

Federal Court



Cour fédérale

Date: 20210629

Docket: T-918-19

Citation: 2021 FC 687

Ottawa, Ontario, June 29, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BCM INTERNATIONAL CANADA INC.

Applicant

and

**CANADA (MINISTER OF EMPLOYMENT,
WORKFORCE DEVELOPMENT AND LABOUR)
AND THE ATTORNEY GENERAL OF CANADA**

Respondents

and

CHISTIAN LEGAL FELLOWSHIP

Intervener

JUDGMENT AND REASONS

I. Introduction

[1] BCM International [BCM] seeks judicial review of a decision of Employment and Social Development Canada [ESDC] dated May 2, 2019, denying their application for funding for Mill

Stream Bible Camp through the 2019 Canada Summer Jobs [CSJ] program. The Applicant claims that the decision is unreasonable, procedurally unfair and interferes with its rights under sections 2(a) and 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*.

[2] For the reasons that follow, the application is granted. The Court declines to address the *Charter* issues raised by the Applicant as will be explained below. I will, however, comment on the reasonableness of the decision, which, in my view, fell short of the standard expected.

II. **Background**

[3] BCM, a faith-based institution, operates Mill Stream Bible Camp located near Omeme, Ontario. It runs week-long summer camps during the months of July and August for youth aged 5 to 15. The camps are dedicated to developing Christian character in young people and leadership skills in youth and adults, through spiritual, physical, mental and social experiences in a camping environment and through their summer programs.

[4] BCM had previously applied for and received funding from the CSJ program between 2011 and 2017. In 2018, BCM applied again but did not include a compulsory attestation in the application form that was required that year. BCM, and other potential applicants, considered the attestation to be contrary to their religious beliefs and values. As a result, BCM's 2018 CSJ application was denied. Due to the controversy and related litigation that resulted from the compulsory attestation, it did not appear in the 2019 CSJ requirements.

[5] As described by the Respondent, the CSJ program for 2019 was created “to help young people between the ages of 15 and 30, particularly those facing barriers to employment, get the information and gain the skills, work experience and abilities they need to transition successfully into the labour market.” This is accomplished by providing wage subsidies to employers, whose programs “take place in an environment that respects the rights of all Canadians.”

[6] In order to be deemed eligible for the 2019 CSJ program, projects had to meet 15 requirements. Edited slightly for clarity, they were as follows:

1. Application was received by the deadline;
2. Attestation is checked;
3. Application is complete;
4. Eligibility of employer;
5. Eligibility of project;
6. Job duration: Between 6 and 16 consecutive weeks;
7. Job hours: Must be full-time (i.e. 30 to 40 hours per week);
8. Other Sources of Funding: The organization must declare whether it will receive funding from other sources for the job placement;
9. Salary: The salary must respect minimum wage requirements;
10. Money owing to the Government of Canada: The organization must declare any money owing to the Government of Canada;
11. Health and Safety: The organization must demonstrate that it has implemented measures to ensure youth awareness of health and safety practices in the work environment. Safety measures must relate to the type of work environment and specific job type

and activities. Service Canada will consider each case on its merits, comparing the risks with the benefits for the youth;

12. Hiring practices and work environment: The organization must demonstrate that it has implemented measures to ensure hiring practices and a work environment free of harassment and discrimination, such as raising awareness and prevention activities;

13. Supervision: The organization must describe the supervision plan for the youth and proposed job activities;

14. Mentoring: The organization must describe the mentoring plan for the youth and proposed job activities;

15. Past results: The Department will review all files associated with the organization to verify if there is documented evidence from previous agreements with the Department that would render the application ineligible (e.g. financial irregularities, health and safety concerns, or past project results). The Department may consult with the Canada Revenue Agency (CRA) on past financial irregularities.

[7] Once the project was deemed eligible, assessment criteria and a point system were to be used to evaluate the quality of the projects compared to other projects to determine whether funding would be granted.

