as follows:

> Dear Mr. Sur:
>
> Thank you for your letter received by email via Mr. Maurice Rouleau on October 18, 2019 regarding Visions Electronics Limited Partnership's eligibility under the Energy Savings Rebate (ESR) program.
>
> The ESR program was developed to assist retail companies that meet all three eligibility criteria outlined in section 3.1 of the Applicant Guide for the program. Included is a copy of the Applicant Guide for your reference. Failure to meet any of these criteria means that the applicant is not eligible to receive funding under the ESR program.
>
> One of the eligibility criteria for funding requires that an applicant's business be an incorporated retail company in Canada at the time of application. On the application form received by Environment and Climate Change Canada (ECCC), the contact person for Visions Electronics Limited Partnership's application, Sung Joo Cho, had checked off the box under section C of the application stating that the applicant was in fact a retail company incorporated in Canada. Furthermore, they attested to the accuracy of the information provided in the application. Relying on this information and giving the applicant the benefit of the doubt during ECCC's initial review phase, ECCC approved in principle

> the project for funding under the program. This approval in principle is subject to successfully concluding a funding agreement that respects the terms and conditions of the ESR program.
>
> However, the information proved to be inaccurate, as confirmed by S. Cho on September 11, 2019 at the time of preparing the funding agreement. Despite the explanations provided in your October 18, 2019 letter, the fact remains that Visions Electronics Limited Partnership was the applicant and does not meet the criterion of being an incorporated retail company in Canada.
>
> In conclusion, ECCC maintains its decision that Visions Electronics Limited Partnership was not an incorporated retail company in Canada at the time the application was submitted and is not eligible to receive funding under the ESR program.
>
> ECCC is committed to maintaining a review and implementation process for the ESR program that is consistent, transparent and equitable to all applicants.
>
> We thank Visions Electronics Limited Partnership for their interest in the ESR program. We will gladly add them to our stakeholders' list should any future funding programming opportunities become available.
>
> Sincerely,
>
> Jessica Pinkham

Savings Rebate Program, Applicant Guide, Spring 2019

[15] Because both parties rely on the terms of the Applicant Guide, the most relevant sections are set out below.

> **1. Purpose of this Guide**
>
> This Applicant Guide provides detailed instructions to complete and submit an application to the Energy Savings Rebate Program of the federal Low Carbon Economy Fund. This guide outlines key program details and eligibility criteria.
>
> …..

3. Determining your eligibility
3.1. Eligible Recipients

In Section C of the Application Form, you must demonstrate that you meet the following three criteria to be an eligible recipient of the funding:

1. Your entity is incorporated in Canada.

   You must provide your business registration number issued by the Canada Revenue Agency. For entities that are affiliates, subsidiaries or franchises, only one application will be accepted per parent company.

2. You have a brick and mortar presence in at least one (1) municipality in Ontario.

   For the purposes of the program, a municipality is a single tier or upper tier municipality as defined in Ontario's *Municipal Act*, *2001*, S.O. 2001, c.25, that is listed on the Ontario Ministry of Municipal Affairs and Housing website at http://www.mah.gov.on.ca/Page1591.aspx. The brick and mortar presence(s) that the applicant occupies in a single or upper tier municipality in Ontario on the date that a proposal is submitted will be considered for purposes of meeting this requirement. If you have a brick and mortar presence, you may also propose to deliver rebates through online sales with products delivered in Ontario. You must include information about online sales in the proposed rebate plan in your application.

3. You carry for sale and intend to provide rebates for at least four (4) of the following eligible product categories.

…

4. Program Process
4.1. Submitting an Application

You can apply by completing and submitting a PDF Application Form to ECCC between:

- June 20, 2019 and no later than July 24, 2019, at 3:00 pm (ET) for applicants with locations in five (5) or more municipalities, and

- June 20, 2019 and no later than March 31, 2020, at 3:00 pm (ET) for applicants with locations in at least one (1) and no more than four (4) municipalities.

Applications must include the following elements in order to be considered complete:

Section A – Applicant Information;
Section B – Primary Contact Information;
Section C – Eligibility;
Section D – Description of Rebates;
Section E – Rebate Plan and Budget;
Section F – Funding Amount;
Section G – Submitting the Application; and
Annex A – List of Locations in Ontario.

…

4.2 Application Deadline

You must submit a complete PDF application form, available online at https://www.canada.ca/en/environment-climate-change/services/climate-change/low-carbon-economy-fund/energy-savings-rebate.html to Environment and Climate Change Canada (ECCC) by email at ec.re-esr.ec@canada.ca by:

- July 24, 2019, at 3:00 pm (ET) for applicants with locations in five (5) or more municipalities, and

- March 31, 2020 at 3:00 pm (ET) for applicants with locations in at least one (1) and no more than four (4) municipalities.

4.3. Application Selection

There are three key steps to application selection:

a) Screening
Applications will be reviewed to confirm their completeness. At this stage, any issues not addressed could lead to proposal rejection.

b) Evaluation
Each retained application will be evaluated by ECCC for eligibility. ECCC reserves the right to decide who is eligible.

You must provide comprehensive, clear and complete information when submitting an application. ECCC, at its discretion and if deemed necessary, may contact applicants post-submission to clarify application details, which may impact selection.

c) Recommendations and Final Decisions

After the evaluation stage, formal recommendations will be made to the Minister of Environment and Climate Change for approval and funding decision. Determinations related to final application selection, funding, and approvals rests solely with the Minister.

4.4. Decision Communicated to Applicants

ECCC will notify both successful and unsuccessful applicants once a decision has been made. If an application is approved for funding, ECCC will issue a notification of approval-in-principle and indicate next steps. Funding may be subject to certain conditions. Applicants with unsuccessful applications will receive an email notification. Decisions are final and there is no appeal process, unless otherwise specified by the Government of Canada.

4.5. Funding Agreements

The signing of a funding agreement is the next step of the process for successful applicants. The agreement will state the terms and conditions under which the Government of Canada will provide funding. Federal contributions are contingent on the signing of a legally binding funding agreement between the Government of Canada and the successful applicant within 30 business days of the notification of approval-in-principle. Otherwise, the federal funding may be cancelled. Selection and notification are not a guarantee of federal funding. Applicants assume the responsibility for any costs incurred prior to finalizing a formal funding agreement with the Government of Canada.

As approval will be based on the details provided in the application, the funding agreement will be drafted according to the scope outlined in the application. ECCC will work with successful applicants to ensure that the proposal is appropriately represented in the funding agreement. The funding agreement will also include a communications protocol outlining information related to branding and other communications elements.

