

FEDERAL COURT

B E T W E E N:

**ANDREW JAMES LAWTON and TRUE NORTH CENTRE FOR
PUBLIC POLICY**

Applicants

-and-

**CANADA (LEADERS' DEBATES COMMISSION/COMMISSION DES
DEBATS DES CHEFS) and THE ATTORNEY GENERAL OF CANADA**

Respondents

**MOTION RECORD OF THE RESPONDENT, CANADA (LEADERS'
DEBATES COMMISSION/COMMISSION DES DEBATS DES CHEFS)
(VOLUME I OF II)**

[Motion to Strike Notice of Application]

January 22, 2020

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Court File No. T-1633-19

FEDERAL COURT

B E T W E E N:

ANDREW JAMES LAWTON and TRUE NORTH CENTRE FOR
PUBLIC POLICY

Applicants

and

CANADA (LEADERS' DEBATE COMMISSION/COMMISSION
DES DEBATES DES CHEFS) and THE ATTORNEY GENERAL OF
CANADA

Respondents

NOTICE OF MOTION
(Rule 369 Motion to Strike Application)

TAKE NOTICE THAT the Respondent, Canada (Leaders' Debate Commission/Commission des Debates des Chefs), will make a motion to the Court in writing under the Court's residual authority to strike notices of application for judicial review.

THE MOTION IS FOR: *(the precise relief sought)*

- (a) An Order striking in their entirety and without leave to amend, respectively, Andrew James Lawton's and True North Centre for Public Policy's notice of application for judicial review (**T-1633-19**) and Rebel News Network Ltd.'s notice of application for judicial review (**T-1631-19**).

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- (b) The costs of this motion; and
- (c) Such further and other relief as this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

Parties to the Motion

2. True North Centre for Public Policy (“**True North**”) is a registered charity with the Government of Canada, with its head office situated in Richmond, British Columbia. It purports to provide coverage of Canadian and international affairs on its website.

3. Andrew Lawton is an individual residing in London, Ontario. He is a fellow and staff writer of True North.

4. Rebel News Network Ltd (“**Rebel News**”) is a federally incorporated company, “carrying on business as a popular online news and media company operating across Canada.”

5. Leaders’ Debate Commission/Commission des Debates des Chefs (the “**Commission**”) was created by Order in Council PC 2018–1322, as an independent body whose mandate is to “organize one leaders’ debate in each official language during the general election period.” The Order in Council authorizes the Commission concerning the broadcasting of the debates—with the aim of making them accessible to as many Canadians as possible and ensuring that high journalistic standards are maintained.

The Commission organizes the 2019 Federal Leaders Debates

6. The Commission organized the 2019 Federal Leaders Debates (the “**Debates**”) that occurred on October 7, 2019, in the English language and, October 10, 2019, in the French language.

7. The Commission administered the “media accreditation” process for the Debates. Accredited media attended and covered the Debates. They were also permitted to attend a subsequent media scrum where, each leader was available to respond to questions for a 10 minute period.

8. On September 23, 2019, the Commission published a press release setting out the dates of the Debates and a media advisory informing that “[m]edia representatives who wish to cover the debates must apply for accreditation using the Government of Canada accreditation portal [which] is now open and will close on October 4, 2019, at 11:59 p.m. EDT.”

9. During the application window, David Menzies and Kean Bexte of Rebel News and Andrew Lawton of True North applied for accreditation.

The Commission denies True North and Rebel New accreditation

10. On October 3, 2019, the Commission developed and adopted an Accreditation Guideline, which provided that it would not accredit media entities that engage in advocacy and deviate from the recognized norms of journalism.

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11. On October 4, 2019, True North and Rebel News were informed that they were denied accreditation as they engaged in advocacy, and not journalism.

True North and Rebel News commence applications for judicial review (the “Applications”)

12. On October 4, 2019, True North commenced an application for judicial review. Among other things, it alleged that the Commission’s process was unfair, the reasons were inadequate, and the Commission’s conduct was “an attempt ... to censor” and “arbitrary.” True North sought, among other things, an order quashing the Commission’s denial of media accreditation.

13. On October 5, 2019, Rebel News commenced an urgent application for judicial review where it alleged that the Commission had breached Rebel News’ procedural and substantive rights. Rebel News also sought an order, among other things, quashing the Commission’s denial of media accreditation; or, in the alternative, directing the Commission to grant accreditation.

14. On October 7, 2019, Rebel News and True North also filed motions seeking (1) an interlocutory injunction for an Order granting them the accreditation required to cover the Debates; or, (2) in the alternative, an interlocutory injunction for an Order requiring the Commission to grant them accreditation.

15. Given that the English language Debate was scheduled to take place on October 7, 2019, Justice Zinn heard the injunction motion on October 7, 2019.

Justice Zinn's Interlocutory Orders

16. Justice Zinn ordered the Commission to accredit True North and Rebel News.

In coming to this conclusion, he found that True North and Rebel News satisfied the tripartite test for injunctive relief.

17. On October 7, 2019, Justice Zinn issued two oral Orders as follows:

- (a) the Leaders' Debates Commission / Commission des Debats des Chefs is to grant David Menzies and Keenan [*sic*] Bexte of Rebel News the media accreditation required to permit them to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language; and
- (b) the Leaders' Debates Commission / Commission des Debats des Chefs is to grant Andrew James Lawton of the True North Centre for Public Policy the media accreditation required to permit him to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language.

18. The Commission accredited True North and Rebel News. They attended and covered the Debates and participated in the media scrum.

19. On November 13, 2019, Justice Zinn provided written reasons for his foregoing Orders.

The Applications are moot

20. The Court should strike Applications on the basis that they are now moot.

21. Justice Zinn provided the totality of the relief that True North and Rebel News had sought through the Applications. Both True North and Rebel News attended the Debates and participated in the media scrum.

