

Date: 20090331

Docket: T-447-09

Citation: 2009 FC 333

Toronto, Ontario, March 31, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CANADIAN ARAB FEDERATION (CAF)

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a last minute motion heard in Toronto on March 30th, 2009 for an interim injunction to set aside the decision of the Minister of Citizenship & Immigration (the Minister), communicated by letter to the applicant on March 18, 2009, advising them that the proposed new annual funding contract for the applicant's English language instruction class for newcomers to Canada was cancelled and would not be renewed beyond its March 31st termination date. Accordingly, the applicant requests that the Court render its decision by March 31st, i.e. today.

FACTS

[2] The applicant organization, the Canadian Arab Federation (CAF) was incorporated under the *Canada Corporations Act* on April 27, 1982. Its objectives include increasing and encouraging the coordination of Arab organizations in Canada; strengthening the identity of Arab societies, organizations and communities in Canada and in the Arab homeland; stimulating and providing relief efforts to alleviate suffering in Canada and the Arab homeland; engaging in other charitable efforts as determined by the organization's directors; and disseminating information about and encouraging support for Arab causes, and in particular the suffering of the Palestinian people, in Canada and in the Arab homeland.

[3] The applicant has operated a program called the Language Instruction for Newcomers to Canada (LINC) Program, instructing newcomers to Canada in English as a Second Language (ESL), for the past eleven years. The majority of newcomers accessing the program are not Arab, but Chinese. Funding for the program has been provided by Citizenship & Immigration Canada (CIC) under an annual funding contract worth approximately \$1 million.

[4] The funding contracts between the applicant and Citizenship & Immigration are signed annually or biannually. The current funding was meant to continue for two years but in 2008, CIC announced that it would continue for a third year into 2010. A contract for the 2009-2010 year was negotiated and approved. The applicant's national executive director and the project and program manager both believed that finalizing the details of this contract was a mere formality and that the funding for 2009-2010 was in place.

[5] In expectation of this funding, the applicant hired a number of individuals. The applicant states that without the funding, many of these positions would have to be eliminated or reduced to part time. The applicant states that the teachers in the program are not likely to lose their jobs, as the applicant has been advised that the program will be transferred to another agency; however the applicant has hired a number of individuals who work partly under the funding contract and partly under other contracts, including the administrator of the program, the IT support administrator, and the Outreach/Communications Coordinator. The applicant also leased a space and equipment and obtained insurance as a result of the funding.

[6] On March 18, 2009, the President of CAF, Mr. Khaled Moummar, received a letter from Mr. Rick Stewart, the Associate Assistant Deputy Minister of Operations at CIC, advising him that funding to CAF was being cancelled because of “serious concerns” about public statements made by Mr. Moummar and other CAF members that the letter characterized as promoting “hatred, anti-Semitism and support for the banned terrorist organizations Hamas and Hezbollah.” The letter stated that these public statements raised “serious questions about the integrity” of CAF and had “undermined the Government’s confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers.” The letter concluded:

Accordingly, we will be seeking to work with the CAF to wind down the Agreement and to ensure that there will be as little disruption as possible to the clients currently receiving services from the CAF under the LINC program...I hope that, given our mutual desire to do what is best for our clients, we can work together to make certain that the transition is as straightforward as possible. (Application Record, p. 123)

[7] The applicant denies that it, or any of its members, supports terrorism or anti-Semitism. The applicant states that the comments made by Mr. Moummar at a rally protesting ongoing Israeli attacks in Gaza were made in reference to the positions taken by politicians justifying these attacks. Mr. Moummar quoted an American professor, Norm Filkenstein, who described Prime Minister Harper and Mr. Ignatieff as “whores of war.” Mr. Moummar stated that this label should also apply to the Minister of Citizenship & Immigration, Jason Kenney and the junior Minister of Foreign Affairs, Peter Kent.

[8] Accordingly, the applicant suggests that calling the Minister Jason Kenney a “political whore of war for Israel” prompted Mr. Kenney to cancel the applicant’s annual \$1 million funding. The respondent disputes that this was the cause, and states that it was not the insult to the Minister *per se* but rather the “anti-Semitism” and “sympathy with terrorists” that caused Mr. Kenney to cancel the funding. At this early stage of the legal proceeding, the respondent has not produced evidence of any other statements or actions by the applicant that caused the Minister to cancel the applicant’s funding.

[9] The applicant states that its objectives include bridging the divide between Jewish and Arab communities and that it works with other communities to combat racism and hate crimes. Mr. Moummar and other members of CAF are critical of Israel because they support a Palestinian right to self-determination. The applicant states that criticism of Israel’s policies is not anti-Semitic. The applicant also states that both prior and following Mr. Moummar’s comments, CAF had been characterized by Minister Kenney as “anti-Semitic” on a number of occasions.