Issues and standard of review

[16] In my view, the issues raised in this matter can be framed as follows:

1. Did ECCC have the authority to decide not to enter a funding agreement?
2. Was the funding agreement decision reasonable?
3. Was the funding agreement decision procedurally fair?
4. If the funding agreement decision was unreasonable or procedurally unfair, what remedy should follow?

[17] The parties submit, and I agree, that reasonableness standard of review applies to the first two issues and the correctness standard of review applies to the third issue.

[18] On reasonableness review, the court "asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at paras 15, 99 [*Vavilov*]). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

[19] Issues of procedural fairness are reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). On a correctness review, no deference is owed to the decision maker

and the reviewing court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue),* 2019 FCA 161 at para 57).

Issue 1: Did ECCC have the authority to decide not to enter a funding agreement?

Applicant's Position

[20] The Applicant submits that all administrative action must be exercised within the legal boundaries for which it was granted (citing *Vavilov* at para 10). In this case, only the Minister had the authority to approve, or to not approve, applications under the Rebate Program. The Applicant submits that the Applicant Guide provides for three stages governing applications for selection under the Rebate Program, and that the Minister's selection and funding decisions are final and not subject to appeal (referencing the Applicant Guide ss 4.3, 4.4).

[21] According to the Applicant, these provisions demonstrate that the "clear intent and purpose" of the Rebate Program is to authorise only the Minister to decide which applications will be successful and that her decision is final and legally binding. Further, that ECCC officials must implement the Minister's approval decision by administering post-approval steps, culminating in an executed funding agreement. The Applicant submits that ECCC officials acted unlawfully in failing to implement the Minister's decision, effectively reversing it. The Applicant asserts that once the Minister made her selection funding approval decision, the ECCC's screening and evaluation authority was spent: ECCC was *functus officio*. Further, that ECCC's only authority after Visions Electronics' application had been approved was to implement the

funding decision. In sum, the Applicant submits that the November 22, 2019 decision was made without authority and should therefore be quashed.

Respondent's position

[22] The Respondent submits that ECCC officials had authority not to enter the funding agreement upon determining that the eligibility criteria had not been met.

[23] The Respondent first notes that the Minister's approval of the Rebate Program funding for Visions Electronics was an approval-in-principle, which was the first stage of a two-stage process. The second stage would have been signing the funding agreement. This is apparent from the Applicant Guide, which expressly states that funding was contingent of the signing of a legally binding funding agreement and that selection and notification were not guarantees of federal funding (Applicant Guide s 4.5). At no time did any legal obligation arise requiring Canada to provide funding to Visions Electronics. The Respondent also notes that the funding agreement is better characterized as a contract. The Rebate Program was not created by legislation and the power exercised by the ECCC officials – the power to contract – is not a statutory power.

[24] The Respondent submits that ECCC officials had the Minister's express authorization to finalize the funding agreements for the Rebate Program and, therefore, had implied authority not to enter funding agreements with ineligible parties. The Respondent notes that if ECCC officials did not have such implied authority they would be in a situation where they would be required to enter unlawful contracts. Further, that the implied authority of ECCC officials not to enter

funding agreements with ineligible parties is supported by ECCC policy concerning termination of funding agreements. That policy is the "*Delegation of Spending and Financial Signing Authorities*" that addresses the termination of funding agreements for grants and contributions more generally and which authorizes ECCC officials to terminate funding agreements. The Respondent submits that the Applicant's argument that ECCC officials had no authority to refuse to enter the funding agreement is inconsistent with the authority of those officials to invoke contractual termination rights under ECCC policy. The Respondent argues that ECCC officials cannot be compelled to enter a funding agreement based on the Minister's approval-in-principle yet also be authorized to exercise termination rights immediately upon finalization of the agreement. The Minister's authorization of ECCC officials to finalize funding agreements must have included an implied authority not to proceed with funding agreements in appropriate circumstances.

[25] In the alternative, the Respondent submits that any discretion exercised by ECCC officials was founded in the *Carltona* principle. This principle establishes that where the exercise of discretionary power is entrusted to a Minister it may be presumed that the act will be performed by responsible officials in the Minister's department. The rationale for this principle is that it would be unreasonable to expect the Minister to perform every task personally (*The Queen v Harrison*, [1977] 1 SCR 238 at paras 245-246 [*Harrison*]). While this doctrine has usually been applied in the context of statutory powers, it has also been applied to the Crown's exercise of the power to contract (*The Queen v Transworld Shipping Ltd.*, [1976] 6 DLR (3d) 304 (FCA) [*Transworld Shipping*]).

Analysis

[26] In challenging ECCC officials' authority to refuse to enter into a funding agreement, the Applicant relies almost exclusively on the terms of the Applicant Guide, in particular s 4.3, to found its assertion that ECCC officials exceeded their authority. In this regard, the Applicant submits that discretion must be exercised within the purpose and context of a legislative scheme, referencing paragraph 67 of *Baker v Canada,* 1999 SCC 699 [*Baker*].

[27] This submission raises the question of the source of the Minister's and ECCC's authority to take the actions that they did and the boundaries of that authority.

[28] In *Baker*, in the context its reasonableness review, the Supreme Court of Canada stated at paragraph 67 that: "Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretations generally".

[29] In *Baker,* the legislation authorized the Minister, by way of regulation, to exempt a person on humanitarian and compassionate grounds, from the usual regulatory requirements for admission to Canada. Such decisions were made by immigration officers who utilized a set of guidelines providing them with instructions about how to exercise the discretion delegated to them. The Supreme Court held that a reasonable exercise of the power conferred by the legislation required close attention to the interests of children, including the purposes of the Act, international law and the guidelines. The latter were of assistance in determining whether the

reasons of the immigration officer were supportable: “The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section…” (*Baker* at para 72).

[30] Guidelines or policies are often used by administrative decision makers to guide their decision making. In that regard, much jurisprudence is concerned with the question of whether the decision maker fettered their discretion when relying on a policy or guideline. As stated by Justice Stratas in *Stemijon Investments Ltd v Canada (Attorney General),* 2011 FCA 299, decision makers who have a broad discretion *under a law* cannot fetter the exercise of their discretion by relying exclusively on an administrative policy. An administrative policy is not law. It cannot dictate in a binding way how that discretion is to be exercised (*Stemijon* at para 60; also see *Gordon v Canada (Attorney General),* 2016 FC 643 at para 29).