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22. The circumstances of the Applications weigh against the Court exercising its discretion to hear moot cases. Hearing the Applications is inconsistent with the principle of judicial economy as the Applications are neither of practical significance nor go towards resolving issues of national importance or serious jurisprudential uncertainty. To the contrary, the Applications involve the application of settled administrative law principles to specific facts.

23. The Respondent relies upon Rules 400 and 401 of the *Federal Courts Rules*, SOR/98-106.

24. Such further and other grounds as the lawyers may advise and this Court may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

- (a) Justice Zinn's Orders, dated October 7, 2019;
- (b) Justice Zinn's Reasons for Orders, dated November 13, 2019;
- (c) The Notices of Application of True North and Rebel News; and

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- (d) Such further and other evidence as counsel may advise and this Honourable Court may permit.

January 22, 2019



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Cour fédérale

Date: 20191007**Docket: T-1633-19****Toronto, Ontario, October 7, 2019****PRESENT: The Honourable Mr. Justice Zinn****BETWEEN:****ANDREW JAMES LAWTON AND
TRUE NORTH CENTRE FOR PUBLIC POLICY****Applicants****and****CANADA (LEADERS' DEBATES COMMISSION/
COMMISSION DES DEBATS DES CHEFS) AND
THE ATTORNEY GENERAL OF CANADA****Respondents****ORDER****UPON** motion made at the Court in Toronto on short notice and on an urgent basis;**AND UPON** reading the motions records filed by the Applicants and the Respondents;**AND UPON** hearing counsel for the parties;**AND UPON** determining that the Applicants have satisfied the test for an interlocutory
mandatory injunction;

FOR REASONS TO FOLLOW THIS COURT ORDERS that the Leaders' Debates Commission / Commission des Debats des Chefs is to grant Andrew James Lawton of the True North Centre for Public Policy the media accreditation required to permit him to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language.

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____
day of Oct 7 2019
Dated this Oct 7 day of _____ 2019

"Russel W. Zinn"
Judge

JAKE SCHUTZ
REGISTRY OFFICER
AGENT DU GREFFE

Federal Court



Cour fédérale

Date: 20191007

Docket: T-1631-19

Toronto, Ontario, October 7, 2019

PRESENT: The Honourable Mr. Justice Zinn**BETWEEN:****REBEL NEWS NETWORK LTD.****Applicant****and****CANADA (LEADERS' DEBATES COMMISSION/
COMMISSION DES DEBATS DES CHEFS) AND
THE ATTORNEY GENERAL OF CANADA****Respondents****ORDER****UPON** motion made at the Court in Toronto on short notice and on an urgent basis;**AND UPON** reading the motions records filed by the Applicant and the Respondents;**AND UPON** hearing counsel for the parties;**AND UPON** determining that the Applicant has satisfied the test for an interlocutory mandatory injunction;

FOR REASONS TO FOLLOW THIS COURT ORDERS that the Leaders' Debates Commission / Commission des Debats des Chefs is to grant David Menzies and Keenan Bexte of Rebel News the media accreditation required to permit them to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language.

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / issued in the Court on the
day of Oct 7 A.D. 2019
Dated this Oct 7 day of 20 19

"Russel W. Zinn"
Judge

~~JUDGE'S COPY~~
JAKE SCHUTZ
REGISTRY OFFICER
AGENT DU GREFFE

Federal Court



Cour fédérale

Date: 20191113**Docket: T-1633-19
T-1631-19****Citation: 2019 FC 1424****Ottawa, Ontario, November 13, 2019****PRESENT: The Honourable Mr. Justice Zinn****Docket: T-1633-19****BETWEEN:****ANDREW JAMES LAWTON AND
TRUE NORTH CENTRE FOR PUBLIC POLICY****Applicants****and****CANADA (LEADERS' DEBATES COMMISSION/COMMISSION
DES DEBATS DES CHEFS) AND THE ATTORNEY
GENERAL OF CANADA****Respondents****Docket: T-1631-19****AND BETWEEN:****REBEL NEWS NETWORK LTD****Applicant****and**

**CANADA (LEADERS' DEBATES COMMISSION/COMMISSION
DES DEBATS DES CHEFS) AND
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR ORDERS

Background

[1] These two applications for judicial review, both filed on Monday, October 7, 2019, relate to identical decisions made by the Leaders' Debates Commission / Commission des Debats des Chefs [the Commission]. The Commission denied accreditation for the 2019 Federal Leaders' Debates to David Menzies and Kean Bexte of Rebel News Network Ltd [Rebel News] and Andrew James Lawton of True North Centre for Public Policy [True North]. Accredited parties are permitted to attend and cover the Debates on Monday, October 7, 2019, in the English language and Thursday, October 10, 2019, in the French language [the 2019 Debates].

[2] On October 7, 2019, Rebel News and True North filed motions seeking (1) an interlocutory injunction for an Order granting the Applicants the media representative accreditation required to cover the 2019 Debates or, (2) in the alternative, an interlocutory injunction for an Order requiring the Commission to grant the Applicants accreditation.

[3] All parties were aware of these pending motions over the weekend and filed substantial motion records, including affidavits, jurisprudence, and memoranda. The Court scheduled the motions to be heard together on the afternoon of Monday, October 7, 2019. Given the identical

nature of the decisions under review and the motions, these reasons apply to both motions and a copy shall be placed in each of the Court files.

[4] All provided excellent and fulsome written and oral submissions. The Attorney General of Canada said that he provided submissions “to assist the Court in considering the issues before it” but took no position on the merits. The motions were opposed by the Commission.