[8] The Applicant Guide identified seven categories of ineligible projects:

1. Projects consisting of activities that take place outside of Canada;
2. Activities that contribute to the provision of a personal service to the employer;
3. Partisan political activities;
4. Fundraising activities to cover salary costs for the youth participant; or
5. Projects or job activities that:

- a) Restrict access to programs services, or employment, or otherwise discriminate, contrary to applicable laws, on the basis of prohibited grounds, including sex, genetic characteristics, religion, race, national or ethnic origin, colour, mental or physical disability, sexual orientation, or gender identity or expression;
- b) Advocate intolerance, discrimination and/or prejudice; or
- c) Actively work to undermine or restrict a woman's access to sexual and reproductive health services.

[9] On January 2, 2019, BCM completed an application for Mill Stream Bible Camp for the 2019 CSJ program seeking \$45,600 to fund six jobs. On February 27, 2019, ESDC sent BCM a "Missing Information" letter, as required by its procedures, seeking additional information or clarification on BCM's health and safety practices in the workplace. BCM responded on March 4, 2019 with a list of health and safety training sessions provided to its employees.

[10] A second Missing Information Letter was sent to BCM on February 28, 2019. In this letter, ESDC asked for additional information regarding the duration and compensation provided for all mandatory training for the requested jobs. BCM responded that all positions would require a minimum of 5 days of training paid at the same rate that would be received by CSJ staff, if the grant was approved. On March 5, 2019, ESDC sent BCM an email requesting the dates of the 5-day training for each position. BCM provided the dates on March 8, 2019.

[11] On March 15, 2019, the ESDC Regional Assistant Deputy Minister for Ontario (ADM) approved a recommendation to determine BCM ineligible for "project or job eligibility," the fifth eligibility category listed above. The memorandum to the ADM bears inaccurate information

regarding the funding requested. While that may reflect some carelessness in dealing with the application, it is not otherwise material to this decision.

[12] On May 2, 2019, ESDC issued its decision in which it stated that BCM's application was deemed ineligible because its project "restrict[s] access to programs, services, or employment, or otherwise discriminate[s], contrary to applicable laws, on the basis of prohibited grounds, including sex, genetic characteristics, religion, race, national or ethnic origin, colour, mental or physical disability, sexual orientation, or gender identity or expression." This decision is the subject of the present judicial review application.

III. Issues

[13] The issues raised by this application are:

- 1) What is the appropriate standard of review?
- 2) Did the Minister breach the rules of procedural fairness in making her decision?
- 3) If the decision was procedurally fair, was the decision reasonable?
- 4) Did the Minister infringe on BCM's rights under section 2(a) and 2(d) of the *Charter*? If so, was the decision a proportionate balancing of BCM's *Charter* interests with the objectives of the 2019 CSJ program?

IV. **Analysis**

A. *What is the appropriate standard of review?*

[14] The Applicant has urged the Court to conduct a *Charter* analysis of the decision asserting a denial of its fundamental rights. The Intervener, while not taking a position on the outcome of this application, addressed the principle of state neutrality in its written and oral submissions.

[15] Courts should avoid conducting a *Charter* analysis when a case may be decided on other grounds. In *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at para 105, the Federal Court of Appeal described the principle of judicial restraint in deciding constitutional questions as follows:

It is well established that in cases where an issue can be decided on a non-constitutional ground, the course of judicial restraint is to decide the case on this precise ground (see *Philips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129, at paras. 6-9; *MacKay v. Manitoba (Attorney General)*, [1989] 2 S.C.R. 357, at pp. 361-367, 61 D.L.R. (4th) 385). As noted by Peter Hogg, in opting for this alternative, “the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided” (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) (loose-leaf 2019 supplement), ch. 59 at 59-22).

[16] The appropriate standard of review in the case at hand is the reasonableness standard. As expressed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], reasonableness is the presumptive standard for most categories of questions on judicial review.

[17] As held by the Supreme Court in *Vavilov*, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one that puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with “respectful attention” and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: *Vavilov* at para 84.

[18] Reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party: *Vavilov* at para 95.

[19] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision: *Vavilov* at para 96.

