Federal Court  Cour fédérale

Date: 20131223

Docket: T-447-09

Citation: 2013 FC 1283

Ottawa, Ontario, December 23, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CANADIAN ARAB FEDERATION (CAF)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Canadian Arab Federation [CAF] of a decision by The Minister of Citizenship and Immigration, then Jason Kenney [the Minister], not to enter into a funding agreement under the Language Instruction for Newcomers to Canada [LINC] program for the year 2009-2010. This decision was made by the Minister despite the fact that Citizenship and Immigration Canada [CIC] had previously entered into similar funding arrangements with CAF for many years; the most recent of which expired March 30, 2009, just days after the decision under review was made.

[2] The reasons for the Minister's decision are set out in a letter to CAF dated March 18, 2009, from the Associate Assistant Deputy Minister of CIC to Khaled Mouammar, President of CAF at that time:

> As you are also aware, serious concerns have arisen with respect to certain public statements that have been made by yourself or other officials of the CAF. These statements have included the promotion of hatred, anti-semitism [*sic*] and support for the banned terrorist organizations Hamas and Hezbollah.
>
> The objectionable nature of these public statements – in that they appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic – raises serious questions about the integrity of your organization and has undermined the Government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers.

Background

Nature of CAF

[3] CAF's objectives as set out in its Letters Patent, relate to advancing the interests of Arabs and Arab communities in Canada in various ways, including "[t]o promote ties and mutual understanding between Arab societies, organizations and communities in Canada and the Arab homeland … to provide assistance to new immigrants to Canada from the Arab homeland … [and] to disseminate information about and encourage support for Arab causes in Canada and the Arab homeland, particularly the cause of the suffering Palestinian people."

[4] CAF's operation had two branches: Settlement Services and Immigrant Support, and Community Engagement. Settlement Services and Immigrant Support was directed towards

assisting both Arab and non-Arab newcomers integrate into the community. Community Engagement was directed towards capacity building, advocacy, and community services.

[5] CAF delivered two main programs under its Settlement Services branch: LINC, which provided English as a second language training to newcomers, and Job Search Workshops [JSW]. Most of the newcomers attending these programs were originally from non-Arab countries. CAF received funding for both of these programs from CIC by way of contribution agreement arrangements.

CIC Contribution Agreements

[6] CIC contracted with CAF and others as private service provider organizations for the provision of settlement services to newcomers to Canada. The contracts provided for an amount of funding allocated to the service provider for reimbursable expenses. An expense unrelated to the LINC or JSW programs cannot be recovered from the funds earmarked in the contribution agreement. As was noted by the Minister in his memoranda, a party to a contribution agreement does not financially benefit from the agreement; however, there may be indirect benefits:

> None of the funds provided by Canada through the contribution agreement was [*sic*] intended to benefit the CAF. An organization may attain incidental advantages as a result of settlement funding; for example, there may be legitimacy attached to organizations who receive government funds and there may be an opportunity to share infrastructure costs with the settlement program. The full amount of the contribution agreement, however, is intended to directly benefit newcomers taking LINC classes.

[7] It is also relevant to this application and it is the Minister's position, that the LINC program offers newcomers more than just language training. The Minister points out that it is intended that

the program will also provide newcomers with an orientation to the Canadian way of life including "social, economic, cultural and political integration," and therefore the suitability of the program provider in this respect is critical. The CIC Application Package given to service providers sets out this facet of the program, as follows:

> By providing basic language instruction to adult newcomers in English or French, LINC facilitates the social, cultural[,] political and economic integration of immigrants and refugees into Canada. In addition, LINC curricula include information that helps newcomers become oriented to the Canadian way of life. This, in turn, helps them to become participating members of Canadian society as soon as possible.

[8] CAF had most recently negotiated a contribution agreement and signed a contract with CIC for the period April 1, 2007 to March 31, 2009. On December 2, 2008, CIC wrote to all parties in receipt of LINC funding at that time, informing them that a new settlement program would be forthcoming but its implementation was still underway. As a consequence, "CIC has decided to extend current LINC contribution agreements to March 31, 2010." Each service provider was asked to submit a budget application and propose revised activities to CIC, which application was subject to an approval process.

[9] In the information accompanying this request for applications for amendment, CIC cautioned CAF and other applicants not to assume approval for the 2009-2010 year, unless and until such approval was received in writing from CIC:

> Do not assume that your application for amendment is approved until you are notified in writing by CIC. Any expenditures incurred prior to the approved start-up date are your own responsibility and will not be reimbursed. We also ask you not to hire staff or make any commitments until you have been informed of CIC's approval. If your application is approved, it will then be used to amend your

> current Contribution Agreement between your organization and Citizenship and Immigration Canada.

[10] CAF submitted a proposal for 2009-2010 on December 9, 2008. On February 12, 2009, a settlement officer from CIC recommended its approval. He noted in that recommendation that "[t]he Canadian Arab Federation delivers a good quality LINC program" and that despite a request for an annual increase to salaries of 2.5%, the proposal for 2009-2010 was $50,000 less than the previous year. The settlement officer emailed an unexecuted final draft of the further agreement to CAF; however, given the value of the proposed contract, final approval was required by the Minister or his delegate.

[11] There is nothing in the record, nor was it submitted by CAF, that CIC ever represented that final approval had been given. In fact, even though contractual negotiations had been concluded and the proposal endorsed by a settlement officer, the proposal still had to be approved and endorsed by a review officer, the local manager, and the regional director before CIC National Headquarters and the Minister's office would be notified of it. If the regional director endorsed the proposal, he had authority to approve and execute the agreement at that stage; however, CAF's proposal never made it to this stage of the process. CAF's proposal had been approved by a settlement officer on February 12, 2009 and a review officer on February 16, 2009, but before it was sent to a local manager, CIC National Headquarters intervened and raised concerns about continuing to fund CAF.