[31] As stated by the Supreme Court in *Vavilov,* to be reasonable a decision must be “justified in relation to the constellation of law and facts that are relevant to the decisions….Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers” (*Vavilov* at para 105). And, because administrative decision makers receive their powers by statute, the governing statutory scheme is likely the most salient aspect of the legal context relevant to a particular decision (at para 108).

[32] In this matter, the Applicant relies on the Applicant Guide to assert that ECCC lacked authority to refuse to enter into a funding agreement. The Applicant Guide is a useful source of information for both ECCC officials and applicants concerning the eligibility criteria and the

process for applying, assessing applications and providing funding for the Rebate Program. However, the Applicant identifies no statutory scheme by which the Rebate Program is established or against which its administration is to be assessed. The Applicant submits that the Rebate Program exists to advance a federal policy to encourage energy efficiency in Ontario and in support of this refers to s 2.2 of the Applicant Guide. However, s 2.2 makes no reference to an underlying regulation or legislation. As noted above, guidelines are not law, and in and of themselves do not impose legal obligations on administrative decision makers. The Applicant does not identify any source of the Minister's or ECCC officials' underlying authority or any legislative scheme that would provide context to the exercise of their authority.

[33] On the other hand, the Respondent submits that after the approval-in-principle decision was made, the power exercised by the ECCC officials is the power to contract and not a statutory power. The Respondent submits that the Rebate Program was not created by legislation, the Minister did not have express statutory authority to make payments related to the Rebate Program nor were there any legislative parameters around which payments were to be made. Rather, the program was an ECCC transfer payment program that provided contribution funding under the umbrella of the Treasury Board of Canada's *Policy on Transfer Payments*. The Rebate Program was funded under annual *Appropriation Acts* approved by Parliament, commonly referred to as "supply bills" or "money bills".

[34] The Respondent submits that the Minister was authorized to enter contracts, including contribution agreements, within the scope of her statutory mandate under the *Department of the Environment Act*, RSC 1985, c E-10 specifically, s 4(1)(a) and(f). Further, that the Minister also

had the authority to delegate her contracting authority to ECCC officials, as was expressly done in this case by way of the August 20, 2019 Memorandum signed by the Minister, and pursuant to the *Carltona* doctrine. Therefore, ECCC officials had delegated authority to exercise the broad discretion of whether to enter into funding agreements.

[35] In my view, the absence of a specific statutory scheme creating the Rebate Program and granting or prescribing the Minister's authority or the ECCC's delegated authority does not mean that the Applicant Guide is the source of the Minister's authority or that it binds the Minister or fetters her discretion. The Applicant Guide, upon which the Applicant relies to assert that only the Minister was authorized to approve applications and that, once funding was approved, ECCC officials lacked authority to refuse to enter into the funding agreement, is just that, a guide.

[36] Rather, as indicated by the Respondent, in this case the scope of the Minister's authority to enter into a contract is coincident with the Minister's statutory departmental mandate. The "… Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the ordinary rule of law" (*Attorney General of Quebec v Labrecque et al* [1980] 2 SCR 1057 at p 1082). And, as stated by the Federal Court of Appeal in *Transworld Shipping*, each Minister has by statute the authority to manage their department and "… subject to such statutory restrictions as may otherwise be imposed, this confers on such a Minister statutory authority to enter into contracts of a current nature in connection with that part of the federal Government's business that is assigned to his department" (at p 307).

[37] In this case, the Minister's authority to enter contracts, including funding agreements, is founded in the common law establishing that the Crown enjoys the general capacity to contract. The scope of that authority is limited only by the Minister's statutory mandate. Therefore, the Minister had broad discretion in determining whether or not to enter a funding agreement.

[38] As to her delegates, by way of the August 13, 2019 Memorandum, the Minister accepted the ECCC recommendation that she approve funding "for the recommended eligible project proposals". As to "next steps" she also accepted the proposal from ECCC that:

> - With your concurrence, the Department will notify successful applicants and work to finalize the funding agreements. As per the terms of the current Delegation of Authority, these agreements will be signed by a delegated official in the Department.

[39] Thus, the Minister expressly delegated her contracting authority to ECCC with respect to the funding agreements.

[40] The same conclusion as to delegated authority could be reached by application of the *Carltona* principle (*Harrison*; *Carltona, Ltd. v Com'rs of Works et al*, [1943] 2 All E.R. 560 at p 563). As stated by the Federal Court of Appeal in *Transworld Shipping* at p 308:

> Once it appears that the Minister has *prima facie* statutory authority to enter into contracts within his department's domain, it follows, in my view, subject to any inconsistent statutory provision, that his power can, and will, in the ordinary course of events, be exercised by the officers of this department…

[41] Thus, in my view, the real question is whether the Minster's funding approval required the ECCC officials to enter in a funding agreement with the Visions Electronics and/or the Applicant, or whether ECCC officials had discretion not to enter the funding agreement.

[42] The Applicant Guide sets out the program process. Applications submitted within the specified deadlines are screened by ECCC for completeness and evaluated for eligibility. ECCC then makes a recommendation to the Minister "for approval and funding decision. Determinations related to final application selection, funding, and approvals rests solely with the Minister". It is this provision of s 4.3 of the Applicant Guide upon which the Applicant largely hinges its argument that once the Minister made a funding approval in favour of the Visions Electronics, ECCC had no further authority, beyond the possible selection of terms and conditions of the funding agreement, and was compelled to enter such an agreement.

[43] However, ECCC's involvement did not end at this stage of the process. Pursuant to s 4.4, if an application was approved for funding, ECCC would issue a "notification of approval-in-principle and indicate next steps" (s 4.4). Section 4.4 also states that decisions are final and there is no appeal process, unless otherwise specified by the Government of Canada.