[20] For questions of procedural fairness, the correctness standard applies: *Girouard v Canada (Attorney General)*, 2020 FCA 129 at para 38. A court conducting this review determines for

itself whether the administrative process satisfied the level of fairness required in all of the circumstances: *Hood v Canada (Attorney General)*, 2019 FCA 302 at para 25; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Hughes v Canada (Attorney General)*, 2021 FC 147.

B. *Did the Minister breach the rules of procedural fairness in making her decision?*

[21] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court provided a list of non-exhaustive factors that affect the content of the duty of fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance to the individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision maker.

[22] Underlying the factors set out in *Baker*, at paras 22-28, is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker: *Baker* at para 22. Participatory rights requires notice of the case to be met and the opportunity to provide relevant evidence to the decision maker: *Vakulenko v Canada (Minister of Citizenship and Immigration)*, 2014 FC 667 at para 16.

[23] The Applicant contends that the decision was not discretionary but rather a determination of whether the candidate restricted access to its programs or otherwise discriminated, contrary to applicable laws, on the basis of prohibited grounds. In this instance, the decision was important to the Applicant and others as it deprived BCM of the opportunity to receive up to \$45,600 in CSJ grants and resulted in over a dozen children not being able to attend camp that summer.

[24] Because the Minister exchanged with BCM on whether wages would be paid for the staff training, the Applicant says it had legitimate expectations that the Minister would similarly inquire about any other concerns she might have with the application and provide BCM with an opportunity to respond. Particularly, the Applicant argues, if those concerns were allegations of discrimination.

[25] The Respondent argues that the Minister owed BCM a low level of procedural fairness because (a) the decision was primarily administrative and not adversarial; (b) the decision related to discretionary government funding; (c) the Minister made the decision pursuant to a broad discretionary power granted by the *Department of Employment and Social Development Canada*, SC 2005, c 34; (d) the Minister made the decision in the context of a large government funding program requiring over 40,000 funding decisions in a relatively short time frame; (e) the only direct impact on BCM was financial; and (f) the Minister established and followed a fair process for reviewing applications.

[26] Here, the Minister did not provide notice of the case to be met nor did she provide the Applicant with an opportunity to provide relevant evidence to the decision maker. This is

because nothing in the correspondence between BCM and ESDC could have led the Applicant to believe that the Mill Stream project would be deemed ineligible because it allegedly discriminates on the basis of prohibited grounds. The correspondence with ESDC indicates that the Minister had some concerns with BCM's health and safety practices and with the payment of wages for a training week but nothing in the correspondence suggests that discrimination was an issue.

[27] ESDC's Operational Directives for the CSJ Program clearly required the Minister to send a Missing Information Letter if it had concerns in relation to any eligibility requirements, which the Minister failed to do. The fact that the decision regarding eligibility was final lends greater importance to the notice requirement and the opportunity to be heard.

[28] As a result, the Minister breached her procedural fairness obligation when it failed to give the Applicant notice of the case to be met and provide it with an opportunity to provide relevant evidence. This finding is sufficient in my view to grant the application for judicial review. However, should I have erred in that conclusion I consider it appropriate to comment further on the reasonableness of the decision.

C. If the decision was procedurally fair, was the decision reasonable?

[29] The Applicant submits that the decision is unreasonable because nothing in the Certified Tribunal Record indicates that anyone involved in the decision process considered whether Mill Stream Bible Camp discriminated in employment contrary to applicable laws.

[30] The Respondent contends that the decision was highly discretionary in that it was based on the Minister's policy view of which organizations would be best placed to provide youth, including LGBTQ2 youth, with the most favourable and inclusive employment experience.

[31] I disagree that the decision was highly discretionary given the elaborate and detailed framework developed by ESDC that governed the determination of eligibility for the CSJ program. The decision affected, as counsel for the Applicant argued, the right to stand in the line for assessment with other eligible projects. That stage of the process would have been highly discretionary but BCM was never given a fair chance for its application to be considered on its merits.