Events Prior to Minister Kenney's Appointment as Minister of CIC

[12] Jason Kenney became the Minister of CIC, responsible for the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] on October 30, 2008. He was preceded in that office by Diane Finley. On August 7, 2008, Minister Finley issued a Press Release in which she stated that "[t]o help newcomers settle in the community of Scarborough in the City of Toronto, the Government is committing more than $10 million over the next two years (through to 2010) to six agencies that provide settlement services." The Press Release went on to list the "six agencies receiving the funding in today's announcement." CAF was one of the listed agencies, and was adjacent to the figure of $2,544,815.

[13] Mohamed Boudjenane, National Executive Director of CAF, attests in his affidavit that this announcement led CAF to believe that it was to be funded for 2009-2010 and the finalization of the details would be a mere formality:

> The funding was originally meant to continue for two years but in the second year, 2008, there was an announcement that it was to continue into a third year to 2010. The Minister of Citizenship and Immigration, Diane Finlay [*sic*], made a public announcement on August 7, 2008 to this effect… It was certainly the basis upon which CAF operated. Both myself and Sara Amash, the project and program manager for CAF were led to believe that the funding for 2009-2010 would continue as previously approved and that it was merely a formality to finalize the details of the contract for that year.

[14] In contrast, Lee Bartlett, Director of Operations for Settlement Services for the Toronto and York offices of CIC, attests in his affidavit, sworn September 22, 2009, that the breakdown of the $2,544,815 figure in the Minister's Press Release is made up of funding to CAF under both the LINC program and under the Immigration Settlement and Adaption Program [ISAP], as follows, none of which relates to LINC funding for 2009-2010:

	FY1 07/08	**FY2 08/09**	**FY3 09/10**	**TOTAL**
LINC	$1,045,782	$1,037,505	N/A	$2,083,287
ISAP	$ 130,804	$ 166,581	$164,179	$ 461,564

[15] The total of the funding in Mr. Bartlett's chart is $2,544,851 - $46 greater than the Minister's announced funding for CAF. Nevertheless, I find that the Press Release could not have led CAF to believe that it had secured LINC funding for 2009-2010, as is alleged by Mr. Boudjenane. The reference to funding for 2009-2010 in the Press Release referred to ISAP funding. Mr. Bartlett was cross-examined on his affidavit and his evidence was unshaken that the figure did not include 2009-2010 LINC funding because no decision had been made to extend previous LINC agreements, nor had any such announcement been made at the date of the Press Release:

> In August 2008, not even a negotiation or even a call for proposals around an extension or even decisions around how we would extend LINC for 2009/10 had been made or announced, and the LINC agreement that was in place at the time of August for CAF ran for 2007/08 and 2008/09, whereas the ISAP agreement for CAF ran 2007/08 to 2009/10, inclusive.
> …
>
> [T]he Minister would not make an announcement that agreements had been reached around funding until such an agreement had been put in place. …[I]t wouldn't have been possible for the Minister to have made an announcement around LINC for 2009/10 for CAF if we hadn't even – or CIC, sorry, hadn't even at that point set out the process for entering into further agreements, and equally hadn't received any proposal from CAF at that point in relation to the amounts that it would seek for LINC in 2009/10 for further agreements.

The Minister's Position on Government Funding

[16] Alykhan Velshi, the Minister's Communications Director, attests in his affidavit, that since he began working for the Minister in 2007 (the Minister at that time was the Secretary of State for Multiculturalism), the Minister has held the view that the Crown should not be funding certain organizations:

> [W]hile private citizens and organisations are free to express their opinions, no individual or organisation is entitled to a financial subsidy from taxpayers. To that end, groups that promote hatred, including anti-Semitism, or excuse terrorism and violence should not receive any official recognition or subsidy from the state.

[17] Mr. Velshi points to a number of public statements by the Minister in support of this assertion. For example, on February 17, 2009, at a conference in London, England, the Minister gave a speech in which he made the following statement:

> There are organisations in Canada, as in Britain, that receive their share of media attention and public notoriety, but who, at the same time as expressing hateful sentiments, expect to be treated as respectable interlocutors in the public discourse.
>
> …
>
> I think as well of the leader of the Canadian Arab Federation, who notoriously circulated an e-mail when my colleague, our shadow Foreign Minister, Bob Rae, was running for the leadership of his party, calling on people to vote against Mr. Rae because of Arlene Perly Rae's involvement in Canada's Jewish Community. The same individual, the same organisation, the Canadian Arab Federation, just last week circulated – including to all parliamentarians – videos which include propaganda, including the inculcation to hatred, of children by organisations such as Hamas and Islamic Jihad.
>
> <u>These and other organisations are free within the confines of our law and consistent with our traditions of freedom of expression, to speak their mind, but they should not expect to receive resources from the state, support from taxpayers or any other form of official respect from the government or the organs of our State</u>. [emphasis added]

[18] A week later, on February 24, 2009, during Question Period, the Minister was asked about funding for certain organizations. The Member asking the question stated that "the Canadian Arab Federation recently circulated videos from banned terrorist organizations, such as Hamas and Islamic Jihad, called Israel a 'racist state', and attacked a member of the House because of his wife's involvement in the Jewish community." He then asked: "What is the government's position on whether such groups should receive taxpayer support?" The Minister responded: "[T]he Government of Canada should take a zero tolerance approach to organizations that make excuses for terrorism, for violence, for hatred and for anti-Semitism. … From our point of view, these groups do not deserve and have no right to taxpayers' dollars to promote their kind of extremism." The Minister expressed similar sentiments during radio interviews he gave on March 2, 2009, and March 6, 2009.

