

Federal Court



Cour fédérale

**Date: 20210629**

**Docket: T-916-19**

**Citation: 2021 FC 686**

**Ottawa, Ontario, June 29, 2021**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**REDEEMER UNIVERSITY COLLEGE**

**Applicant**

**and**

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

**Respondent**

**and**

**CHRISTIAN LEGAL FELLOWSHIP**

**Intervener**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is a judicial review of a decision by the Respondent Minister to deny an application for funding through the 2019 Canada Summer Jobs program on the ground that the application

did not demonstrate that measures had been implemented by the Applicant to provide a workplace free of harassment and discrimination. For the reasons that follow, the application is granted.

## II. **Facts**

### A. *Background*

[2] The Canada Summer Jobs program [CSJ], a federal initiative to provide funding for work experiences for young persons and to help support community services, has been in existence for many years. While the program was initially aimed at students, the eligibility was expanded in 2019 “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.”

[3] The objectives of the program, as described by CSJ’s 2019 Applicant Guide [the guide], are to provide quality work experiences for youth; respond to national and local priorities to improve access to the labour market for youth who face unique barriers; and provide opportunities for youth to develop and improve their skills.

[4] In order to be deemed eligible for the CSJ program, the guide indicated that projects must meet 15 eligibility requirements as follows, edited slightly for clarity:

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.

[5] 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.

[6] Redeemer University is a faith-based university and a registered charity located in Hamilton, Ontario. It is a Reformed Christian institution meaning that it holds to the traditions and theology of the historic Reformed Christian religious denomination to which it is affiliated. Redeemer University holds and affirms the Reformed Christian understanding of sexual morality that sexual activity is only permitted within the context of an exclusive, lifelong, marital union between a man and a woman.

[7] The university applied for and received CSJ funding from 2006 through 2017. In 2018, it applied again but did not include a compulsory attestation in the application form that was required that year because the university considered it to be contrary to its religious beliefs and values. As a result, Redeemer University's 2018 CSJ application was denied.

[8] Due to the controversy that ensued in relation to the compulsory attestation, the attestation was removed from the 2019 program requirements and replaced with the following statement:

“Any funding under the Canada Summer Jobs program will not be used to undermine or restrict the exercise of rights legally protected in Canada.”

[9] Additionally, a new question was added to the application form and required organizations to specify how they would provide a safe, inclusive, and healthy work environment free of harassment and discrimination (e.g., in their hiring practices, policies, guidelines). The eligibility requirements also required the organizations to demonstrate that they had implemented measures to ensure hiring practices and a work environment free of harassment and discrimination, such as raising awareness and prevention activities.

[10] CSJ applications were subject to internal review by Employment and Social Development Canada [ESDC] according to the terms of Operational Directives [the Directives]. The Directives instructed CSJ program officers to risk assess “to help ensure that youth are not subjected to unsafe, non-inclusive or unhealthy work environments”. The program officers were to review information from the present and past application forms and information in the public domain. Applications deemed to be at high risk of being ineligible by a program officer were to be referred to an Escalation Committee, which would review the officer’s concerns.

[11] On January 17, 2019, Redeemer University completed an application for the 2019 CSJ program seeking \$104,187 to fund 11 jobs. On February 27, 2019, the application, deemed high-risk because of information from 2011-2012 and 2014-2015 found on the university’s website and a recent article about faith-based institutions, was referred to the Escalation Committee. The Certified Tribunal Record [CTR] before the Court provides virtually no information about the committee’s consideration of the matter.

[12] In accordance with the Directives, ESDC sent a Missing Information and Request for Clarification Letter dated March 7, 2019, requesting additional information or clarification on the practices Redeemer University had implemented to provide a work environment that is safe, respectful and free from harassment and discrimination. Specifically, the letter sought information and/or required clarification on:

- Measures to provide a workplace free of harassment and discrimination
- Other and/or Additional Information: Please provide additional information or clarification on the practices you have implemented to provide a work environment that is safe, respectful and free from harassment and discrimination. As per the Canada Summer Jobs Applicant Guide, you must demonstrate that you have implemented measures to ensure hiring practices and a work environment free of harassment and discrimination, such as raising awareness and prevention activities. Ineligible projects and job activities include those that 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.