The Commission

[5] The Commission was created by Order in Council PC 2018–1322, as an independent body whose first mandate is to “organize one leaders’ debate in each official language during the general election period.” The Order in Council makes no specific reference to media accreditation, but does contain several statements concerning the broadcasting of debates, the aim of making them accessible to as many Canadians as possible, and ensuring that high journalistic standards are maintained for the leaders’ debates.

[6] Paragraph 4 of the Order in Council states that in fulfilling its mandate, the Commission “is to be guided by the pursuit of the public interest and by the principles of independence, impartiality, credibility, democratic citizenship, civic education, inclusion and cost-effectiveness.”

The Accreditation Process and the Decisions Under Review

[7] On the morning of Monday, September 23, 2019, the Commission published a press release setting out the dates of the 2019 Debates and a media advisory informing that “Media representatives who wish to cover the debates **must apply for accreditation** using the Government of Canada accreditation portal [which] is now open and will close on October 4, 2019, at 11:59 p.m. EDT” [bolding in original]. No additional information was given regarding the accreditation process or criteria to be used in deciding whether or not to accept an application for accreditation.

[8] The Executive Director of the Commission attests that the Commission, “in consultation with the Press Gallery Secretariat and Summit Management Office of Global Affairs Canada, who the Commission determined were key opinion leaders, developed internal media accreditation guidelines” [emphasis added] [Accreditation Guidelines].

[9] The Accreditation Guidelines are dated Thursday, October 3, 2019 – one day before the decisions under review were made and delivered to the Applicants. The statement of principle set out in the Accreditation Guidelines says that it was produced “in consultation with the Secretariat of the Parliamentary Press Gallery”:

Journalistic independence is fundamental to the Commission. In order to protect this independence, the Commission has asked the Parliamentary Press Gallery Secretariat to be involved in media accreditation and to provide support and guiding principles. The Commission respects and maintains that accreditation will be granted to recognized professional media organizations.

This statement establishes clearly that the Commission will accredit journalists and media organizations that respect the

recognized norms of independent journalism. It precludes media organizations that engage in advocacy and political activism.
[italics in original]

[10] David Menzies and Kean Bexte of Rebel News and Andrew James Lawton of True North applied for accreditation. Shortly after 9 a.m. on Friday, October 4, 2019, each received a negative decision.

[11] The Decision sent to Rebel News by email reads as follows:

Hello,

Your request for media accreditation for the 2019 Federal Leaders' Debates has been denied. It is our view that your organization is actively involved in advocacy.

Regards,
Collin Lafrance
Chief | Chef
Press Gallery Secretariat
Secrétariat de la Tribune de la presse

[12] A similar email was received by True North. It reads:

Hello,

Your request for media accreditation for the 2019 Federal Leaders' Debates has been denied. The about section of tnc.news clearly states that True North is actively involved in advocacy.

Regards,
Collin Lafrance
Chief | Chef
Press Gallery Secretariat
Secrétariat de la Tribune de la presse

[13] Although the wording of these decisions indicates that they were made by the Press Gallery, the Commission asserts that it made the decisions itself. In his affidavit, the Executive

Director of the Commission attests that the accreditation process had five steps: (1) the Press Gallery “conducted an initial review of the applications,” (2) “research was conducted on the applicant where the applicant’s organization was unfamiliar or appeared to not be a professional media organization or journalist,” (3) the “Commission consulted with the Press Gallery Secretariat regarding the applicant, and whether or not the applicant was an independent media organization, or fell within the purview of an advocacy, research, or activist group,” (4) the Commissioner deliberated whether to accredit the applicant, and (5) the Commission’s response was conveyed to the applicant by the Press Gallery.

[14] The Commission says that it received “a considerable number of accreditation requests, around 200 for the English debate and 150 for the French debate.” The Court observes that even if there was a complete overlap and only 200 persons applied for accreditation, the five-step process had to be done in a very short time-frame. The initial review, research, consultation, deliberation, and communication had to have been all accomplished in the single day available between the day the internal Accreditation Guidelines were put in place and the 2019 Debates.

[15] The Executive Director of the Commission attests that ultimately all applications for accreditation were accepted except the two before the Court, “two other advocacy groups and an individual who applied for accreditation who was not active as a journalist.” These five were apparently not seen as “recognized professional media organizations.”

[16] Extremely relevant to these applications is an understanding of what it is that the media and its representatives obtain as a result of accreditation. On the record before me, it is not much.

[17] The Commission's Executive Director attests in his affidavit that accreditation gives one nothing vis-à-vis the live face-to-face debate :

The actual debates are closed to the accredited media. Instead, the debates will be live-streamed on screens in media rooms, which are in a different room (but the same building) from the debates. Accredited media therefore have no more access during the debates than any other Canadian watching a live-stream.
[emphasis added]

[18] The value of accreditation is that accredited media are permitted to attend a scrum following the face-to-face debate. At the scrum, each leader is available to the media for 10 minutes to respond to questions. This one-hour period appears to be the only material benefit an accredited party receives.

Should the Court Entertain these Motions?

[19] Canada questions whether these motions should be heard given the short notice provided. Reference was made to the observation of Justice Pinard in *Mutadeen v Canada (Minister of Citizenship and Immigration)*, unreported, June 22, 2000, Court File IMM- 3164-00 [*Mutadeen*], that “‘last minute’ motions for stays force the respondent to respond without adequate preparation, do not facilitate the work of this Court, and are not in the interest of justice; the stay is an extraordinary procedure which deserves thorough and thoughtful consideration.” It is

significant that it was found in *Mutadeen* that the applicant could have and should have brought the motion much earlier than he did. No such finding can be made on the facts here. These Applicants moved as quickly as possible to advise the responding parties of their intentions and all parties prepared comprehensive materials for the Court. Given the significant volume of material filed on these motions by the Commission and Canada it cannot be said that they had inadequate time to properly respond. Moreover, given the brief period between the decision being made and the first of the 2019 Debates, and a weekend falling between those dates, these motions could not have been brought on sooner.