[44] The Applicant Guide also refers to the next steps in the process in s 4.5:

> **4.5. Funding Agreements**
>
> The signing of a funding agreement *is the next step of the process for successful applicants*. The agreement will state the terms and conditions under which the Government of Canada will provide funding. Federal contributions *are contingent on* the signing of a legally binding funding agreement between the Government of Canada and the successful applicant within 30 business days of the notification of approval-in-principle. Otherwise, the federal

> funding may be cancelled. *Selection and notification are not a guarantee of federal funding.* Applicants assume the responsibility for any costs incurred prior to finalizing a formal funding agreement with the Government of Canada.
>
> *As approval will be based on the details provided in the application*, the funding agreement will be drafted according to the scope outlined in the application. ECCC will work with successful applicants to ensure that the proposal is appropriately represented in the funding agreement. The funding agreement will also include a communications protocol outlining information related to branding and other communications elements.
>
> (emphasis added)

[45] The fact that the approval for funding under the Rebate Program was an approval-in-principle was also stated in ECCC's email of August 20, 2019 advising that organizations approved for funding would receive an approval-in-principle letter by August 22, 2019. The August 21, 2019 email from ECCC to Mr. Cho attaches "the federal approval-in-principle letter" and states:

> Canada's contribution is subject to the signing of the Funding Agreement by both parties. Attached is a copy for your input which is required in relevant sections (i.e. yellow highlighted sections). Confirmation is also required of the information included within Schedule B. If required, Environment and Climate Change Canada (ECCC) will follow up with any outstanding requirements. Once complete, ECCC will review, finalize, and prepare a copy for signatures. Please note that the Agreement is not subject to negotiations and is to be signed by all parties within thirty (30) business days of the date of receiving the Agreement…

[46] The August 21, 2019 formal notification letter from ECCC to Mr. Cho also refers to approval-in-principle:

> We are pleased to inform you of federal approval-in-principle of funding for point of sale rebates at Visions Electronics in Ontario, under the Energy Savings Rebate Program of the Low Carbon

> Economy Fund. This approval is given following a successful review of your proposal….
>
> The Funding Agreement, when signed, represents the final step in the federal approval of point of sale rebates, and will outline in detail the conditions under which federal funding will be provided…The Agreement is not subject to negotiation and has to be signed by all parties within thirty (30) business days of the date of receiving the Agreement…

[47] I agree with the Respondent that the Minister's funding approval decision was, in effect, the first stage of a two-stage process. The first stage was approval-in-principle, comprised of the selection, evaluation and recommendation by ECCC and the acceptance, or rejection, of the funding approval recommendation by the Minister. The second stage was the entering into the funding agreement, which, in essence, is the effecting of a private or commercial contract.

[48] It is also significant to note that the characterization of the funding approval as approval-in-principle is found in the sections of the Applicant Guide that are subsequent to the acceptance by the Minister of the ECCC funding recommendation (ss 4.4 and 4.5). That is, the Applicant Guide does not reflect the Applicant's view that once the Minister accepted the ECCC funding recommendation this was final and funding must be provided. Rather, the Applicant Guide contemplates the next step in the process as being moving from approval-in-principle to the execution of a funding agreement.

[49] And, while the Applicant Guide is not binding, s 4.5 does inform parties' expectations for the Rebate Program funding process. Section 4.5 explicitly states that receiving funding is contingent on signing the funding agreement and that selection and notification are not a guarantee of federal funding.

[50] I do not agree with the Applicant's submission that after fulfilling their screening and evaluation role, ECCC officials were *functus officio*. The Applicant submits that after the Minister accepted the recommendation and approved funding, ECCC's role was limited to simply inserting the appropriate terms and conditions in the funding agreement and then executing it. However, nothing in the Minister's funding approval removes the requirement, or the authority to enter into, a funding agreement. Similarly, even though deciding not to enter the funding agreement may have the same effect, the ECCC did not "reverse" the Minister's decision without authority as the Applicant submits. Rather, the ECCC decided not to take the next step in the process and enter the funding agreement.

[51] In sum, ss 4.4 and 4.5 informed the Applicant that the funding approval was an approval-in-principle, that receiving funding was contingent upon the signing of a funding agreement and, that selection and notification are not a guarantee of funding. The fact that the funding was an approval-in-principle was also communicated by ECCC's correspondence to the Applicant. Neither s 4.3 nor the issuance of the approval-in-principle for funding legally obliged the Minister or ECCC to provide funding. Nor do ss 4.4 and 4.5 interfere with the Minister's and her delegates' broad discretion to contract, as discussed above. Therefore, no statute, guide, or communication with Visions Electronics served to limit ECCC's discretion as to whether to enter into the funding agreement. In my view, ECCC had the authority not to enter the funding agreement.

Issue 2: Was the funding agreement decision reasonable?

Applicant's position

[52] The Applicant submits that ECCC is constrained by the legal and factual context of the Rebate Program, which required ECCC to evaluate applicants based on defined criteria and to respect the final determinations of the Minister. Here, Visions Electronics met the eligibility criteria as screened by ECCC and approved by the Minister's final and non-appealable decision. By "reversing" the Minister's decision the ECCC made an error of law. The Applicant submits that the Rebate Program does not restrict partnerships acting through their incorporated partner from applying for funding, and that ECCC's decision is based on the assumption that Visions Electronics was not incorporated in Canada at the time of application. The Applicant submits that there is no evidence that ECCC considered that Visions Electronics was operating through its general partner.

[53] The Applicant next submits that the Court in this case cannot meaningfully exercise its judicial review function because ECCC did not provide the Applicant with reasons. The Applicant submits that there are no reasons that explain what interpretation ECCC gave to the scope of the incorporation criteria or explain how ECCC had authority to reverse the Minister's decision. Therefore, the Court should find that ECCC made the decision without considering a relevant and necessary fact.

[54] Finally, the Applicant submits that the failure to account for a relevant factor is as erroneous as taking an irrelevant factor into account (citing *CUPE v Ontario (Minister of*

Labour), 2009 SCC 29 at para 172). The Applicant submits that the ECCC did not consider the relevant fact that Visions Electronics' general partner is incorporated. The Applicant submits that there is no express or implied restriction in the Rebate Program that would exclude funding for partnerships acting as retailers by incorporated general partners.

[55] The Applicant submits that because the decision is not intelligible, transparent or justified, it is unreasonable. Further, that there is only one reasonable outcome and therefore the matter should not be remitted back to the ECCC for redetermination. Rather, the decision should be quashed and the Minister's funding approval declared to have legal force.

Respondent's position

[56] The Respondent submits that the funding decision is reasonable.

[57] According to the Respondent, it would have been unlawful for ECCC to proceed with the funding agreement after determining that Visions Electronics was not eligible. The range of outcomes was limited by the legislative and policy constraints. The Rebate Program is a federal transfer payment, governed by s 34(1)(b) of the *Financial Administration Act,* RSC 1985, c F-11 [*Financial Administration Act*] and the Treasury Board's *Policy on Transfer Payments* and *Directive on Transfer Payments*. Section 34(1)(b) of the *Financial Administration Act* requires an official to certify that a recipient is eligible for payment. Further, the terms and conditions of payment transfers must be in accordance with the Treasury Board Policies. The Respondent submits that the Rebate Program terms and conditions required recipients to be incorporated in Canada. Therefore, ECCC was not authorized to enter into funding agreement with

unincorporated entities. The only lawful decision available was not to proceed with the funding agreement.