[13] On March 8, 2019, Redeemer University responded to the Missing Information Letter by providing the CSJ program with two documents: (1) Policies and Procedures Regarding Harassment and Discrimination and (2) Health and Safety training.

[14] On March 15, 2019, the ESDC Regional Assistant Deputy Minister for Ontario approved a memorandum recommending that the Redeemer University application be determined to be ineligible for funding on the ground of harassment and discrimination. The memorandum bears

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

[15] On May 2, 2019, the Respondent issued its decision in which it held that Redeemer University's application was deemed ineligible because it did not demonstrate that measures have been implemented to provide a workplace free of harassment and discrimination. This decision is the subject of the present judicial review application.

[16] The Applicant seeks judicial review of that decision on the basis that it was denied procedural fairness and that the decision interferes with its rights under sections 2(a), 2(b) 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*].

[17] The Christian Legal Fellowship was granted leave to intervene in the application to make submissions on the constitutional principle of state neutrality pursuant to Rule 109 of the *Federal Courts Rules*, SOR/98-106 by order dated November 13, 2020.

### III. Issues

#### A. *Motions to strike and admit fresh evidence.*

[18] As a preliminary matter, prior to the hearing the Applicant moved to strike the affidavits of two sociologists submitted by the Respondent in support of its position on the *Charter* issues. These affidavits provided the deponents' opinions regarding the negative impacts caused by

employers who discriminate against LGBTQ2 persons in Canada. These opinions did not relate directly to the decision under review and much of the content had been taken from affidavits made by the deponents in other proceedings. On cross-examination, the deponents acknowledged that they had no knowledge of this matter other than the limited information provided to them by the Respondent's counsel.

[19] The Applicant also moved, four days before the hearing, to adduce fresh evidence under Rule 312 of the *Federal Courts Rules* relating to a CSJ decision made in respect of its application for funding in 2020. The 2020 decision, the Applicant submitted, was inconsistent with the 2019 decision and would assist the Court in determining whether the earlier decision was reasonable and in accord with the *Charter*.

[20] I heard argument on these motions at the outset of the hearing and ruled that I would not allow the fresh evidence regarding the 2020 decision. Judicial review of a decision is generally limited to the record before the decision maker, subject to certain exceptions, which did not in my view apply here: *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4. The Affidavit tendered relates to a different decision, a different year and was based on a different record.

[21] As for the affidavit evidence submitted by the Respondent, I expressed doubt that the opinions were relevant to the matter under review before me but reserved my decision to determine whether they were admissible at the conclusion of the argument and my consideration of the merits of the application. Their relevance, if any, was limited to the *Charter* issues and the



evidence could have been of assistance to the Court by providing context around the eligibility requirement at issue. In light of the decision I have reached, the affidavits have no bearing on the outcome.

B. *Substantive issues*

[22] The substantive issues raised by this application are:

- A. What is the appropriate standard of review?
- B. Did the Minister breach the rules of procedural fairness in making her decision?
- C. If the decision was procedurally fair, did the decision interfere with Redeemer University's rights under section 2(a), 2(b), and 2(d) of the *Charter*?
- D. If the decision interfered with Redeemer University's *Charter* rights, was the decision a proportionate balancing of Redeemer University's *Charter* interests with the objectives of the 2019 CSJ program?

[23] For reasons which I will provide below, I have concluded that this is not an appropriate case for the Court to address the *Charter* issues raised by the Applicant as the application can be dealt with on the ground of procedural fairness alone.