[20] Accordingly, the Court, being satisfied of the urgency of the motions, particularly given that the 2019 Debates were only to be held once and the first within a few hours, decided to hear the motions on an urgent basis on Monday, October 7, 2019, pursuant to Rule 362(2)(b) of the *Federal Courts Rules*, SOR 98-106.

Can the Relief Requested be Granted?

[21] Canada noted, and I agree, that the request for an Order granting the Applicants media accreditation is beyond the jurisdiction of the Court under the *Federal Courts Act*, RSC 1985, c F-7: See *Xie v Canada (Minister of Employment and Immigration)*, (1994) 75 FTR 125 at para 17, *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at paras 8 and 9, *Canada (Attorney General) v Burnham*, 2008 FCA 380 at para 11, *Canada (Human Resources Development and Social Development) v Layden*, 2009 FCA 14 at paras 10 to 15, and *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 62, leave to appeal refused, [2015] SCCA 380.

[22] The parties were informed at the commencement of the hearing that the motions would be considered only with respect to the request that the Court order the Commission to grant the accreditation that was sought.

[23] The motions before the Court are mandatory interlocutory injunctions, as they are in the nature of an injunction directing the Respondent Commission to do something.

The Test for the Requested Relief

[24] The test the Court must apply when asked to issue a mandatory interlocutory injunction is set out by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [CBC] at para 18:

In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction. [emphasis in original]

[25] The Applicants bear the burden of proving to the Court on a balance of probabilities that they have met all three prongs of the tri-partite test. This Court observed in *The Regents of University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8 that

“[t]hese factors are interrelated and should not be assessed in isolation (*Movel Restaurants Ltd v EAT at Le Marché Inc*, [1994] FCJ No 1950 (Fed TD) at para 9, citing *Turbo Resources Ltd v Petro Canada Inc* (1989), 24 CPR (3d) 1 (FCA)).”

[26] The Order the Applicants seek is both extraordinary and discretionary. Given its discretionary nature, provided the tri-partite test has been met, the “fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case:” *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25.

Is there a strong *prima facie* case?

[27] In *CBC* at para 17, the Supreme Court of Canada provided guidance to judges hearing motions for mandatory interlocutory injunctions:

[There] is a burden on the applicant to show a case of such merit that is it very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. [emphasis in original]

[28] Here, given the nature of the underlying proceedings there will be no trial; rather, the ultimate hearing will determine whether the decisions under review should be set aside. Accordingly, the question to be answered on the first prong of the tripartite test is whether, on a preliminary review, there is a *strong likelihood* that the Applicants will be successful in the underlying review applications. At the hearing on the merits, these Applicants need not prove

that the decisions are wrong; rather, they must convince the Court that the decisions are unreasonable or were reached in a manner that is procedurally unfair.

[29] Accordingly, I turn to consider whether on the material before me, there is a strong likelihood that the Applicants will succeed in showing that the accreditation decisions under review are unreasonable or were made in a procedurally unfair manner.

The Reasonableness of the Decisions

[30] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, the Supreme Court of Canada articulated that an unreasonable decision lacks justification, transparency or intelligibility:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] Justice Stratas in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 16 explained what is meant by “justification, transparency and intelligibility” as follows:

Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why.

[32] Although brief, I find that the decisions under review provide a basis for the decision to deny accreditation; namely that, in the view of the Commission, the Applicants are involved in

advocacy. However, I find that the decisions are lacking in discernible rationality and logic, and thus are neither justified nor intelligible.

[33] It is not apparent from the decisions or the mandate of the Commission why advocacy would disqualify one from accreditation. In its memorandum, the Commission offers the following rationale for excluding those who are involved in advocacy:

The Commission's decisions requiring that only those media organizations that do not actively engage in advocacy receive accreditation is consistent with the Commission's mandate under the [Order in Council] to uphold the highest journalistic standards.

One of the reasons for the Commission's creation was to ameliorate the public's perception of the media and its relationship with the political leaders and to provide an undistorted view of the leaders during the election process. To have organizations that represent particular interests or advocacy points at the debates would run contrary to the Commission's mandate.

In my view, the record does not support that submission.

[34] As support for its purported mandate to maintain high journalistic standards, the Commission points to the "Report of the Standing Committee on Procedure and House Affairs" relating to the creation of the Commission. Recommendation 10 reads: "That the Debates Commissioner be mandated to maintain high journalistic standards in the organization of leaders' debates." However, when one reads the committee's discussion, as reproduced below, it is obvious that the high journalistic standards relates to the actual period of face-to-face debate and does not include the scrum which follows it:

The Committee was told that in the context of federal party leaders' debates, the maintenance of high journalistic standards was an important concern for broadcasters. The elements that need

to meet high journalistic standards include the format, the staging (e.g., lighting, the set, the camera angles, etc.), the topics, the questions and follow-up questions posed to the candidates and the moderator. The Committee agrees with broadcasters that the maintenance of high journalistic standards would be an important matter during any future debates. [emphasis added]

[35] The Applicants have provided evidence that some of the “independent media organizations” accredited by the Commission, also appear to engage in advocacy. But they were not denied accreditation.

[36] As one example, the Applicants note that the mandate of the Toronto Star, which was accredited, includes the following:

The Toronto Star is a multiplatform news organization that makes things happen. We inform, connect, investigate, report and effect change.

...