[19] On March 10, 2009, at the Standing Committee on Citizenship and Immigration, the Minister outlined his reason for refusing to extend funding to CAF for 2009-2010:

> The very first day I arrived at Canadian Heritage as the secretary of state responsible for the multiculturalism program, I received a briefing on grants and contributions. I indicated to the officials that I wanted to ensure that we were not providing grants and contributions to organizations that make excuses for, or apologize for, violence or terrorism, or organizations that are terrorist or that promote hatred. I mentioned, in particular, Mr. Mohamed Elmasry of the Canadian Islamic Congress because of his remarks that Israelis over the age of 18 are legitimate targets for elimination.
>
> I further mentioned, in particular, Mr. Khaled Mouammar, president of the Canadian Arab Federation - this was a discussion I had with my officials in January 2007 - because of his circulation, during the 2006 Liberal leadership convention, of a flyer that attacked Bob Rae, a respected member of this Parliament, because of his wife's involvement in the Jewish community. Following the circulation of

> that flyer, Liberal Senator Yoine Goldstein referred to this flyer as "racist filth". It was my view then, and it's remained my view since, that we ought not to finance organizations that promote extremism or hatred - in this case, hatred toward Jewish people in particular - or who publicly support a banned, illegal terrorist organization.
>
> Mr. Mouammar has a long record of public comments expressing support for Hamas and Hezbollah, which are two banned, illegal, and essentially anti-Semitic terrorist organizations. He has referred to Israel as a racist state and he has called for the end of Israel as a Jewish state. In my judgment, these and other comments of his are beyond the pale.
>
> Do I suggest that we should have a test on political opinions for the office-holders of NGOs that receive grants and contributions? No, absolutely not. People are free to say what they like within the bounds of our laws. People are free to criticize cabinet ministers or the government. But I do not believe we have any obligation to provide subsidies to individuals who use their organizations as platforms to promote extremism or hatred or to apologize for terrorism.
>
> That's the view I articulated in January 2007 at Canadian Heritage. As a result, we provided no funding to these organizations. That's also the view I articulated recently at the London conference on anti-Semitism. I have also articulated this to my officials. I have asked my department to find ways in which we can include the promotion of hatred or apologizing for terrorism as some of the criteria used in considering applicants for grants or contributions.

The Minister's View of CAF

[20] The Minister was clearly aware of CAF before he became Minister of CIC; however, he only became aware that CIC was funding CAF on February 2, 2009. Upon the Minister becoming aware, he emailed his Chief of Staff expressing his position on CAF and the funding agreement, as follows:

> … I am unclear who in our office has the lead on settlement funding.
>
> In any event, please ask the Dept to bring forward complete information on the contribution embarrassingly approved by our

> government for the radical and anti-semitic [*sic*] Canadian Arab Federation
>
> This is the same group whose President attacked Bob Rae because his wife is jewish [*sic*], and who now is calling me a "professional prostitute" (I guess that's better than being an amateur!)
>
> I would like to know the status of their contribution agreement with CIC to see if they are in breach in any possible respect. I want to pursue all legal means to terminate this shameful funding arrangement, and to ensure that it is not renewed. [internet references omitted]

[21] The decision under review does not set out the specific conduct or events that the Minister took into consideration in reaching his decision not to fund CAF. Alykhan Velshi, the Minister's Communications Director, testified that the statements relied on to reach the conclusion that CAF's statements "have included the promotion of hatred, anti-semitism [*sic*] and support of the banned terrorist organizations Hamas and Hezbollah," included the following six matters.

1. <u>The Bob Rae Flyer</u>

[22] In 2006, during the Liberal Party Leadership Convention, CAF's President, Khaled Mouammar, using his personal email account, forwarded a leaflet that attacked Bob Rae and his wife for involvement in the Jewish community. The flyer was originally produced and emailed by a man who was not associated with CAF. The flyer contains the following text over a picture of Bob Rae:

> Bob Rae was a keynote speaker for the [Jewish National Fund of Canada], a group shown by Israeli scholars to be complicit in war crimes and ethnic cleaning.
>
> Rae's wife is a Vice President of the [Canadian Jewish Congress], a lobby group which supports Israeli Apartheid and Israel's illegal Apartheid Wall.

President Carter has condemned Israeli Apartheid.

Bob Rae supports Israeli Apartheid.

Don't elect a leader who supports Apartheid!

[23] The distribution of the Bob Rae Flyer to delegates was reported by Canadian Press: "Bob Rae was the target of anti-Semitic attacks during the Liberal leadership contest, motivated at least in part by the fact that his wife is Jewish." When contacted by Canadian Press, CAF denied producing or distributing the flyer but later issued a press release stating: "CAF believes that Canadians have a right to know the factual information provided" in the flyer.

[24] Mr. Velshi testified that the Bob Rae Flyer formed part of the basis for the Minister's decision as it attacked Mr. Rae because of his wife's involvement in the Jewish community, and specifically the Canadian Jewish Congress. In Mr. Velshi's view, the Bob Rae Flyer was anti-Semitic and thus a form of hatred.

2. Rallies in January 2009

[25] In January 2009, CAF in conjunction with other organizations, organized several rallies where some protestors (who were not related to CAF) held offensive placards and shouted repugnant slogans. Some participants were seen holding signs equating Israelis to Nazis, some were screaming vulgarities like "Jewish child, you are going to fucking die. Hamas is coming for you. Fuck off." Hezbollah flags were flying in the background, and some signs likened Zionism to Nazism and terrorism.

[26] It was during one of these rallies that Mr. Mouammar described the Minister, among others, as a professional whore of war:

> We have politicians who are professional whores who support the war [i.e. the Israel-Palestine conflict] as Norman Finkelstein said at that lecture at the University of Toronto. These are, these are people like Peter Kent across the street, like Jason Kenney, like Michael Ignatieff, who only had to say while Israel was murdering women and children with phosphorous bombs burning their fleshes, the only thing these, these, professional politicians; who are whores, whores of war, the only thing they had to say was that Israel had the right to defend itself by killing women and children with phosphorous bombs.

The Minister denies that this derogatory name calling triggered or played a part in his decision. Given that he had made statements regarding government funding to CAF as early as 2007, there is no reason to question his assertion.

3. The 2007 Cairo Conference

[27] Ali Mullah, Vice President of CAF at the time, attended the Cairo Conference, which described itself as an "international peace conference." It was attended by many people with different backgrounds, including some Jewish participants. The conference was also attended by delegates from Hamas, Hezbollah, Jemaah Islamiyya, and the Palestine Liberation Front - four organizations on Canada's list of terrorist organizations. Although it was reported that CAF had sent Mr. Mullah as its delegate, it was later confirmed that he attended in his personal capacity, and not as a representative of CAF.