IV. **Analysis**

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

[24] The Applicant has urged me to apply the correctness standard to the issues it has raised invoking the *Charter*. Redeemer argues that while the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness was the presumptive standard of review of administrative decisions, the presumption can be rebutted where the rule of law requires it. In this instance, Redeemer submits, the rule of law requires that the correctness standard apply as the matter under review involves constitutional questions as well as general questions of law of central importance to the legal system as a whole.

[25] The Respondent contends that the appropriate standard of review in cases where the Court is reviewing whether a decision reflects a proportionate balancing of the *Charter* protections at play is reasonableness, as confirmed in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]. The Supreme Court has drawn a distinction between those cases in which the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Charter* (as in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter*.

[26] Contrary to what is alleged by the Applicant, this case does not raise any questions of general importance to the legal system as a whole.

[27] At its heart, the impugned decision concerns an administrative process to allocate funding to a select number of organizations from a much larger pool of applicants based on eligibility criteria set by the Minister. While the decision may engage the *Charter* interests of the Applicant, that is insufficient to elevate the issues in this case to a question of general importance to the legal system.

[28] As held by the Supreme Court in *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*Trinity Western*], discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out in *Doré: Vavilov* at para 57.

[29] The *Doré* framework requires this Court to (1) consider whether the administrative decision engages the *Charter* by limiting *Charter* protections; and (2) if that is the case, the Court considers whether, in assessing the impact on the relevant *Charter* protection in light of the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.

[30] 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 at para 50.

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

[31] As held by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The duty of fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected: *Baker* at para 22.

[32] Several factors are relevant to determining 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 of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself: *Baker* at paras 23-28.

[33] Underlying all the factors 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.

[34] The parties agree that procedural fairness 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.

[35] The Respondent submits that the Minister fully met her procedural fairness obligation because ESDC published clear criteria for the decision, notified the Applicant of its concerns and reiterated that Redeemer bore the onus of meeting the criteria, and provided a further chance to provide submissions. In the alternative, the Respondent contends that if procedural fairness was breached, the breach was minor and did not materially affect the result.

[36] In my view, contrary to what the Respondent contends, 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 Missing Information Letter indicates that the Minister believes that Redeemer University unlawfully discriminates or that the Minister takes issue with any of Redeemer University's policies.

[37] The Missing Information Letter simply seeks additional information or clarification on the practices implemented to provide a work environment that is safe, respectful and free from harassment and discrimination. It fails to disclose that the Minister had determined that Redeemer University had not implemented measures to provide a workplace free of harassment and discrimination because of information found on the Internet. In other words, the Applicant had no way to know the case it had to meet because the Missing Information Letter appears to

question the sufficiency of the information provided in the application, not the adequacy or application of Redeemer's policies themselves.

[38] Without this information, it was impossible for the Applicant to know that the Minister was seeking submissions on the adequacy or application of the Applicant's policies and to provide relevant evidence that spoke directly to the Minister's concern.

[39] As for whether those policies were adequate, the CTR discloses no attempt on the part of ESDC to reasonably assess the application based on the content of the application itself or the extrinsic evidence it collected. If the concern of the decision maker was that Redeemer discriminated based on sexual orientation, there was no contemporaneous evidence of that in the file. I note, for example, that the application expressly referenced LGBTQ2 youth as targeted for hiring by Redeemer but that information does not appear to have been brought to the attention of the Escalation Committee or the decision maker. There is no reference to it in the CTR other than in the application for funding itself. The extrinsic evidence relied upon by the program officer and referred to the Escalation Committee consisted of a few website pages from 2011-2012 and 2014-2015 and a more recent article in a magazine called Religion News, which contained one paragraph pertaining to Redeemer. And that paragraph indicated that the institution was reviewing its policies.

