

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAVEN TOURS LTD.

Applicant

-and-

**INDUSTRY, TOURISM AND INVESTMENT
GOVERNMENT OF THE NORTHWEST TERRITORIES**

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The Attorney General for the Northwest Territories seeks an order dismissing Raven Tours Ltd.’s application for judicial review by reason of lack of jurisdiction.

BACKGROUND

[2] In 2021, the Government of the Northwest Territories (“GNWT”) through the Department of Industry, Tourism and Investment (“ITI”), created the Pandemic Relief Extension Program (“PREP”) to provide financial assistance to licensed tourism operators adversely affected by the COVID-19 pandemic. Funding for PREP comes from public funds, in this case authorized by *Supplementary Appropriation Act (Operations Expenditures), No 1, 2021-2022*. ITI received \$5.8 million in funding, \$2.5 million of which it allocated to PREP.

[3] Information about the PREP is set out in a brochure published by ITI and contained in the Record at Tab 2. The funding is conditional. Funds may not be used to generate a profit for the recipient. There are mid-term and final reporting requirements under which recipients must demonstrate no profit has been generated as a result of the funding and they are required to repay any amounts which result in a profit.

[4] With respect to eligibility, the brochure states tourism operators that have defaulted previously on a Government repayment plan or loan from the Business Development and Investment Corporation are ineligible for funding through the PREP.

[5] The appeal process is also set out in the brochure. Specifically, it states an unsuccessful applicant can appeal in writing to the Assistant Deputy Minister, Economic Development, for ITI.

[6] The PREP is a financial contribution program. In administering contributions, the GNWT's departments, boards and agencies are bound by the terms of the *Financial Administration Manual* ("FAM"). The FAM is a collection of policies, procedures and interpretation bulletins which guide the operational aspects of public spending. The FAM is created by the Financial Administration Board pursuant to s 10 of the *Financial Administration Act*, SNWT 2015 c 13.

[7] The essential requirements of contribution agreements are set out in Chapter 805 and Interpretation Bulletin 805.01 of the FAM. Contributions are also addressed in Chapter 600 of the FAM, entitled the "Revenue Cycle". Chapter 600 contains interpretation bulletins respecting "related parties" in the context of both credit and contributions, namely Interpretation Bulletins 625.01 and 625.02. The former provides, in part:

The credit granting process contemplated within this Policy applies to applicants such as those applying for credit for purposes such as a loan, fuel tax collection or other instances where credit will be extended. *Contributions to individuals or businesses do not require a credit application. They are assessed on a combination of criteria including past performance with the GNWT (including related companies owned by the shareholders) capacity and eligibility.* (Italics and emphasis mine)

[8] Interpretation Bulletin 625.02 includes the following statement, setting out the rationale for considering "related parties" where credit and contributions are contemplated:

When credit is being granted by departments or by the Comptroller General it is the intent that related parties shall be considered in the determination of creditworthiness. At the extreme, the provision is in place to ensure that principals of legal entities that are indebted to the GNWT do not incorporate another legal entity to access GNWT funds and avoid their legal obligation to the GNWT.

It also protects the GNWT where related companies may have effective control and influence over one another and should, therefore, be treated as a single entity from a credit granting perspective. The debts or financial obligations of related and controlled companies must be considered when granting credit to an applicant.

In determining what factors constitute related companies and control reference is made to the CPA Canada Public Sector Accounting Handbook Sections PS 2200 and PS 4250.

[9] Section PS 2200 of the CPA Canada Public Sector Accounting Handbook, incorporated by reference into Interpretation Bulletin 625.02 and contained at Tab 6A of the Record, sets out a number of factors to be considered in determining if parties and/or entities are “related”. A related party can be an entity or an individual and relevant factors include who or what entity controls the reporting entity, whether there is common control, and whether the entities share common individuals in key management positions.

[10] Raven Tours Ltd (“Raven”) applied for funding under PREP. It was unsuccessful. The reason cited for denying its application was based on it being a party related to another tourism operator which was in default of its financial obligations to the GNWT. Specifically, ITI concluded Raven is closely related to Extreme Adventures Canada (“EAC”), an entity owned solely by Michael Ewen. At the time the application was assessed, EAC was in default on a loan from the Business Development and Investment Corporation. Mr. Ewen was the Chief Executive Officer and sole director of Raven. The ownership information is not in dispute.

[11] Raven appealed the decision to the Assistant Deputy Minister of ITI. The appeal was unsuccessful, for the same reason in the first instance.

[12] Raven has applied for judicial review of that decision.

ISSUE

[13] The broad issue is whether the Assistant Deputy Minister’s decision is reviewable.

THE PARTIES' POSITIONS

Attorney General's Position

[14] Counsel for the Attorney General submits the Assistant Deputy Minister's decision is not subject to judicial review. Two arguments are advanced:

- a. Absent an infringement on a constitutional or other fundamental right, decisions on how to distribute public money are part of the government's prerogative spending powers, exclusively within its purview and therefore, they are not subject to judicial review; and
- b. The Assistant Deputy Minister was not acting as a "tribunal" for the purposes of judicial review under r 591 of the *Rules of the Supreme Court of the Northwest Territories*.