4. Distribution of Links from Terrorist Organizations

[28] On February 2, 2009, the Minister became aware that CAF, in its Daily Gaza Bulletin and its webpage, had links to web sites that featured videos with images of Hamas operatives

undergoing training and which depicted flags of Hamas and Islamic Jihad. CAF asserts that it never endorsed the contents of the videos in the links it posted and transmitted; rather it simply directed readers to facts so that they could form their own opinions on the issues.

5. Honouring Zafar Bangash

[29] CAF, at its 40th Anniversary Gala, honoured Zafar Bangash, who is otherwise not affiliated with CAF. Mr. Bangash has referred to Canadians as "infidels or non-believers" in the past and reported on the September 11 attacks in a way that was unsympathetic to the victims.

6. Essay Contest

[30] CAF sponsored an essay contest (with two other organizations) on the "ethnic cleansing" of Palestine. The timing of this contest coincided with the 60th anniversary of the establishment of Israel as a state. The Minister contends that the use of the term "ethnic cleansing" assumes that Jewish people are engaged in genocide and constitutes anti-Semitism.

[31] Collectively, these six incidents formed the basis for the Minister's decision.

CAF Requests to Meet with the Minister

[32] On March 2, 2009, the President of CAF wrote to the Minister requesting a meeting:

> It is important that CAF's working relationship with you and the Ministry of Immigration is based upon mutual respect and proactive outreach on both sides to the benefit of Arab Canadian communities on the whole. CAF is therefore requesting a meeting with you in the presence of other concerned Arab Canadians. This meeting will be a great opportunity to enhance and strengthen our working relationship.

The Minister did not respond.

[33] The letter does not indicate why it was sent at that time; however, it is noteworthy that it was sent two weeks following the Minister's speech in London where he said, with reference to CAF and others, that while they are at liberty to engage in free speech within the law, "they should not expect to receive resources from the state, support from taxpayers or any other form of official respect from the government or the organs of our state."

[34] It is against this backdrop that the following issues arise.

Issues

[35] The six issues raised by CAF in its written memorandum can be collapsed and addressed within a discussion of the following four questions:

a. Did the Minister owe CAF a duty of procedural fairness, and if so, was it breached?

b. Is the Minister's decision not to enter into a funding agreement with CAF under the LINC program tainted by a reasonable apprehension of bias?

c. Was CAF's section 2(b) *Charter* right to freedom of expression engaged, and if so, was that right infringed, and, was the infringement justified?

d. Was the Minister's decision reasonable?

1. Did the Minister owe CAF a duty of procedural fairness?

[36] CAF submits that the Minister owed it a duty of fairness because:

1. A duty of fairness is imposed on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: *Cardinal v Kent Institution*, [1985] 2 SCR 643 at 653 [*Cardinal*];
2. CAF had received funding for the LINC program without any issues for twelve consecutive years;
3. CAF had a legitimate expectation that funding would be renewed because of its history with CIC and because the contract for 2009-2010 had been negotiated and was awaiting final approval; and
4. Final approval had historically been a formality after the contract's terms had been negotiated and the Minister rarely intervened at any stage.

[37] The Minister submits that no duty of fairness was owed to CAF because:

1. The relationship between CAF and CIC was purely contractual in nature and no duty of fairness is owed by the government when it is exercising its contractual rights in the same manner as an ordinary citizen: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 103-104, [2008] 1 SCR 190 [*Dunsmuir*];
2. The funding period under the last executed agreement between CIC and CAF for the provision of LINC services expired on March 31, 2009, no new agreement had been executed, and CAF was specifically advised that approval could not be taken for granted; and

3. There is no obligation on CIC to enter into a new agreement with any party, or to renew an existing agreement that is set to expire, merely because it is a government institution.

[38] The following provides the reasons for my conclusion that the Minister did not owe a duty of procedural fairness to CAF. In summary, it is because the nature of the relationship was strictly commercial. There is no statutory provision that imposes procedural fairness obligations in relation to contribution agreements, nor is there any contractual provision set out in the call for proposals or the contribution agreements themselves that stipulates that service provider organizations will be treated in a procedurally fair manner. Finally, according procedural rights in what is essentially a strictly commercial context would unduly burden the Minister, particularly where the window for making a decision is short and there are greater public policy considerations which the Minister must weigh. In such a context, the parties' rights are best protected by a reviewing court's assessment of the reasonableness of the decision, not by extending procedural rights where none would otherwise exist.

[39] When determining whether a duty of procedural fairness applies to the decision under review, one must first determine the nature of the relationship between the affected person and the public authority.

[40] In *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 669, the Supreme Court, relying upon the decision of Justice LeDain in *Cardinal* at 653, stated that whether the duty of fairness exists will be dependant upon "the consideration of three factors: (i) the nature of the

decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights."

[41] In *Dunsmuir* at para 114, the Supreme Court noted an exception to this broad statement of principle [the *Dunsmuir* exception]. *Dunsmuir* involved the dismissal of an employee from his employment with the province:

> The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.
> [emphasis added]

[42] CAF submits that the *Dunsmuir* exception does not apply to the relationship between CAF and CIC. CAF relies on the Supreme Court of Canada's decision in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*] for the proposition that the *Dunsmuir* exception to the duty of fairness was intended to be narrow and specific to the employment context and therefore does not apply to this case. In particular, the Supreme Court in *Mavi* held, at para 51, that:

> The situation here does not come close to the rather narrow *Dunsmuir* employment contract exception from the obligation of procedural fairness. As the *Dunsmuir* majority itself emphasized:
>
> > This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law. [Emphasis added; para. 82.]

> *Dunsmuir* was not intended to and did not otherwise diminish the requirements of procedural fairness in the exercise of administrative authority. [emphasis in original]

[43] In my view, the *Dunsmuir* exception is not as narrow as CAF submits. I find support for this view in the decision of the Federal Court of Appeal in *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116, [2010] 2 FCR 488 [*Irving Shipbuilding*], wherein Justice Evans for the Court and with reference to *Dunsmuir*, stated at para 60 that the broader point made in that case "is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract." I also agree with Justice Evans' statement at para 45 that "[t]he 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."