[58] Further, ECCC’s interpretation of the eligibility criteria is reasonable and entitled to deference. The Respondent notes that a decision maker’s interpretation of its own policies and procedures attracts significant deference (citing *Douglas v Canada (Attorney General),* 2014 FC 299 at para 70). In this case, the Applicant Guide states that the applicant must be incorporated in Canada and Mr. Cho acknowledged that Visions Electronics was not incorporated. The Respondent notes that ECCC’s determination that Visions Electronics did not meet the incorporation requirement was also consistent with its treatment of other applicants who were denied funding because they were not incorporated in Canada.

[59] The Respondent submits that it was reasonable for ECCC not to enter the funding agreement with Visions’ general partner. The Respondent notes that reasons should not be read against a standard of perfection and that the record and broader context can speak to the basis for the decision. The Respondent submits that ECCC considered Visions’ request that their general partner be made a party to the funding agreement. For example, having received the proposed revised funding agreement from the Applicant, which it had changed to include Visions’ general partner as a contracting party, in her September 23, 2019 email to Mr. Kruger, Ms. Pinkham stated that ECCC would not complete a funding agreement or consider the Applicant’s proposal as to its general partner. The Respondent states that Ms. Pinkham provided the Applicant with ECCC’s rationale for this decision – the general partner had not applied for the Rebate Program prior to expiry of the application submission deadline on July 24, 2019 and ECCC did not plan to

make any changes to the program parameters. The Respondent notes that ECCC’s decision was also consistent with its communications with Visions Electronics following the approval-in-principle. Visions Electronics was advised that the funding agreement was not subject to negotiation yet, contrary to this, the Applicant amended the agreement to name its general partner as a contracting party. Visions Electronics was the successful applicant and ECCC’s decision not to enter into a contract with a different legal entity after the deadline for application had passed was reasonable.

[60] Finally, the Respondent submits that it was reasonable for ECCC not to enter the funding agreement because the funding approval was based on inaccurate information provided by Visions Electronics.

[61] The Respondent submits that ECCC’s actions are consistent with their legal duty not to enter a funding agreement with a party that does not meet the eligibility criteria. ECCC’s legal authority was tied to implementing the Rebate Program’s terms and conditions and their duty to abide by them.

Analysis

[62] The Respondent concedes that the funding decision is justiciable even though it relates to government officials entering into a commercial contract. However, it asserts, and I agree, that deference is owed when reviewing government decisions concerning the entering of such contracts, including funding agreements.

[63] In that regard, the Respondent refers to *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 [*Irving Shipbuilding*]. There the Federal Court of Appeal noted that "[p]ublic contracts lie at the intersection of public law and private law" (at para 1). In that case, the parties and the Court agreed that the award of a submarine contract could be the subject of an application for judicial review. The Court found that s 18.1 of the *Federal Courts Act,* RSC 1985 c F-7, and the Minister's broad statutory responsibilities for the acquisition of goods and services under the *Department of Public Works and Government Services Act,* SC 1996, c 16, founded jurisdiction, and that the latter included a power to contract for the maintenance and servicing of submarines for the department. The Federal Court of Appeal then stated:

> [21] The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27], a public law proceeding to challenge the exercise of public power. **However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract,** may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.
>
> [22] This Court reached a similar conclusion in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services),* [1995] 2 F.C. 694 (C.A.) at paras. 7-17 ("*Gestion Complexe*"). The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(*a*) of the *Federal Court Act* as a decision of "a federal board, commission or other tribunal".
>
> [23] Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the

procurement process through its judicial review jurisdiction. Thus, he said (at para. 20):

> As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

(emphasis added)

[64] Here the Applicant does not frame its challenge in the contractual context, but nor does it challenge the jurisdiction of this Court on that basis. And, while *Irving Shipbuilding* and *Gestion Complexe* are concerned with procurement contracts, the principle that contracts entered into by the federal government may be subject to judicial review and that deference is owed when there is broad statutory power permitting contracting, remains the same. In this matter, given the broad discretionary nature of decisions about entering into the funding agreements, in my view, ECCC officials should also be afforded deference in deciding not to enter the funding agreements.

[65] Regarding the legal context, the legislative constraints in making this decision were minimal. As discussed above, there is no specific legislation pursuant to which the Rebate Program was created or governed and against which the reasonableness of the ECCC decision can be assessed.

[66] Based the Respondent's submissions, it would appear that the relevant legislative constraint is s 34(1)(b) of the *Financial Administrative Act*, which requires departments to certify that a recipient is eligible for the funding it receives. The Respondent states that the terms and conditions of federal transfer payments are authorized by Cabinet and approved by the Treasury Board in accordance with the *Policy on Transfer Payments* and *Directive on Transfer Payments*. Further, that under the Rebate Program, the terms and conditions required that funding recipients be incorporated in Canada. Therefore, ECCC officials were not authorized, and could not lawfully and reasonably enter into funding agreements with unincorporated entities under the Rebate Program's terms and conditions.

[67] This may be so. However, the record before me does not contain any document that is entitled or encompasses the Rebate Program. Therefore, I have no way of confirming that the eligibility criteria reflected in the Applicant Guide constitute the terms and conditions of the Rebate Program. Further, while copies of the *Policy on Transfer Payments* and *Directive on Transfer Payments* are found in the record, no affidavit was filed by the Respondent explaining how these documents relate to the Rebate Program decision making process.

[68] While an unreasonable decision is an unlawful one, here the record establishes that the basis for ECCC's refusal decision was Visions Electronics' failure to meet the eligibility criteria, it does not establish that ECCC also refused on the basis that it would be unlawful for ECCC to enter the funding agreement.

[69] As to the factual context, on the application form submitted by Mr. Cho, under Section A – Applicant Information, "full legal name of applicant (i.e. corporation and/or trade name)", he entered Visions Electronics Limited Partnership. Under Section C – Eligibility, the application states "Please refer to the eligibility criteria outlined in the Applicant Guide". It has a box next to the words "Select if the Applicant is a retail company incorporated in Canada". Mr. Cho ticked this box. Under Section G – Submitting the application, he ticked the box next to "I hereby declare that the information contained herein is true, accurate and complete in every respect and contains no misrepresentations, falsifications, omissions, or concealment of facts". Thus, the named applicant on its face was a limited partnership and not an incorporated company, contrary to the eligibility requirements.