[10] The respondent admits that negotiations for a further agreement with the applicant for LINC services from April 1, 2009 to March 31, 2010 had been completed, and a draft contract had been completed. It appears from the preliminary evidence that the respondent had agreed that the contract would be renewed on April 1, 2009.

[11] The respondent, after deciding on March 18, 2009, not to extend the contract or enter into a new contract with the applicant, agreed to continue providing language instruction to the applicant's clients, take over the applicant's employment contracts with its 6 language instructors, 3 childminders, 1 coordinator and 1 administrative assistant, take over the applicant's existing lease where it delivers the LINC program, and cover any other expenses of the CAF with respect to the LINC program.

[12] As a result, at the hearing, the applicant listed the 4 remaining job titles of persons employed by the applicant whose salaries would have been paid in part by the new LINC contract as of April 1, 2009 in the following amounts:

1. the Executive Director - \$18,200;
2. the Bookkeeper - \$40,768;
3. the Central Communications/Outreach Officer - \$12,792; and
4. the IT Technical Support person - \$42,821.

The total of these lost salaries is \$114,581.

ISSUES

[13] The issue on this motion is whether the applicants have satisfied the tri-partite test for an interim injunction. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court the Court stated that an applicant must establish three principles in order to be granted an interim injunction:

1. that there is a serious issue to be tried;
2. that the applicants would suffer irreparable harm if a stay is not granted; and
3. that the balance of convenience favours granting the injunction.

Serious Issue

[14] The applicants submit that there are four serious issues raised in this application:

1. whether the Minister is prevented from cancelling or refusing to extend the LINC funding due to promissory estoppel or the legitimate expectations of the applicant or breach of oral contract to extend;
2. whether the Minister breached the duty of fairness in cancelling or refusing to extend funding without providing the applicant with a fair opportunity to respond to his concerns;
3. whether the Minister's decision is arbitrary and illegal in that it is essentially a sanction against the exercise of free expression by the president of CAF and other unnamed individuals; and
4. whether the Minister is biased or can reasonably be apprehended to be biased such that his decision cannot stand.

To obtain an interim injunction, it is only necessary to establish that the alleged serious issue is not frivolous – i.e. that it is a serious issue according to a low threshold of probability of success.

Legitimate Expectations

[15] The applicant cites *Mount Sinai Hospital Center v. Quebec*, 2001 SCC 41, 200 D.L.R. (4th) 193, wherein Supreme Court found that the Mount Sinai Hospital Center had a legitimate expectation that the Minister of Health and Social Services would issue a new permit because the Minister had previously stated it would be forthcoming. The Court stated at paragraph 30:

The doctrine of legitimate expectations is sometimes treated as a form of estoppel, but the weight of authority and principle suggests that an applicant who relies on the doctrine of legitimate expectations may show, but does not necessarily have to show, that he or she was aware of such conduct, or that it was relied on with detrimental results. This is because the focus is on promoting "regularity, predictability, and certainty in government's dealing with the public

Fairness

[16] In *Pelletier v. Canada (AG)*, 2005 FC 1545, 275 F.T.R. 108, a case involving the termination of the applicant's employment, Mr. Justice Simon Noël, found that the duty of fairness included an obligation to give the affected person a right to be heard.

[17] It is trite law that the respondent Minister, Mr. Jason Kenney, has the legal duty as either a Minister of the Crown or an administrator to act in accordance with the duty of fairness which is:

1. to advise the applicant that he intends to cancel the new proposed contract and provide the applicant with his reasons for doing so;
2. to provide the applicant with a full opportunity to respond, i.e. to tell the applicant's side of the story; and
3. to consider the applicant's response fairly before making his final decision.

The Court notes that counsel for the respondent made no representations against this legal obligation on the part of the respondent Mr. Kenney, and noted as an officer of the Court that the he could not disagree with this applicable principle of law.

[18] The Court finds that the evidence to date demonstrates that the respondent Minister did probably breach his legal duty to act fairly to the applicant. The Court would have expected the respondent to respect this elementary and fundamentally important principle and rule of law.

Freedom of Expression

[19] The applicant submits that the Minister's decision would have a chilling effect on free expression. The applicant cites the test set out by the Supreme Court in *Irwin Toy v. Quebec (A.G.)* (1989) 1 S.C.R. 927, which requires that the Court determine:

1. whether the activity of the litigant falls within the protected sphere of s. 2(b);
and
2. whether the purpose of the government action is to restrict freedom of expression.

Bias

[20] The applicant submits that the Minister can be reasonably apprehended to have been biased against CAF. The applicant has included, as Exhibit K of the Applicant's affidavit, a list of incidents demonstrating the Minister's bias towards CAF and his opinion that it is an "anti-Semitic organization."

[21] I am satisfied that the applicant has raised a serious issue with respect to the duty to act fairly. I do not need to decide for the purpose of this motion if the other issues also meet the low threshold for serious issue.