[44] In *Mavi*, unlike in *Irving Shipbuilding*, while the parties' relationship was governed by a contract, it was also inextricably rooted in statute, as was noted by the Court at para 2:

> The present proceedings were initiated by eight sponsors who denied liability under their undertakings. As will be explained, the undertakings are valid contracts but they are also structured, controlled and supplemented by federal legislation. The debts created thereby are not only contractual but statutory, and as such their enforcement is not exclusively governed by the private law of contract. The issue raised by this appeal is the extent to which, if at all, the government is constrained by considerations of procedural fairness in making enforcement decisions in relation to these statutory debts. [emphasis added]

In my view, the fact that the contracts were grounded and rooted in statute distinguishes *Mavi* from *Irving Shipbuilding* and from this case. The undertakings in *Mavi* were not of a strictly contractual nature. In fact, the Supreme Court in *Mavi* distinguished *Dunsmuir* on this basis, stating at para 47:

> The Attorneys General resist the application of a duty of procedural fairness in part on a theory that the claims against the sponsors are essentially contractual in nature. *Dunsmuir*, they say, stands for the proposition that procedural fairness does not apply to situations governed by contract. However, in this case, unlike *Dunsmuir*, the governments' cause of action is essentially statutory.
> [emphasis added]

[45] Unlike in *Mavi*, one cannot say that the relationship of the parties in this case is "structured, controlled and supplemented by federal legislation," or that the cause of action is essentially statutory. The Settlement Manual—a guidebook given to settlement officers for evaluating applications for funding—states that "[w]ith the establishment of the Department of Citizenship and Immigration in 1950, the federal government made provisions in its Annual Estimates for payments to not-for-profit organizations in order to provide settlement services to immigrants in Canada." These settlement programs fall within the *Act's* objectives in section 3, most particularly the objective "to promote the successful integration of permanent residents into Canada." The parties have not pointed to any other statutory provision relevant to LINC funding. Accordingly, there is no statutory provision governing procedural fairness in relation to the possible extension of the term of an existing contribution agreement.

[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.

[48] CAF points out that there was nothing in the document package to indicate that organizations that were considered by the Minister to be anti-Semitic or supporters of terrorism would not be granted a contract extension. Equally there was nothing in the package that indicated that approval by the Minister would be automatic even if his officials were otherwise satisfied with the proposal.

[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.

Implied Duty of Fairness

[50] The question remains whether there is any implied duty of procedural fairness. I find that there is no implied duty in this case for many of the reasons the Court found that there was no implied duty of fairness in *Irving Shipbuilding*.

[51] First, this is essentially a commercial relationship, notwithstanding the fact that the service provider makes no profit from the agreement. As Justice Evans stated at para 46 of *Irving Shipbuilding*: "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."

[52] Second, if CAF is awarded procedural rights in this context, it would open the door to every failed applicant for a contribution agreement being entitled to at least notification that their proposal was not going to be accepted and an opportunity to address the reasons why. Such an obligation on the Minister would unduly delay his decisions in a process when, as in this case, the time for a decision is short. Further, it opens the door to what Justice Evans called a "cascading array of potential procedural rights-holders." Where there are more persons seeking funding than funds available, any change in decision by the Minister leads automatically to a subsequent failed

applicant. If procedural fairness is extended to the initial failed applicant, the same safeguards must be extended to the subsequent failed applicants.

[53] Third, as was submitted by the Minister, a decision on funding settlement programs for newcomers to Canada involves broader public policy considerations; there is more at stake than just the relationship between the service provider and CIC. Those who enrol in the LINC program are to be orientated to the Canadian way of life and therefore the suitability of the program provider is critical. The question of whether a particular organization is best suited to act as a beacon of Canadian values in the provision of settlement services (even when its second-language training program is otherwise fully acceptable), is not something subject to judicial review on procedural grounds. The Applicant's interests - to the extent that they have interests at all - are protected from capricious decision-making under the reasonableness standard, not by affording it procedural fairness.

[54] Even if the nature of the relationship between CIC and CAF was other than that of a commercial contract, and even if the *Dunsmuir* exception was read to apply as narrowly as CAF submits, I nevertheless would have found that CAF does not have a right, privilege, or interest that is affected by the decision sufficient to impose a duty of fairness on the Minister.

[55] The Supreme Court held in *Cardinal* that a duty of fairness is imposed on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. This language was tracked in the Supreme Court's decision in *Knight*, when it stated that the effect of the decision on the individual's rights is a

factor to be considered when determining whether a duty of fairness applies. In *Wells v Newfoundland*, [1999] 3 SCR 199 [*Wells*], the Supreme Court again reaffirmed the concept that a right, interest, or privilege must be engaged before a duty of fairness will be imposed, when at 224, it said that "[t]here is no vested interest at stake causing a duty of fairness to arise (*Knight*, supra). The respondent did not show any basis on which he could have formed a reasonable expectation to be consulted in the process."

[56] Although the Court's comments in *Wells* were directed towards the issue of procedural fairness in the context of reappointment of a public official following lawful termination, the message is still instructive—there must be some valid interest that stands to be affected by the decision for there to be a duty of fairness owed. Here, CAF (or any other service provider organization for that matter) does not have a right to LINC funding. While the Minister conceded that there may be indirect benefits to CAF as a result of the contribution agreements such as increased legitimacy of the organization as a result of its contractual relationship with the government, or the sharing of infrastructure costs with CAF's other operations, I find that these are not sufficient privileges or interests so as to engage an obligation of fairness.

[57] If the added legitimacy resulting from the very act of contracting with the government is a sufficient interest to impose procedural fairness obligations, virtually every party that contracts with the government in any fashion will suddenly acquire procedural rights. Furthermore, part of the reason that the Minister decided not to continue to fund CAF was because he did not think it was appropriate for the government to appear to support, endorse, or legitimize an organization that might be viewed as anti-Semitic or that might support terrorism.