[70] It is true that there is no indication in the record that ECCC flagged Vision Electronics' partnership status as a concern. That is, Visions Electronics successfully made it past the screening and evaluation stages apparently without anyone at ECCC noticing that their may be a problem with eligibility. This would suggest that an oversight occurred, particularly as the record indicates that two other applicants were screened out and found to be ineligible because the "Applicant is not incorporated in Canada".

[71] However, and contrary to the Applicant's submissions when appearing before me, I cannot conclude that this oversight by ECCC led to a legal obligation requiring ECCC to then enter the funding agreement. The Applicant Guide required applicants to demonstrate that they met all of the eligibility requirements (s 3.1). It also advised that funding approval would be based on the details provided in the application (s 4.5). I do not agree that the Applicant met this

responsibility and requirement by virtue of the fact that funding approval-in-principle was granted – when it was granted on the basis of the inaccurate application information provided by Visions Electronics – and that ECCC was therefore legally compelled to enter a funding agreement.

[72] In that regard, I note that the November decision letter states that the eligibility requirements were set out in the Applicant Guide, that in its application Visions Electronics indicated that it was a retail company incorporated in Canada and that ECCC *relied on* that information in granting approval-in-principle for funding. The decision letter states that as the information was inaccurate, and despite the subsequent explanations provided in Mr. Sur's letter of October 18, 2019, the fact remained that Visions Electronics was the applicant and did not meet the criteria of being an incorporated retail company in Canada. Therefore, ECCC maintained its decision that Visions Electronics was not an incorporated retail company in Canada when the application was submitted and is not eligible for receive funding under the Rebate Program.

[73] Further, Visions Electronics was advised that the funding agreement was not open to negotiation. When provided with the template by ECCC, Visions Electronics was asked to identify highlighted information. In the recitation of the parties to the agreement, this indicated: "VISIONS ELECTRONICS LIMITED PARTNERSHIP, incorporated under the [ACT], with its headquarters located at [ADDRESS] in the Province of Ontario". The incorporating legislation and headquarters location being highlighted. Also highlighted was part of section 5, Recipient Representations and Warranties, specifically s 5(a):

The Recipient represents and warrants to Canada that:

a) the Recipient has the capacity and authority to sign this Agreement [INSERT EITHER "AS DULY AUTHORIZED BY [BY-LAW OR RESOLUTION REFERENCE], dated [DATE], OR "by resolution of its Board of Directors, dated [DATE]

b) the Recipient has the capacity and authority to carry out the Project;

c) this Agreement constitutes a legally binding obligations of the Recipient, enforceable against it in accordance with its terms and conditions;

d) All information submitted to Canada as set out in this Agreement is true, accurate, and was prepared in good faith to the best of its ability, skill, and judgement;

[74] Although the funding agreement was not open to negotiation, Mr. Kruger in his September 19, 2019 email to Ms. Pinkham attached a funding agreement which he revised. In the revised document he identified the recipient party as "VISIONS ELECTRONICS LIMITED PARTNERSHIP, registered in the Province of Alberta, with its headquarters located at 6009 – 1 A Street SW, Calgary, in the Province of Alberta".

[75] He revised s 5(a) to read:

a) the Recipient has the capacity and authority to sign this Agreement as Duly Authorized in their capacity as President of Visions Electronics Limited Partnership [INSERT EITHER "AS DULY AUTHORIZED BY [BY-LAW OR RESOLUTION REFERENCE], dated [DATE], OR "by resolution of its Board of Directors, dated [DATE]

[76] The revised funding agreement still identified a limited partnership as the applicant.

[77] I also do not accept the Applicant's submission that because the Applicant Guide does not explicitly restrict partnerships acting by incorporated partners from applying, the ECCC failed to consider the scope of the incorporation requirement. The Applicant Guide and the application form were clear. The Guide states that to be eligible the applying entity – which ECCC could reasonably assume was the named applicant applying for funding – "is incorporated in Canada". If Visions Electronics, which as a limited partnership was not incorporated, had any doubt as to what this meant in its circumstances, it was its responsibly to raise the matter with ECCC before the application deadline.

[78] In sum, in my view, it was reasonable for ECCC to decide not to enter into a funding agreement with Visions Electronics based on the relevant factors: the fact that the Applicant Guide required applicants to be incorporated in Canada, that other applicants were screened out for not being incorporated in Canada and, that Visions Electronics had represented itself as being incorporated in Canada when it was not.

[79] However, the core of the Applicant's submission is that ECCC did not properly consider that Visions' general partner was incorporated in Canada and could legally act for Visions Electronics. The Applicant makes this argument in various ways – by submitting that ECCC did not explain its interpretive approach to the incorporation criterion or that ECCC failed to consider the relevant factor that Visions Electronics' general partner is incorporated in Canada. In essence, the Applicant submits that in form Visions Electronics is a limited partnership, but in substance, because they operate through their general partner, it is incorporated in Canada.

[80] In my view, ECCC did consider this factor and it was reasonable for ECCC not to enter a funding agreement with Visions Electronics' general partner. The Applicant Guide and the approval-in-principle letter state that funding agreement is not subject to negotiation. This, in my view, would encompass negotiating who the recipient entity is. In her September 23, 2019 email, Ms. Pinkham again communicated that because Visions Electronics had informed ECCC that it was not incorporated in Canada, it was therefore ineligible for the Rebate Program. Accordingly, ECCC was not in a position to consider the proposal for point of sale rebates, to complete a funding agreement "or consider the below proposal (with a general partner) from Vision Electronics", the proposal being that the funding agreement be entered into by Visions Electronics' general partner. She also stated that the program was fully subscribed at that point and the intake for applications closed and ECCC did not plan to make any changes to the parameters at that time.

[81] The November 22, 2019 decision letter responded to Mr. Sur's letter of October 18, 2019. Mr. Sur described 1706811 Alberta Ltd, as the general partner of Visions Electronics Limited Partnership, as "the true applicant" under the Rebate Program. Mr. Sur also stated his view that because the general partner is authorized under the partnership agreement and the Alberta *Partnership Act* to carry on the business of Visions Electronics, and had the "power to enter into contracts and hold properties of Visions [Electronics] in trust for Visions [Electronics]", this qualified Visions Electronics as an applicant under the Rebate Program.

[82] Mr. Sur also stated that all contracts of Visions Electronics "must be entered into by 1706811 Alberta Ltd as the general partner of Visions". Yet the general partner was not

identified in the initial application, even though the Applicant Guide specified that a funding agreement – being a contract – had to be executed as part of the funding process.