Irreparable Harm

[22] The applicant submits that it would suffer irreparable harm in two ways: first, it would lose its employees without the funding, and second, the application to judicially review the decision would be moot as the program would already be dismantled by the time the application came before this Court. The applicants state that these harms cannot be easily compensated in damages.

[23] In order to establish irreparable harm, an applicant must show that the harm caused could not later be compensated through damages. As I stated in *White v. E.B.F. Manufacturing Ltd.*, 2001 FCT 1133, 15 C.P.R. (4th) 505 at paragraph 13:

¶ 13 ... The second question is whether damages will provide the plaintiff with an adequate remedy. An interlocutory injunction is a discretionary and equitable remedy which will not be granted in the absence of the applicant showing irreparable harm. “Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured with damages....

[24] The applicant submits that the harm it would suffer if the funding was cancelled meets this test. As the Minister has committed to assisting with the transition and has stated that the LINC program would be transferred to another agency, it is clear that the program would not be “dismantled.” However, the applicant has also argued that it would have to terminate its employment of a number of employees who work in support of the LINC.

[25] The applicant has quantified the exact amounts it would lose under the 2009-2010 LINC contract – namely approximately \$114,000 as the portions of the salaries the LINC contract contributed to the salaries of the applicant’s four employees noted above in paragraph 12. This hard and clear evidence shows that the applicant’s damages can be quantified and cured with damages – which means they do not qualify as “irreparable harm”.

[26] If the applicant succeeds on this application for judicial review, it can sue the respondent Minister Kenney for damages for breach of contract or other causes of action.

[27] The applicant also claims that the cancellation of this contract will put the applicant out of business. The Court finds that the applicant has many other important aspects to its business which will continue without the LINC contract so that this does not constitute irreparable harm.

[28] The Court also finds that the cancellation of the LINC contract will not affect the right of the applicant and its officers to engage in legal free speech in Canada, so that this does not equate to irreparable harm. If, on judicial review, the Minister is found to have cancelled the applicant’s funding without due regard to fairness simply because the applicant disagreed with the Minister’s political positions, the applicant would be entitled to recover damages. There is not, therefore, a chilling effect on the applicant’s free speech if this interim injunction is not granted.

Balance of Convenience

[29] Since the Court has found no irreparable harm, in all of the circumstances the Court finds the balance of convenience favours the Minister.

CONCLUSION

[30] Does the Minister of Citizenship and Immigration have the right to cancel the contract with the Canadian Arab Federation for this ESL program for new Canadians because its president made public comments attacking the Minister's political positions and personal character? Is it appropriate for government to cancel the contract because the Canadian Arab Federation loudly protests the Israeli invasion of Palestine, and calls a Canadian cabinet minister a name for not opposing the Israeli invasion?

[31] Being a target of public criticism is part of holding political office. If the Minister decided to cancel the English as a Second Language funding contract for the Canadian Arab community simply because he was called a name in the heat of a political protest against the Israeli attacks in Gaza, his decision should not stand. It was not unexpected that the Arab community would be repulsed by Israel's invasion of Gaza. Naturally, the Arab community was upset that the Canadian government did not strongly protest this attack. Many reputable Canadian Jews were similarly opposed to Israel's attack on Gaza.

[32] However, the Court recognizes that Mr. Kenney alleges that the Canadian Arab Federation is racist, anti-Semitic, and a supporter of a terrorist organization and that it was for these reasons that he cancelled the contract, and not because he was called a name.

[33] Regardless of his reasons for cancelling the funding contract, the Minister clearly owes a duty to the Canadian Arab Federation to give them notice that he intends to cancel the contract, provide the reasons for cancelling the contract, and give the Canadian Arab Federation an opportunity to respond before making his decision. The Minister may have breached the duty of fairness in this regard. For that reason the Minister's decision may be set aside by the Court after a full hearing. This is a serious issue, an elementary principle of administrative law, and the Minister and his officials must act according to the law.

[34] In this case the Minister has made arrangements so that the CAF employees working exclusively on the LINC contract will continue to be employed and the LINC program will continue. Accordingly, the employees of the Canadian Arab Federation and the community that it serves will not suffer irreparable harm. As a result, the Court will not grant an interim injunction. At the same time, this application for judicial review of the Minister's decision can proceed and the Canadian Arab Federation may obtain a decision declaring that the Minister's decision was illegal. Following that, the Canadian Arab Federation may be entitled to commence an action for damages, but that is all in the future.

[35] On the other hand, at the full hearing of this application to set aside the decision of Minister Kenney, the Minister's evidence may satisfy the Court the applicant should not be extended funding for the reasons cited by Mr. Kenney, namely anti-Semitism, hate mongering and support of terrorism. The Court will decide this question after a full hearing of the evidence on both sides.

[36] For these reasons, this motion for an interim injunction must be dismissed.

ORDER

THIS COURT ORDERS that:

This motion for an interim injunction is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-447-09

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PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 30, 2009

**REASONS FOR ORDER
AND ORDER:** KELEN J.

DATED: March 31, 2009

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