[58] The sharing of infrastructure costs is similarly not a sufficient interest to impose an overarching duty of fairness on the Minister. In this case, the actual financial benefit to CAF cannot be significant—it was already renting a separate building for its other operations and the majority of the LINC staff played no additional role in CAF's other operations. Furthermore, funding for the LINC program was provided on a cost-recovery basis for recoverable expenses related to the LINC program only. This effectively limited the extent to which costs unrelated to the program could be reimbursed. On the other hand, as I have already indicated, imposing a duty of fairness on the Minister would significantly constrain his ability to expeditiously make broad, policy-based decisions. Any incidental interest CAF may have had was heavily outweighed by the public's interest in a Minister with the discretion to make decisions swiftly, instead of one who is paralyzed by procedure.

[59] For these reasons, I find that CAF was not entitled to procedural fairness in the Minister's decision not to accept their proposal and extend the term of its contribution agreement with CIC under the LINC Program.

Content of the Duty of Fairness

[60] Had I found that it was entitled to procedural fairness, I would have found that this case attracts no more than minimal procedural protections and that those requirements were met. The five factors set out in *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, which the Court is to consider when determining what procedural rights the duty of fairness requires in a particular context, all point to such a conclusion.

[61] The decision not to approve an extension of CAF's LINC funding is not close to judicial decision-making. It is discretionary and purely administrative. Although there is no appeal from such a decision, there is no impediment to CAF applying in the future for funding and this, in my view, points to a lower duty of fairness.

[62] Despite the fact that LINC funding comprised roughly 74 percent of CAF's annual budget, the LINC funding was not critical to CAF's operations as the provision of LINC training was not within its main mandate nor did the contribution agreements generate income for CAF's activities as funding was provided on a cost recovery flow-through basis. CAF had no legitimate expectation that the contract extension would be provided. In fact, it was aware from the Minister's statements that funding was in jeopardy. Further, CAF had no legitimate expectations in the process - on the contrary, CAF was explicitly told not to expect approval until it was notified in writing and similarly, not to incur any expenses or hire any staff until final approval was received. Despite approval appearing to be a formality in years past, it does not change the fact that the Minister always had ultimate discretion.

[63] Lastly, the choice of procedure used by CIC and the requirement of the Minister's approval given the value of the contract, are left to the Minister. All of these factors indicate that minimal procedural protections would have been appropriate in this case.

[64] Had it been entitled to fairness, in my view, the following are the procedural rights CAF would have been entitled to receive: (1) to know the reasons why the Minister did not approve its

proposal, (2) to know the Minister's concerns regarding it and the fact that those concerns could lead to it not being approved for future funding, and (3) to be given an opportunity to respond to those concerns.

[65] Here, a letter was provided to CAF outlining the Minister's reasons for his decision. The Minister submits that the other two elements are also satisfied. He says that CAF was aware of his concerns and it had the opportunity to respond to them. The notification and response, he says, were the numerous public statements he and CAF officials made.

[66] The Minister made many public statements detailing the specific statements and activities of CAF that he says he considered when making the decision. He also made it clear that CAF's LINC funding was in jeopardy as a result of those statements and activities. Further, CAF was aware of the Minister's specific concerns, it addressed them, and offered its response in various statements and press releases. In a radio interview on February 17, 2009, nearly a month before the decision, the interviewer put directly to Mr. Mouammar that the Minister was "poised to slash federal funding to Canada's largest Arabic group" because "groups whose leaders say intolerant or hateful things should not get taxpayers' funding." Mr. Mouammar responded:

> It does not belong to Jason Kenny [*sic*], and it's up to Canadian taxpayers to decide who gets this money to provide such settlement services, not Jason Kenny [*sic*]. His approach is really a fascist approach. He is threatening people that you cannot criticize government policies, and if you do, you are therefore banned from receiving funding from settlement services, which are not under his jurisdiction, because as I said, this is taxpayers' money.

[67] No authority was provided for the proposition that public statements provide notice of the sort required to satisfy the duty of procedural fairness. However, I can see no principled basis to reject the adequacy of notice through public statements provided they are sufficiently detailed, the receiving party is made aware of them, and the receiving party provides a response. In this case, I find all of the requirements were satisfied and the notice was adequate.

[68] I cannot see how the fairness of the decision-making process would have been enhanced had the Minister sent a formal notice to CAF detailing the very statements and concerns he had publicly expressed, and given it an opportunity to respond. The function of notice had clearly been served as evidenced by Mr. Mouammar's response during the February 17, 2009 interview. Further, it is not suggested by CAF that it could have or would have offered a response that differed from the public response it had given.

[69] In my view, CAF was aware of the Minister's concerns and the possible result. CAF responded publicly to those concerns. The Minister had CAF's public responses before him when he made his decision. The three elements required by the duty of fairness were therefore satisfied in these unique circumstances. Had I found otherwise, on these facts, I would have found the breach to have been a technical, inconsequential breach, and the result unlikely to have been different in light of the parties' public discourse. For those reasons, I would not have exercised my discretion to award CAF a remedy.

2. Was the Minister's Decision Tainted by a Reasonable Apprehension of Bias?

[70] Regardless of whatever else the duty of fairness may require in terms of procedural protections, where fairness applies, the decision maker must in all cases be impartial and free from a reasonable apprehension of bias. Because I have found that no duty of fairness applied here, I need not explore whether the decision was tainted by a reasonable apprehension of bias. However, should a reviewing court determine that fairness did apply, I shall provide my assessment of CAF's allegations of bias.

[71] The test to be applied in determining whether an administrative decision-maker is biased will vary depending on the nature of the decision-making body: *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities*, [1992] 1 SCR 623 at 637-640 [*Newfoundland Telephone*].