[83] Similarly, in Mr. Kruger's email of September 13, 2019 he states that he understood from Mr. Cho that there was a concern about dealing with a limited partnership and that "We have been exposed to his kind of situation in the past and have always been able to circumvent it by allowing the contract to be entered into by its General Partner, which is an incorporated entity and takes on all authority to act on behalf of the business….".

[84] The Affidavit of Mr. Cho sworn on February 21, 2020 states that his day-to-day job did not require him to deal with the information required in Section A of the application and that he relied on Mr. Kruger's knowledge of Visions Electronics when completing that section. Further, that when he was requested by Ms. Pinkham to provide the specific Act under which Visions Electronics was incorporated and the s 5(a) information, his response that Visions Electronics is a limited partnership and is not incorporated also came from Mr. Kruger. However, in written responses to questions on his affidavit, when asked if he agreed that the information contained in the application was not true, accurate and complete, since Visions Electronics Limited Partnership was not a retail company incorporated in Canada, Mr. Cho responded, "no, I do not agree, I reject the assumption in this question that Visions Electronics is not incorporated in Canada. As I understand it, Visions Electronics Limited Partnership's General Partner is 1706811 Alberta Ltd., an entity incorporated in Alberta, Canada". If this was Mr. Cho's state of knowledge when he submitted the application, then the failure to identify the general partner relationship indicates that the application he submitted was inaccurate and incomplete and, in my

view, conflicts with his certification that Visions Electronics is a retail company incorporated in Canada. Otherwise, viewed in whole, the evidence establishes that Mr. Cho simply did not understand that the applicant Visions Electronics as a limited partnership was not a corporation. For that reason, the application as submitted did not meet the eligibility requirements.

[85] As noted above, the funding agreement as revised by Mr. Kruger also did not identify the general partner in the description of the recipient party. As to Mr. Kruger's revision to s 5(a) of the funding agreement, when appearing before me counsel for the Applicant acknowledged that Mr. Kruger's revision to s 5(a) would have been grounds for ECCC to refuse to enter the funding agreement. However, counsel submitted that ECCC did not indicate that this revision was the reason for its refusal to do so. Regardless, I note that it is unclear how the "Recipient" – being the limited partnership – has the capacity and authority to sign the funding agreement "as Duly Authorized in their capacity as President of Visions Electronics Limited Partnership" given that Mr. Sur's letter indicates that all contracts must be entered into by the general partner and that this was the approach proposed by Mr. Kruger.

[86] Even if ECCC had accepted the Applicant's contention that Visions Electronics' general partner could act for Visions Electronics and that that the general partner was incorporated in Canada, this would still have required the funding to be provided to an entity other than the one that made the actual application, after the deadline for applications had passed. Or, it would entail allowing the general partner to enter the non-negotiable funding agreement which had been approved-in-principle for Visions Electronics' and based on its representation that it was an incorporated entity.

[87] The question before me is whether the decision is justified based on the facts and law. Given the limited applicable legal constraints as discussed above and based on the record before me, the decision was reasonable. ECCC explained that, as had been acknowledged subsequent to the approval-in-principle of funding for the applicant, Visions Electronics was not incorporated as represented in the application and, therefore, did not meet the application eligibility requirements. Further, that ECCC was not prepared to consider permitting the general partner to enter a funding agreement as it was not identified as the applicant in the application and the time for submitting new applications had passed.

Issue 3: Was the funding agreement decision procedurally fair?

Applicant's position

[88] The Applicant submits that the standard of review is correctness and cites the *Baker* factors used for determining the level and content of the duty of fairness in this case. The Applicant submits that neither the Minister's funding approval nor ECCC's decision of November 22, 2019 were subject to appeal. Further, that the decision had significant adverse financial and competitive impact on Visions. Accordingly, procedural fairness requires that Visions Electronics knew the case to meet and opportunity to be meaningfully heard before ECCC made its decision.

[89] Regarding notice, the Applicant notes that this is a fundamental aspect of the duty of fairness. The Applicant submits that notice must permit the affected party to know how the decision will affect them and that no notice is inadequate (*Sitler v Alberta*, 2003 ABQB 277 at

paras 3-5). The Applicant submits that Visions Electronics was not given notice of the case to meet or that ECCC was considering reversing the Minister's funding approval. The Applicant submits that the purpose of the screening and evaluation stage of the application process is to ensure that applications are complete and that the Rebate Program "mandated" that ECCC must use these initial stages, prior to funding approval, to ensure that applications were complete and clarify any questions of eligibility with applicants. Despite this "mandated structure" ECCC did not raise Visions Electronics corporate status as a issue and that the September 12, 2019 email from ECCC revoked the funding approval without providing notice.

[90] The Applicant also submits that it was denied an opportunity to make submissions. The Applicant notes that it is essential that submissions be considered by the decision maker, regardless of those submissions' form, because otherwise it is doubtful whether the decision maker grappled with the key issues subject to decision. The Applicant submits that ECCC could not have considered its submissions because the decision was made without Vision Electronics' knowledge and without notice. The Applicant submits that the duty to receive submissions was elevated in this case because the decision was final. The Applicant states that the decision is "inescapably unlawful" because Visions Electronics only knew the case to meet after the decision was made.

Respondent's Position

[91] The Respondent submits that in the context of a government decision of whether to enter a contract, a duty of fairness can arise by contract, legislation or the common law. Here no contractual or statutory rights to procedural fairness were owed to Visions Electronics. And,

while it may have had a broad common law right to procedural fairness, that public law right has little application to an essentially commercial relationship governed for the most part by contract (citing *Irving Shipbuilding* at para 6). Here any level of procedural fairness owed to the Applicant is low and was met. ECCC advised Visions Electronics its position on eligibility in September, two months before the November 22, 2019 decision was made. Further, the Applicant Guide served as notice in this case. It stated that the entity must be incorporated. Therefore, Visions ought to have known about the incorporation criterion when making its application. Additionally, before making its final decision in November, ECCC reviewed several submissions from received from Visions Electronics, thus it had an opportunity to make submissions and was not denied procedural fairness in that regard.

Analysis

[92] In my view, there is no merit to the Applicant's submission that ECCC was mandated to raise with Visions Electronics any concerns that ECCC may have had with their submitted application. As discussed above, the Applicant Guide indicates that the responsibility lay with applicants to demonstrate that they met the eligibility requirements and to submit a complete and accurate application. Nothing in the Applicant Guide mandates that during the screening and evaluation process ECCC must ensure that submitted applications are complete and to clarify any questions of eligibility. The fact that Visions Electronics failed to address the fact that it, as the entity submitting the application, was doing so as a limited partnership (and not an incorporated entity, in and of itself, by way of a general partner or otherwise), cannot be conveyed into a lack of procedural fairness on the part of ECCC.