We focus public attention on injustices of all kinds and on reforms designed to correct them. We are the news organization people turn to when they need help; when they want to see the scales balanced, wrongs righted; when they want powerful people held to account.

The Star has long been guided by the values of Joseph E. Atkinson, publisher from 1899 to 1948. Throughout his leadership Atkinson developed strong views on both the role of a large city newspaper and the editorial principles that it should espouse. These values and beliefs now form what are called the Atkinson principles, the foundation of the Star’s ongoing commitment to investigating and advocating for social and economic justice.

The principles Atkinson espoused were founded on his belief that a progressive news organization should contribute to the advancement of society through pursuit of social, economic and political reforms. He was particularly concerned about injustice, be it social, economic, political, legal or racial. [emphasis added]

[37] There is also evidence in the record that some of the accredited news organizations have previously endorsed specific candidates and parties in general elections. The Commission responds that in those cases the advocacy was in editorials or produced by columnists. This begs the question as to where one draws the line as to what is and is not advocacy that disqualifies an applicant from accreditation. This goes to the lack of rationality and logic in the no-advocacy requirement.

[38] This also goes to the lack of transparency. Absent any explanation as to the meaning to be given to the term “advocacy” and given that the Commission accredited some organizations that have engaged in advocacy, I am at a loss to understand why the Commission reached the decisions it did with respect to the Applicants.

[39] Accordingly, I find that the Applicants are likely to succeed on the merits in setting aside the decisions as unreasonable.

The Procedural Fairness of the Process

[40] The application and scope of procedural fairness in administrative decision-making is explained by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

[41] It was noted at para 20 of *Baker* that “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.” In the matters before this Court the interests of those whose

accreditation applications were rejected are most certainly affected. This was not disputed by the Commission; rather it submitted that the Applicants were afforded a fair process in accordance with *Baker*.

[42] The Supreme Court of Canada observed at para 22 of *Baker* that “the duty of fairness is flexible and variable, and depends on an appreciation of the context and the particular statute and the rights affected.” In paras 23 to 27, it listed five factors that a court ought to consider when determining the content of the duty of fairness in a particular case. There is no suggestion that these are the only factors a court may consider:

- (i) The nature of the decision being made and the process followed in making it;
- (ii) The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
- (iii) The importance of the decision to those affected;
- (iv) The legitimate expectations of those challenging the decision regarding the procedures to be followed or the result to be reached; and
- (v) The choices made by the decision-maker regarding the procedure followed.

[43] As the Supreme Court noted in para 22, “underlying all these factors is the notion that the purpose of 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.”

[44] The Commission submits that an analysis of the *Baker* factors points to these Applicants being “owed fairness that fell in the lower end of the spectrum.” It further submits that the duty of fairness owed the Applicants was “to allow True North and Rebel Media to apply for accreditation and decide their application in good faith.”

[45] I turn now to address whether, on the law and the evidence presented, there is a strong likelihood that the Applicants will be successful in proving that the Commission failed to comply with its duty of fairness.

The Duty of Fairness in Making Accreditation Decisions

[46] The Commission submits that it fulfilled its duty of fairness to the Applicants in making decisions on accreditation. An examination of all relevant factors points to a different conclusion.

[47] I agree with the Commission’s submission that an accreditation determination “does not contain the hallmarks of a court-like decision.” However, it has long been held that those affected by purely administrative decisions are entitled to a level of procedural fairness. In *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, it was held that a police constable whose employment was at pleasure was entitled to be told why his services were no longer required and given an opportunity, whether orally or in writing, to respond.

[48] Applied to the human rights context, the Supreme Court in *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 [*Syndicat des employés*], held that the commission was required to comply with the rules of procedural fairness. In doing so, the court agreed with the observation of Lord Denning in *Selvarajan v Race Relations Board*, [1976] 1 All ER 12 (CA), at p 19:

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

[49] The evidence of the Commission is that it retained the services of the Press Gallery Secretariat to “conduct an initial review of the applications” and consulted with it “regarding the applicant and whether or not the applicant was an independent media organization, or fell within the purview of an advocacy, research, or activist group.”

[50] At no time prior to the decisions under review being made did the Commission inform applicants that accreditation could or would be denied to those seen as “an advocacy, research, or activist group” and thus the Applicants had no advance notice of this requirement, and no opportunity to address it. Additionally, unlike the process in *Syndicat des employés*, at no time prior to the decision being made were these Applicants told of the case against them as an advocacy group and afforded a fair opportunity of answering it.

[51] There is no suggestion made by the Commission that it did not have time to take those steps prior to the decisions being made. What is clear is that the decisions were made and

communicated to the Applicants on the morning of Friday, October 4, 2019, leaving them with no time to engage in any internal appeal, had such been available, or to respond to the Commission's apparent concerns. In short, the process adopted by the Commission left the Applicants in the dark as to the basis on which accreditation might be denied, and in making the decision on the last possible day, entailed that they would have no opportunity to respond. I conclude that in these circumstances, procedural fairness required that notice be given of the criteria adopted for approval or denial, and an opportunity for applicants to respond.

[52] The Commission, in my view, also greatly minimizes the importance of the challenged decisions to those who applied for accreditation. In its memorandum, the Commission writes:

Even though True North and Rebel Media may not be physically present at the debate, the Commission's mandate is to ensure public access to the debates. True North and Rebel Media will not be hindered or censured from commenting and reporting on the leaders' debates.

[53] This submission ignores the reality that accredited persons have access to more than the two-hour period when the leaders are involved on stage in debating. As noted above, no accredited press have direct access to the leaders during that period. If all one gets from accreditation is the "privilege" of sitting in a room with some 258 other journalists watching the televised broadcast of the six leaders debating, then one must wonder why anyone would apply to be accredited rather than watching from the comfort of one's office or home.