[72] The Ontario Court of Appeal in *Davis v Guelph (City)*, 2011 ONCA 761 at para 71, 345 DLR (4th) 1, summarized how to determine the appropriate test for bias:

> At the adjudicative end of the spectrum, the traditional "reasonable apprehension of bias" test will apply in full force. At the other end of the spectrum, however - where the nature of the decision is more of an administrative, policy or legislative nature - the courts have held that a more lenient test, known as the "closed mind" test is applicable. [references omitted]

[73] Additionally, the Supreme Court of Canada stated in *Imperial Oil Ltd v Quebec (Minister of the Environment)*, [2003] 2 SCR 624 at 646-647 that:

> The appellant's reasoning thus treats the Minister, for all intents and purposes, like a member of the judiciary, whose personal interest in a case would make him apparently biased in the eyes of an objective and properly informed third party. This line of argument overlooks the contextual nature of the content of the duty of impartiality which,

> like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions. [emphasis added]

[74] CAF submits, without analysis, that the appropriate standard is a reasonable apprehension of bias and not the closed mind test. The Minister says that this was a policy driven decision - he exercised a broad discretion, weighed competing interests, and made a decision respecting a commercial relationship - and therefore the higher standard of a closed mind is appropriate.

[75] I agree with the Minister that the closed mind test is the appropriate standard by which to judge his decision because the Minister is a democratically elected official and this particular decision comes in the context of the administration of the *Act*. The question to be asked is whether the Minister had prejudged the matter "to the extent that any representations at variance with the view, which has been adopted, would be futile:" *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1197. For the following reasons, I find that the Minister's mind was closed.

[76] The Minister says that he did not make up his mind until March 18, 2010, and he was impartial when he rendered his decision. The Court was pointed to comments he made in numerous radio interviews leading up to the decision, including the following:

a. In an interview on March 2, 2009 the Minister made clear to the host that he had not yet made a decision; and
b. The Minister stated in an interview on March 14, 2009 that if the character of CAF were to change and there was to be new leadership that was more in keeping with Canadian

> values, he would be "…entirely comfortable with [CAF] being a service delivery partner."

[77] The Minister submits that while he expressed strong opinions prior to the decision, these statements did not indicate that his position could not be dislodged. He reminds the Court that in *Newfoundland Telephone*, the Supreme Court of Canada stated at 639 that "a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing."

[78] However, the Minister's public statements are only part of the evidence that must be examined to determine whether he had a closed mind regarding CAF. Private statements are often more indicative of a person's true state of mind, than public statements. This may be especially true of political figures.

[79] I agree with CAF that particularly telling is the Minister's February 2, 2009 email in which he requests "information on the contribution agreement embarrassingly approved by our government for the radical and anti-semitic [*sic*] Canadian Arab Federation." He goes on to say that he wants "to pursue all legal means to terminate this shameful funding arrangement, and to ensure that it is not renewed." [emphasis added]

[80] Any reasonable person reading this would conclude that the Minister had made up his mind about the issue of future funding for CAF; his only interest was in pursuing the means to reach his end goal of terminating the relationship CIC had with CAF.

[81] I conclude, despite the Minister's public statements and assertions to the contrary, that his private actions revealed that he would not truly consider CAF's submissions - that any efforts by CAF short of changing its leadership were futile. His mind was closed.

3. Was CAF's Freedom of Expression Infringed?

[82] There is no doubt, and it was undisputed by the Minister, that CAF's advocacy activities are protected expression. Additionally, the expression surrounding the LINC program is also protected. Nevertheless, I find that CAF's freedom of expression was not infringed.

[83] The Supreme Court of Canada in *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 [*Baier*], set out how one determines whether a right claimed is a positive entitlement to a particular platform or benefit, or a negative right to be free from government restraint. The claim is a positive entitlement claim if the government has to legislate or otherwise act to support or enable an expressive activity; the claim is a negative rights claim if what is being sought is freedom from government restriction on activity that people would otherwise be free to engage without any need for government support or enablement.

[84] CAF contends that by cancelling its LINC funding, the Minister restricted its expression surrounding the Israel-Palestine conflict and therefore, that this is a standard negative rights freedom of expression claim. CAF is asking that the Minister be restrained from restricting expression in which it would otherwise be free to engage. The Minister contends that this is a positive rights

claim because CAF is seeking positive entitlement to funds for its LINC program and by extension, its expression.

[85] I agree with the Minister that this is a positive rights claim for three reasons.

[86] First, only the expression through the LINC program is engaged by the decision to cut funding. There is no link between the discontinuation of funding for LINC training and CAF continuing its advocacy surrounding the Israel-Palestine conflict. The funding provided by the contribution agreement was intended only for expenses related to the LINC program, and for no other purpose. CAF was reimbursed only for eligible costs actually incurred in carrying out the services during the term of the contract - the funds were not provided to be used at CAF's discretion. It is notable that CAF's LINC contract was not terminated as a consequence of its speech, it was merely not extended. Further, CAF's other contribution agreement for ISAP continued. In addition, the LINC program was run by CAF's Settlement Services branch which is entirely separate from its advocacy branch. The two were essentially wholly independent, even operating out of entirely separate geographic locations. These factors demonstrate the separation between CAF's LINC operation and its advocacy operation.

[87] Second, the LINC program is a platform that the government created. Since access to the LINC program requires enablement by the government, this points to a positive rights claim.

[88] Third, *Baier* makes clear that a claim does not become a negative rights claim simply because the applicant historically had access to the platform of expression prior to the legislation or

decision to disentitle the applicant. In this case, CAF's access to the LINC program for 12 years prior to the Minister's decision does not automatically convert the claim into a negative one. The Court in *Baier* said that "to hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b) and justifying such changes under s. 1."

[89] *Baier* held that an applicant must establish the following factors to successfully claim a positive entitlement under s. 2(b) of the *Charter*:

1. The claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime;
2. The claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and
3. The government is responsible for the inability to exercise the fundamental freedom.

[90] In *Baier*, legislation was passed that disqualified school employees from running for positions as school trustees of any school board unless they went on a leave of absence and resigned from their positions as teachers if elected. The Alberta Teachers Association alleged that this was an infringement of the employees' freedom of expression. It argued that the role of a school trustee was a unique platform for advocacy surrounding educational issues and therefore constituted a fundamental freedom.