[93] As stated by the Federal Court of Appeal in *Irving Shipyard* "Public contracts lie at the intersection of public law and private law" (at para 2). There the Court held that the fact that the case before it involved the award of a contract provided the essential context in which had to be determined if a duty of fairness was owed. On the facts of that case, it found that a duty of fairness could arise in one of three ways: contract, legislation, and the common law. Having found that neither the contract nor statute gave rise to a duty of fairness in that matter the Court then considered the common law:

> [45] The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken. In my opinion, it cannot be assumed that a duty imposed on the exercise of administrative action taken in the performance of a statutory, governmental function applies in the case of a decision to purchase goods and services where the legal relations of the parties are largely governed by the law of contract.
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> [46] The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.

[94] The duty of fairness in the context of an administrative decision and a public contract was considered in *Canadian Arab Federation v. Canada (Citizenship and Immigration)*, 2013 FC 1283 [*CAF*]. There, this Court considered the duty of procedural fairness in the context of a Minister's decision not to renew a funding agreement with the Canadian Arab Federation [CAF]. In *CAF,* department officials had recommended that CAF be approved for funding for the Language Instruction for Newcomers to Canada [LINC] program, however, the Minister decided

not to approve the final funding agreement. At issue was whether the decision was procedurally fair and reasonable. When considering procedural fairness, Justice Zinn first considered whether any duty of procedural fairness applied to what he concluded was essentially a commercial or contractual relationship:

> [46] In this case, the **parties were in a purely contractual relationship at the time the Minister made his decision.** CAF was a party to a LINC funding contract with CIC, ending March 31, 2009. There was no provision in that contract for the automatic renewal or extension of that term. However, as a consequence of that contractual relationship, CAF was invited to submit a proposal for an amendment to the contract to extend its term for one year. CAF was informed that its contract with CIC would be extended to March 31, 2010, subject to an application being submitted and "approved." Despite the negotiations for 2009-2010 having been completed, the fact remains that no contract for funding for 2009-2010 had been approved or executed, and it had been made clear to CAF in both the *Guidelines for Amendments: Language Instruction for Newcomers to Canada (LINC) 2009-2010*, and subsections 4.6 and 12.5 of the 2007-2009 contribution agreement, that it should not expect any additional funding beyond March 31, 2009, until it was notified in writing that the application for an amendment to extend the term of the existing contract had been approved.
>
> [47] There was nothing in the documents sent to CAF that committed CIC to amend the existing contract. The letter from CIC indicating that the contract term of CAF's existing contribution agreement could be extended is akin to a request for the submission of a proposal and, as was held in *Irving Shipbuilding*, arguably creates a contract when the recipient responds. In this case, that contract contains no express promise that parties responding will be treated in a procedurally fair manner.
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> …
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> [49] Accordingly, to the extent that the parties' relationship was a commercial and contractual relationship, there is nothing in the record that suggests that there was any obligation on the Minister to engage with CAF about his concerns prior to making his decision not to extend the existing contract's term. There is neither a statutory or contractual basis on which this Court can impose on a duty of procedural fairness on the Minister.

[95] Justice Zinn also held that, had he found that the applicant was entitled to procedural fairness then, applying the *Baker* factors, he would have found that the case before him attracted no more than minimal procedural protections and that those requirements were met (paras 61-64).

[96] Similarly, in this case, once approval-in-principle was achieved, what was left was executing a contract, the funding agreement. Nothing in the record before me supports that there was any statutory or contractual duty of fairness obligation owed by ECCC to engage with Visions Electronic in advance about its decision.

[97] Further, it must be kept in mind that that the content of any duty of fairness is determined by context (*Baker* at para 21) and, that the review of an administrative decision cannot be divorced from the institutional context in which the decision was made (*Vavilo,* at para 91). Like *CAF*, in this case, even if a common law duty was owed, that duty was at the low end of the scale and it was met as Visions Electronics had both notice of the decision and an opportunity to respond. As discussed above, Visions Electronics had notice of the incorporation requirement. Both the Applicant Guide and communications between ECCC and Mr. Cho indicated that applicants must be incorporated in Canada in order to receive funding. Visions Electronics also had notice that the approval-in-principle did not guarantee funding and that funding was contingent on signing the funding agreement. Further, the September 23, 2019 email from Ms. Pinkham and all subsequent communications up until the November 22, 2019 decision provided notice to Visions Electronics that ECCC was not going to enter into the funding agreement.

[98] Visions Electronics also had an opportunity to, and did, make submissions concerning ECCC's position on Visions Electronics' eligibility. ECCC first notified Visions Electronics that it was not eligible for the Rebate Program on September 12, 2019. Between September 12, 2019 and November 22, 2019, various representatives of Vision Electronics, as well as its counsel, made representations to ECCC on this issue of Visions Electronics corporate status and eligibility. And, as discussed above, ECCC considered those submissions. There is a difference between having an opportunity to make submissions and those submissions determining or changing the outcome. Procedural fairness does not guarantee a particular outcome. While ECCC's position did not change between September and November, Visions Electronics was informed of ECCC's position and did have the opportunity to make submissions in response. Further, ECCC gave Visions Electronics reasons for why it took the position that it did and why it would not change the entity named as the recipient in the funding agreement.

[99] As the Applicant knew the case to be met and had an opportunity to respond, any duty of procedural fairness was met.

Conclusion

[100] For the reasons above I am satisfied that in these circumstances ECCC had authority not to enter into a funding agreement with Visions Electronics, or the Applicant in its stead. I am also satisfied that ECCC's decision was reasonable and procedurally fair.

JUDGMENT IN T-2066-19

THIS COURT'S JUDGMENT is that

1. This application for judicial review is denied; and

2. The Respondent shall have its costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2066-19
STYLE OF CAUSE:	VISIONS ELECTRONICS LIMITED PARTNERSHIP, OPERATING AS VISIONS ELECTRONICS BY ITS GENERAL PARTNER, 1706811 ALBERTA LTD. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MAY 10, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 20, 2021

APPEARANCES:

Joshua A. Jantzi Mark Youden	FOR THE APPLICANT
Cameron G. Regehr	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Department of Justice Edmonton, Alberta	FOR THE RESPONDENT