[54] The Commission's Executive Director in his affidavit provides the answer. The benefit of accreditation, and perhaps the sole benefit, is access to the media scrum.

After the debates have ended, the leaders will attend in the lobby of the museum for a media scrum with the accredited media. Accredited media will have 10 minutes per Party leader to ask questions, with a two-minute transition between leaders. The media scrum is an essential part of the debates and must maintain the same high journalistic standards as the rest of the event. Due to the time limit of 10 minutes per Party leader, it is not expected that each member of the media will have an opportunity to ask questions. It will be in the discretion of the Party leader regarding from whom they take questions. [emphasis added]

[55] Given that the scrum takes place after the face-to-face debates have concluded, there is a significant question whether the Commission has any jurisdiction to control attendance there, as its mandate is directed to the conduct of the live debates. In any event, the Commission recognizes the importance to reporters and the media in being able to attend the scrums.

[56] It is significant and relevant when assessing how these decisions affect these Applicants that the English-language and French-language debates on October 7 and 10, 2019, are the only debates organized by the Commission in this general election, and thus the only opportunity the media has to question the six leaders immediately following their debates. All things being equal, there will not be another general election for four years. This must be weighed when considering the impact the denial of accreditation has on these Applicants.

[57] It appears from the decisions that the reason for non-accreditation was that Rebel News and True North are “actively involved in advocacy.” At no time did the Commission inform applicants what the requirements were to obtain accreditation. If it was intended by the Commission that accreditation would not be granted to those engaged in advocacy, then a fair and open procedure, appropriate to the importance of the decision being made should have stated

that advocacy would negatively impact the decision to accredit, and applicants should then have been given an opportunity to put forward their views and evidence to the Commission on whether they were engaged in advocacy.

[58] Equally troubling, as noted earlier, is that there is no description provided by the Commission as to what is meant by “advocacy” in the consideration of these applications, and there is evidence that some of the news organizations accredited engage in advocacy. The Commission provides no rationale why some types of advocacy do not impact accreditation, while others do.

[59] For these reasons, I find that the Applicants are likely to succeed at the hearing of the merits in successfully challenging the accreditation decisions as both unreasonable and procedurally unfair. They have met the serious issue prong of the tripartite test.

Irreparable Harm

[60] The Commission submits that the Applicants will not suffer irreparable harm, or any harm at all:

The Commissions’ [*sic*] decision in no way inhibits or censures the applicants [*sic*] ability to report on the leaders’ debate. The applicants will not be precluded from covering the debates and providing information to their audience and/or readership about the debates.

[61] This ignores the relevance and importance of the scrum. Even the Commission in its memorandum acknowledges that the scrum portion is one of the three segments that “inform the irreparable harm analysis.” With respect to that segment, it submits:

[A]ll of the accredited media will have an opportunity to ask questions of a leader for 10 minutes (per leader). It goes without saying that given them a number of media accredited, not all media at the live debates will have an opportunity to ask a question.

[62] Whether or not the Applicants ask any question at the scrum is irrelevant to the harm analysis. They have lost, as the Commission notes, the “opportunity to ask questions of a leader” following the 2019 Debates [emphasis added]. There is nothing speculative about that loss of opportunity. It is certain. Moreover, it is a loss that cannot be ameliorated, addressed, or corrected in any way after the 2019 Debates have taken place.

[63] Accordingly, I find that the Applicants have proven on the balance of probabilities that they will suffer irreparable harm if the requested Order is not granted.

Balance of Convenience

[64] The Commission submits that “the balance of convenience strongly weighs in favour of deferring to the Commission’s decision.” It submits that issuing the requested Order “would interfere with the accreditation process set out in the Commission’s mandate” and “could mean that other types of advocacy groups should be granted media accreditation.”

[65] First, there is no evidence that any others have sought the Court's assistance in granting them accreditation and, as noted earlier, there are only two other such unaccredited advocacy groups. The "flood-gates argument" advanced by the Commission is without merit.

[66] Second, there is no real interference with the "accreditation process set out in the Commission's mandate" as it is not at all certain that it has any such mandate. Its mandate relates to the organization and running of the debates proper, not the scrum which is the only portion of the 2019 Debates available to accredited media. It is my assessment that had the Commission not included the scrum portion, it would still have fulfilled its mandate.

[67] Given the few media representatives involved in granting the requested Order (less than one percent of all those accredited), and given the urgency of the decision in light of the timing of the 2019 Debates, I find that the balance of convenience rests squarely with these Applicants.

Conclusion

[68] I have found that these Applicants have satisfied the tripartite test for the granting of the injunction requested. Moreover, and for the reasons above, I find that granting of the requested Order is just and equitable in all of the circumstances.

[69] For these Reasons, following the oral hearing on October 7, 2019, the Court issued the following two Orders:

the Leaders' Debates Commission / Commission des Debats des Chefs is to grant David Menzies and Keenan [*sic*] Bexte of Rebel News the media accreditation required to permit them to attend and

cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language;

the Leaders' Debates Commission / Commission des Debats des Chefs is to grant Andrew James Lawton of the True North Centre for Public Policy the media accreditation required to permit him to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language;

[70] After issuing these Orders, the Applicants requested and were granted an opportunity to make submissions on costs. The Court was later informed that “the parties have resolved the issue of costs” and thus no further Order is required.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1633-19

STYLE OF CAUSE: ANDREW JAMES LAWTON ET AL v CANADA
(LEADERS' DEBATESNCOMMISSION/COMMISSION
DES DEBATS DES CHEFS) ET AL

DOCKET: T-1631-19

STYLE OF CAUSE REBEL NEWS NETWORK LTD v CANADA
(LEADERS' DEBATESNCOMMISSION/COMMISSION
DES DEBATS DES CHEFS)

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 7, 2019

REASONS FOR ORDERS: ZINN J.