[91] The Court rejected this characterization saying that "claiming a unique role is not the same as claiming a fundamental freedom. The appellants' claim, as they have articulated it, is grounded in access to the particular statutory regime of school trusteeship" (at para 44). Similarly, CAF's access to LINC funding is a particular platform created by the government, not a fundamental freedom.

[92] The Court in *Baier* also stated that even if eligibility for trusteeship was a fundamental freedom, removing eligibility was not a substantial interference with freedom of expression because even without the position, teachers could still engage in advocacy surrounding educational issues. This is analogous to CAF's situation: even without access to the LINC program, CAF can still engage in, and has still engaged in, its advocacy surrounding the Israel-Palestine conflict. Discontinuing LINC funding has not created an "inability" to engage in expression or substantially interfered with CAF's expression.

[93] In summary, there is no positive entitlement to funding because the right to administer the LINC program is not grounded in a fundamental freedom. There is also no substantial interference with CAF's advocacy efforts because CAF has continued to express its ideas surrounding the Israel-Palestine conflict despite not receiving funding for LINC training.

[94] Having found that there is no breach of s. 2(b) of the *Charter*, it is unnecessary for me to conduct a section 1 analysis.

4. Was the Minister's Decision Reasonable?

[95] There is no jurisprudence on the applicable standard for reviewing a decision (Ministerial or not) to reject a funding request under the LINC program. After undertaking the analysis set out in *Dunsmuir*, I determine the applicable standard of review to be reasonableness. The factors to be considered are: (i) the existence of a privative clause, (ii) any special expertise of the decision-maker, and (iii) the nature of the question being decided.

[96] First, there is no privative clause at play and thus there is no reason to extend to the Minister any added deference.

[97] Second, one could argue that the Minister has no particular expertise that is relevant to the determination of whether or not funding should be granted to CAF for administering the LINC program, and therefore little deference is required. However, the Minister is an elected official making a decision in the administration of the *Act* that involves broader policy considerations and therefore he should be granted deference by virtue of his position. This factor points to a reasonableness standard of review.

[98] Third, the nature of the question being decided also points to reasonableness. In this case, this is a policy-driven commercial decision made with the intent of giving effect to the broad purposes of the *Act*. There is no question of law central to the importance of the legal system. Therefore, much deference is owed.

[99] Accordingly, the applicable standard in this case is the reasonableness standard. The fact that this is a broad policy-based decision by an elected official warrants a high degree of deference for his decision.

[100] The reasonableness standard of review requires only that the Minister's decision fall within a range of reasonable outcomes to avoid being overturned.

[101] In assessing whether the decision falls within that range, one must first correctly determine what is being assessed. The parties differ in their characterization of the Minister's decision. CAF submits that the Minister's decision is that CAF is anti-Semitic and supports terrorist organizations and it is that decision which is unreasonable. The Minister submits that he decided not to distribute finite resources to fund CAF because it is not an appropriate service provider organization as it appears to be engaged in extremism contrary to Canadian values, and that decision was reasonable.

[102] In the March 18, 2009 letter, it is stated that the Minister decided not to renew CAF's funding, because:

> Serious concerns have arisen with respect to certain public statements that have been made by yourself or other officials of the CAF. These statements have included the promotion of hatred, anti-semitism [*sic*] and support for the banned terrorist organizations Hamas and Hezbollah.
>
> The objectionable nature of these public statements – in that they appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic – raises serious questions about the integrity of your organization and has undermined the Government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers. [emphasis added]

[103] Based on the express wording of the decision letter, I agree with the Minister's characterization of the decision. The question that must be addressed is whether or not it was reasonable to not continue funding CAF's LINC program because it is an organization that appears to be anti-Semitic and support terrorist organizations. I find that the Minister's decision in this case falls within the range of reasonable outcomes.

[104] CAF filed many affidavits from academic scholars, legal professors, Jewish advocacy groups, and people who have worked closely with CAF, stating that they have never witnessed anti-Semitism, promotion of hatred, or support for terrorism from CAF. While this evidence is compelling, it must be considered in light of the conflicting opinion and evidence in the record on the question of what constitutes anti-Semitism and evidence of how other Canadians have perceived CAF's actions. The only thing that is clear from the record is that there is no consensus.

[105] The Court is not required to resolve the question of what constitutes anti-Semitism because the Minister did not say that CAF is anti-Semitic, rather he said that public statements made "appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic." The Minister does not have to prove that CAF is anti-Semitic, only that they could appear to be anti-Semitic. There is an abundance of evidence in the record to show that, although many do not consider CAF's actions to be anti-Semitic, including people of Jewish ethnicity, there are many others that hold the opposite view, including a former CAF president. In this context, it is especially important to be deferential to the Minister's decision.

[106] With respect to the six specific matters relied on by the Minister, it is submitted by CAF that it did not authorize them, the persons involved were not officially representing CAF at the time, or the actions and content were not endorsed or approved of by CAF. In many cases, this defense ignores the maxim that "one is known by the company one keeps." Quite simply, CAF cannot completely disassociate itself from the content of web links it includes in its materials, or from comments, distribution of materials, or attendances at meetings and conferences by its executive.

[107] All of the statements and actions raised by the Minister can, in my view, reasonably lead one to the view that CAF appears to support organizations that Canada has declared to be terrorist organizations and which are arguably anti-Semitic. Aside from the Minister himself reaching this view, the record is replete with news articles and statements of others to the same effect, all of which support that it was not unreasonable for the Minister to reach that conclusion.

[108] The decision, for these reasons, falls within the scope of reasonableness, as described in *Dunsmuir* at para 47.

Costs

[109] The Minister is entitled to his costs. If the parties cannot reach an agreement on quantum, they are to advise the Court within 30 days of this decision. The Minister shall provide his written submissions on costs, not exceeding ten (10) pages, within ten (10) days thereafter, and CAF shall have twenty (20) days from receipt of the Minister's submissions to provide its written response.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed; and

2. Costs are awarded to The Minister of Citizenship and Immigration.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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