[32] The record in this proceeding suggests that the application for the BCM camp at Omemee was conflated with that for another BCM camp in Nova Scotia, the operators of which were considered by the program managers to have "controversial church beliefs". In an after-the-fact attempt at justifying the decision, the Respondent contends that a 2018 BCM Summer Camp Staff Application discloses that potential summer employees were asked to divulge their beliefs about homosexuality. This, the Respondent contends, was sufficient to raise concerns that BCM may discriminate against LGBTQ2 youth. But there is no indication in the record that this was the basis for the exclusion decision. If it were, this would clearly engage BCM's *Charter* interests.

[33] Deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when

courts ground their review of the decision in the reasons provided: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54. Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision: *Vavilov* at para 96.

[34] Similarly, where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility: *Vavilov* at para 98.

[35] Because of the controversy generated by the 2018 eligibility requirements and resulting legal challenges, prior to the commencement of the 2019 process, ESDC officials presented the Minister with two options for excluding employers and job activities; option A would have excluded certain employers based on their discriminatory practices and option B would have excluded projects and job activities that, among other things, discriminate "contrary to applicable laws". ESDC considered that Option A would render more faith-based employers ineligible and on that basis was undesirable. Option B, they submitted, would allow the Department "to make more informed eligibility decisions that consider the quality of the work placement in terms of wages offered, skills development opportunities, supervision and mentoring, safety of the

workplace, and the inclusiveness and health of the work environment.” The Minister chose Option B.

[36] Throughout the eligibility review of the Mill Stream project, ESDC officials expressed concerns with an unpaid week of training, which would have been in contravention of Ontario’s labour laws. They sought clarification on the Applicant’s health and safety practices in the workplace and on the duration and compensation provided for all mandatory training for the requested jobs. As discussed above, at no time did they raise any discrimination concerns with the Applicant and none are found in the Certified Tribunal Record.

[37] The record is unequivocal, the Minister never assessed whether BCM’s Mill Stream project discriminated, in contravention of applicable laws, on the basis of prohibited grounds. As a result, it was unreasonable for the Minister to determine that the Mill Stream project was not an eligible project on the basis of discrimination. The decision does not indicate how Mill Stream Bible Camp discriminates and the record is of no assistance to understand the decision maker’s rationale other than references to an associated organization in Nova Scotia believed to be managed by persons who hold “controversial church beliefs”. It remains to be considered, perhaps in another case, whether government officials should be basing their program advice to Ministers on their opinions of what constitutes “controversial church beliefs”.

V. Conclusion

[38] As discussed above, I find that the Applicant was denied procedural fairness in the consideration of its application for funding under the 2019 CSJ Program. If I have erred in that

conclusion, I also find that the decision was unreasonable under the standard approved by the Supreme Court of Canada in *Vavilov*. I decline to address the *Charter* issues raised by the Applicant for the reasons expressed above.

[39] The Respondent submits, and I agree, that if the Court were to find in favour of the Applicant there would be no practical benefit of remitting the application for reconsideration given that the 2019 CSJ program has been completed and the funds disbursed. That raises the question of what remedy would be appropriate.

[40] In the circumstances, I think it is appropriate to issue a declaration that the Respondent breached procedural fairness and made an unreasonable decision in denying the Applicant eligibility for the 2019 CSJ program funding.

[41] I am also of the view that the Applicant should be granted the costs of this application on a solicitor and client basis.

JUDGMENT IN T-918-19

THIS COURT ORDERS that:

1. It is declared that the Applicant was denied procedural fairness in the consideration of its eligibility for the 2019 Canada Summer Jobs Program funding by the Respondent;
2. The decision to deny the Applicant eligibility for consideration under the program was unreasonable; and
3. The Applicant is awarded costs on a solicitor and client basis.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-918-19

STYLE OF CAUSE: BCM INTERNATIONAL CANADA INC. V
CANADA (MINISTER OF EMPLOYMENT,
WORKFORCE DEVELOPMENT AND LABOUR)
AND THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

DATE OF HEARING: APRIL 14, 2021

ORDER AND REASONS: MOSLEY J.

DATED: JUNE 29, 2021

APPEARANCES:

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Kerry Boyd Jennifer Lee Keelan Sinnott	FOR THE RESPONDENT
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