DATED: NOVEMBER 13, 2019

APPEARANCES:

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Ewa Krajewska
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Ontario Regional Office
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FOR THE RESPONDENT
ATTORNEY GENERAL OF CANADA

EXHIBIT A

This is Exhibit "A" referred to in the Affidavit of Candice Lee Malcolm sworn October 6, 2019.



Commissioner for Taking Affidavits (or as may be)

JESSICA L. KUREDJIAN

Court File No.

FEDERAL COURT

B E T W E E N:

(Court Seal)

ANDREW JAMES LAWTON and TRUE NORTH CENTRE FOR
PUBLIC POLICY

Applicants

-and-

CANADA (LEADERS' DEBATES COMMISSION/COMMISSION DES
DEBATS DES CHEFS) and THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

-2-

Date _____ Issued by _____
(Registry Officer)

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AND TO: The Attorney General of Canada
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120 Adelaide Street West
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Respondent

APPLICATION

This is an Application for judicial review in respect of the decision of the Leaders' Debates Commission (the "**Commission**"), refusing the Applicants, Andrew James Lawton ("**Andrew**") and True North Centre for Public Policy ("**True North**") [collectively, the "**Applicants**"] the media representative accreditation ("**Accreditation**") required to cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English Language and Thursday, October 10, 2019 in the French Language (the "**Debates**"). The two (2) sentence denial of Accreditation was outlined in email correspondence sent from Mr. Collin Lafrance, the Chief of the Canadian Press Gallery to Andrew at 9:10am on Friday, October 4, 2019 (the "**Decision**").

The Applicants make Application for:

1. An Order quashing the Decision of the Commission;
2. An Order directing the Commission to provide reasonable and meaningful feedback to the Applicants regarding the Decision including details of the decision-making procedure the Commission employs in reviewing applications for Accreditation, the reason(s) why the Commission made the Decision, including how the Decision is consistent with its mandate and particulars of who was involved in making the Decision;
3. An Order directing the Commission to provide detailed information regarding the relationship between Mr. Collin Lafrance, the Chief of the Canadian Press Gallery and the Commission, including a description of what

capacity and under what authority Mr. Lafrance was working when he reviewed and denied the Applicants' request for Accreditation.

4. Costs of this Application; and,
5. Such other relief as counsel may advise and this Court deems just.

The grounds for the Application are:

The Parties

6. True North is a registered charity with the Government of Canada. Its head office is situated in Richmond, British Columbia. True North is an independent, non-partisan and not-for-profit organization that advances Western democratic values consistent with the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11. True North employs staff journalists and advocates for freedom of press.

7. Andrew is an individual residing in London, Ontario. He is a fellow and staff journalist of True North, freelance journalist, broadcaster, columnist and commentator.

8. The Commission is a body created pursuant to an Order in Council dated October 29, 2018 (the "**Order**"). The Commission, which is situated in Ottawa, Ontario, was created to make the Debates a more predictable, reliable, and stable element of federal election campaigns. The Commission consists of

the Debates Commissioner, the Advisory Board and the Secretariat. Per the Order, The Commission's mandates are to:

- (a) Organize the Debates in each official language during each general election period;
- (b) Ensure that the leader of each political party that meets minimum criteria to be invited to participate in the Debates;
- (c) Ensure that the Debates are broadcast and otherwise made available in an accessible way to persons with disabilities;
- (d) Ensure that the Debates reach as many Canadians as possible, including those living in remote areas and those living in official language minority communities through a variety of media and other fora;
- (e) Ensure that the Debates are broadcast free of charge, whether or not the broadcast is live;
- (f) Ensure that any reproduction of the Debates is subject to only the terms and conditions that are necessary to preserve the integrity of the debates;
- (g) Ensure that high journalistic standards are maintained for the Debates;

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- (h) Undertake an awareness raising campaign and outreach activities to ensure that Canadians know when, where and how to access the Debates; and,
- (i) Provide advice and support in respect of other political debates related to the general election, including candidates' debates, as the Debates Commissioner considers appropriate.

The Commission's website states that "*In fulfilling its mandate, the Leaders' Debates Commission is to be guided by the pursuit of public interest.*"

9. Per the Order, the Commission is to:

- (a) Conduct any necessary research or rely on any applicable research to ensure that the Debates are of high quality;
- (b) Develop and manage constructive relationships with key opinion leaders and stakeholders;
- (c) Conduct its activities in a manner that does not preclude other organizations from producing or organizing leaders' debates or other political debates;
- (d) Ensure that the decisions regarding the organization of the Debates, including those respecting participation criteria, are made publicly available in a timely manner;

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- (e) Ensure that the leaders' responses to the invitations to participate in the Debates are made publicly available before and during the Debates; and,
- (f) Conduct an evidence-based assessment of the Debates that it has organized, including with respect to the number of persons to whom the Debates were accessible, the number of persons who actually accessed them and the knowledge of Canadians of political parties, their leaders and their positions.

The Applicants' Application for Accreditation

10. At 9:05am on Monday, September 23, 2019, the Commission published a press release advising of the dates of the Debates. It additionally stated: "*Media representatives who wish to cover the debates **must apply for accreditation** using the Government of Canada Accreditation portal...*":

11. Andrew applied through the Government of Canada Accreditation portal for Accreditation as a staff journalist of True North on Tuesday, September 24, 2019. At 10:54am on the same date, Andrew received email correspondence from accreditation@international.gc.ca confirming receipt of the Applicants' application for Accreditation.