Raven's Position

[15] Raven takes no issue with the proposition that policy decisions on *how* to spend public money, including establishing eligibility criteria, is within the exclusive purview of government. It also concedes the GNWT is bound to follow the FAM. It argues, however, that the manner in which the Assistant Deputy Minister interpreted and applied the FAM Interpretation Bulletins 625.01 and 625.02 to find Raven and EAC are related entities is incorrect. It also appears to question whether the Interpretation Bulletins are applicable in the circumstances.

[16] Raven also argues the Assistant Deputy Minister's decision violated its *Charter* rights under s 7 (life, liberty and security of the person).

[17] Raven disagrees with the Attorney General's position that the Assistant Deputy Minister was not acting as a tribunal in deciding the appeal.

ANALYSIS

Is the decision subject to judicial review?

[18] It is beyond doubt that government policy decisions about how to spend money are not reviewable, so long as there is no violation of *Charter* or other fundamental rights, *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* 1991 CarswellOnt 45 (Ont Div Ct) at paras 42-44, 78 DLR (4th) 289, 1991 CanLII 7099. This includes defining who will be eligible to benefit from the programs flowing from those decisions and decisions about whether

to continue or terminate such programs. *Kuki v Ontario (Ministry of Training, Colleges and Universities)*, 2013 ONSC 5574; *Bowman v HMTQ*, 2019 ONSC (Div Ct) 1064.

[19] As noted, Raven does not dispute these principles and it does not dispute that the GNWT is bound by the FAM. The heart of its argument, rather, is that ITI's finding, at the first instance and then on appeal, that Raven and EAC are "related parties" is incorrect. Respectfully, I disagree.

[20] As a general principle, corporate entities are legally separate from their directors and shareholders, as well as other corporate structures. Among other things, this means Corporation X cannot be held responsible for the debts of Corporation Y. Under the same principle, the CEO of Corporation X is not personally liable for Corporation X's debts. There are certain exceptions to this principle, some created by statute and others by policy or practices. This is one such case.

[21] The Financial Management Board has created policies which allow those who administer public funds to look beyond the "corporate veil" in certain circumstances and take into account common elements amongst different entities and individuals and consider their past performance. This is based on the legitimate need for accountability and prudent management of public monies. The Financial Management Board is entitled to make this policy decision and the GNWT's departments, boards and agencies are bound to follow it.

[22] ITI set up the PREP to provide tourism operators with financial relief. Recipients had to account for money received and, under certain conditions, repay some or all of it. ITI also set eligibility criteria and in doing so, decided those tourism operators that had previously defaulted on financial obligations to either the GNWT or the Business Development and Investment Corporation would be ineligible to receive funding. In assessing an applicant's eligibility, ITI considered not just the applicant's own financial history with the GNWT, but that of other entities or individuals related to the applicant, as it was required to do under the FAM. Tourism operators were deemed the same entity or person as those to which they were closely related. Those such as Raven, which were closely related to entities or individuals who had previously defaulted on financial obligations to the GNWT, were therefore deemed ineligible. This was a policy decision going to the structure and design of the PREP.

[23] Raven's argument that its s 7 *Charter* rights have been breached cannot succeed. In *Irwin Toy v Québec*, [1989] 1 SCR 927 at 1004, the Supreme Court of

Canada determined a corporation cannot possess “life, liberty or security of the person”. Only a natural person can possess these.

[24] In summary, ITI made a decision regarding eligibility which excluded Raven from the PREP. This is a general policy decision going to the overall design of the PREP and applicable to all tourism operators. No *Charter* or other fundamental rights are engaged. Raven does not fall within the class of eligible tourism operators and that decision is not subject to judicial review.

Was the Assistant Deputy Minister Acting as a Tribunal?

[25] While the foregoing is sufficient to deal with the Attorney General’s application, I will address the argument that the Assistant Deputy Minister, as the appeal body, is not subject to judicial review. With respect, I do not accept the Attorney General’s position on this.

[26] Context is important. In these circumstances, the Assistant Deputy Minister falls into the category of “other body exercising a public function” in r 591(a) of the *Rules of Court*. The Legislative Assembly provided authorization for ITI to spend public funds under the PREP. As part of its program design, ITI decided it would create a formal appeal process and it designated specifically the Assistant Deputy Minister as the “body” which would hear the appeals. That appeal process, and the decisions which flow from it, affect applicants directly. Further, to the extent that the funds come from the public purse, they affect taxpayers in general. This is precisely the kind of process that must be subject to judicial review. To hold otherwise would invite the exercise of arbitrary power, unchecked by the ability of courts to enforce standards of natural justice and procedural fairness.

[27] In saying this, I am mindful of this Court’s decision in *Acho Dene Koe First Nation v Minister of Industry Tourism and Investment*, 2020 NWTSC 19. The facts in that case distinguish it from this one. Unlike the situation here, where ITI has expressly designated the Assistant Deputy Minister as the appeal body and decision-maker, the individual in question in *Acho Dene Koe First Nation* had no authority to make the “decision” alleged in that case, either through statute or by specific designation.

CONCLUSION

[28] The Attorney General’s motion is granted. Raven’s application for judicial review is dismissed.

[29] Success on the two issues presented is divided. The parties will bear their own costs.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
14th day of June, 2022

Agent for Raven Tours Ltd.:

Michael Ewen

Counsel for the Attorney General
of the Northwest Territories:

Thomas Wallwork and
Trisha Paradis

Counsel for Industry, Tourism and
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Jeremy Walsh

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