[40] What appears to have happened is that the ESDC program officer reviewing the application did a cursory search of the Internet for information about Redeemer's policies and practices, turned up a few pages about its faith-based approach to education and submitted them

to the Escalation Committee as evidence of Redeemer's ineligibility. The Missing Information Letter was not, in my view, a genuine attempt to seek clarification or further information from the Applicant as the letter did not address the real concerns held by the Respondent. Those concerns related to the undoubtedly sincere beliefs of the Applicant's community regarding the nature of marriage. Most importantly, the Respondent failed to give the Applicant an opportunity to demonstrate how those beliefs did not result in discriminatory practices. Sending the letter was simply going through the motions to appear to be fair, not an exercise in fairness itself.

[41] As a result, the Minister breached her procedural fairness obligation when she failed to provide the Applicant with notice of the case to be met and provide it with an opportunity to provide relevant evidence. I am satisfied, therefore, that the application must be granted on this ground.

### *C. The Charter issues*

[42] The Applicant submits that the decision interfered with its rights under sections 2(a), 2(b) and 2(d) of the *Charter* and the interference was not a proportionate balancing of Redeemer's *Charter* interests with the objectives of the 2019 CSJ program. Rather, the Applicant contends, the decision violated Redeemer's religious freedom and breached the principle of state neutrality in religious matters.

[43] At first impression, it appeared that the record might support a finding that the officials administering the CSJ program had discriminated against Redeemer. There is some support for such a finding in the fact that Redeemer was clearly identified as a potentially high-risk

candidate based solely on the cursory examination of a few web pages and a magazine article. Unfortunately, the Court does not have a clear understanding of what occurred thereafter and cannot speculate about what transpired in the Escalation Committee.

[44] While the Christian Legal Fellowship did not take a position on the merits of this case, in accordance with the terms of the order granting it Intervener status, it made submissions on the state neutrality principle.

[45] The Respondent submits that if the Court allows the application on procedural fairness grounds, it should not proceed to decide the Charter issues. The Respondent argues that the Court should exercise judicial restraint in keeping with the caution expressed by the Supreme Court of Canada in a number of cases.

[46] 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).



[47] I agree with the Respondent that the Court should avoid making pronouncements on *Charter* questions if it is not necessary to resolve an application for judicial review. The Respondent should take no comfort from this conclusion. There is no evidence in the limited record of the decision-making process that the Respondent made any overt attempt to consider Redeemer's rights to freedom of religion, freedom of expression or freedom of association in considering its application. Should it be established in another case that officials discriminated in administering funding programs against faith-based institutions because of the sincerely held religious beliefs of their community, a finding of a *Charter* violation may well result. Such institutions must be treated not just with procedural fairness but also with respect for their *Charter*-protected rights.

#### V. **Conclusion**

[48] As indicated above, I am satisfied that the Respondent breached procedural fairness in rejecting the Applicant's application for funding from the CSJ program in 2019. This stemmed from a cursory review of the application materials and some extrinsic evidence. There was no reasonable effort to obtain additional information or clarification about the concerns that led the Respondent to identify the application as "high-risk". For that reason, this application must be granted.

[49] There is no point in returning the matter for reconsideration as the 2019 program has expired. But a declaration must issue to record the fact that the decision breached procedural fairness and the Applicant shall be awarded its costs on a full indemnity basis.

**JUDGMENT IN T-916-19**

**THIS COURT ORDERS that:**

1. the application is granted with costs on a full indemnity basis; and
2. the Court declares that the Applicant was denied procedural fairness by the Respondent in the consideration of its 2019 application for a Canada Summer Jobs grant.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-916-19

**STYLE OF CAUSE:** REDEEMER UNIVERSITY COLLEGE v CANADA  
(MINISTER OF EMPLOYMENT, WORKFORCE  
DEVELOPMENT AND LABOUR) and CHRISTIAN  
LEGAL FELLOWSHIP

**PLACE OF HEARING:** HEARD VIA VIDEOCONFERENCE

**DATE OF HEARING:** APRIL 13, 2021

**ORDER AND REASONS:** MOSLEY J.

**DATED:** JUNE 29, 2021

**APPEARANCES:**

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