12. At 9:10am on Friday, October 4, 2019, Andrew received email correspondence from Mr. Collin Lafrance, the Chief of the Canadian Press Gallery advising that the Applicants' request for Accreditation was denied. Mr.

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Lafrance's two (2) sentence email reads as follows: "*Hello, your request for media accreditation for the 2019 Federal Leaders' Debate has been denied. The about section of tnc.news clearly states that True North is involved in advocacy.*"

13. Procedural fairness demanded that the Applicants understood the criteria being applied to be granted Accreditation and had the reasonable expectation that they would receive meaningful feedback from the Commission regarding why Accreditation was denied.

14. Procedural fairness also demanded that the application assessment for the Accreditation process be sufficiently transparent to allow the Applicants to know what was required and/or expected of them to be successful in being granted Accreditation.

15. Given the lack of meaningful feedback and complete lack of transparency in the Accreditation process, the Commission's decision to deny the Applicants' Accreditation without detailed reasons or appeal options was unfair, arbitrary, unreasonable and frankly an attempt by the current Government to censor and silence media outlets that have provided a platform for Canadians with views inconsistent with its mandate.

16. Section 18.1 of the *Federal Courts Act* RSC 1985, c F-7.

17. Such other grounds as counsel may advise and this Court deems just.

This Application will be supported by the following material:

18. A supporting Affidavit and the exhibits thereto; and,
19. Such other materials that counsel may advise and this Court deems just.

The Applicants request that the Respondents send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Commission to the Applicants and to the Registry:

- (a) A detailed list of the selection criteria used by the Commission in determining the granting of Accreditation;
- (b) A list of the decision-makers involved in the decision-making process and the process of communicating the Decision to the Applicants, including a description of their position in or relationship to to the Commission;
- (c) The complete file and all notes pertaining to the application for Accreditation made by the Applicants; and,
- (d) A complete list of the parties granted Accreditation.

-10-

October 4, 2019



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Applicants

and

CANADA (LEADERS' DEBATES COMMISSION/COMMISSION
DES DEBATS DES CHEFS) et. al
Respondents

Court File No.

FEDERAL COURT

NOTICE OF APPLICATION

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Kuredjian, Jessica L.

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Sent: Friday, October 04, 2019 7:26 PM
To: jessica.kuredjian@gmail.com; Kuredjian, Jessica L.
Subject: Document(s) Transmitted: CAS.2019-110-060993-00

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Federal Court

Court: Federal Court
Confirmation Number: CAS.2019-110-060993-00

Proceeding Type: Federal Court
Proceeding Subject: Application for Judicial Review
Nature of Proceeding: S. 18.1 Application for Judicial Review
Registry Office: Toronto
Style of Cause: ANDREW LAWTON ET AL. v. LEADERS' DEBATES COMMISSION/ COMMISSION DES DEBATS DES CHEFS ET AL.
Request for Urgency: Yes
Request for Urgency Text: The applicants are bringing a motion for injunctive relief on Monday, October 7, 2019 in the within application. There are other parties issuing similar applications and bringing the same motion.
Filing Party: Andrew Lawton
 True North Centre for Public Policy
Document Type: APPLICATION FOR LEAVE AND JUDICIAL REVIEW
Document File Name: Application for Judicial Review.pdf

Party: Andrew Lawton
Party Role: Applicant
Party: True North Centre for Public Policy

Party Role: Applicant

Party: Leaders' Debates Commission/ Commission Des Debats Des Chefs

Party Role: Respondent (application)

Party: The Attorney General of Canada

Party Role: Respondent (application)

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Submission Confirmation

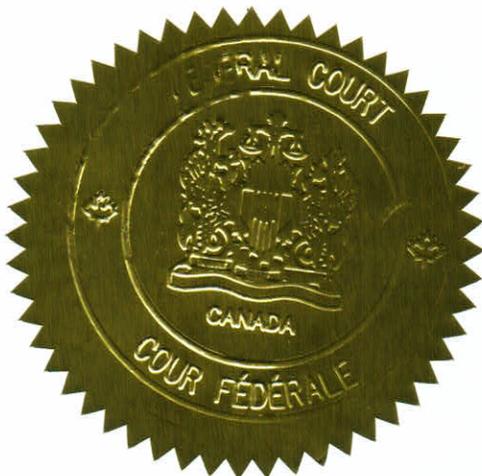
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 Your 1 document(s) have been transmitted to the Toronto Registry Office. Your confirmation number is CAS 2019-110-000993-00. Please record this confirmation number in case you have to contact the Registry regarding the document submitted for filing. A confirmation e-mail will be sent to jkuredjian@caselsbrock.com shortly.

Registry Fee Information
 If the document you are submitting requires a filing fee (see Tariff A of the Federal Court Rules, Rule 23 of the Federal Courts Immigration and Refugee Protection Rules), note that your document will only be filed and processed as of the time you contact the Registry and provide payment.
 For payment, please contact the office of the Registry to which your document was transmitted to provide credit card details to a Registry Office.
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Confirmation number:
 CAS 2019-110-000993-00

Application ... Document5 ... Initiate New... TimeKeep ... Application ... Au

Court File No. T-1631-19

**FEDERAL COURT****REBEL NEWS NETWORK LTD.**

Applicant

-and-

**CANADA (LEADERS' DEBATES COMMISSION/COMMISSION DES DEBATS DES
CHEFS) and THE ATTORNEY GENERAL OF CANADA**

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appear on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

- 2 -

SHIRLEY ACIRO
REGISTRY OFFICER
AGENT DU GREFFE

Date OCT 07 2019

Issued by _____
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(Leaders' Debates Commission/Commission Des Debats Des Chefs)

AND TO: ATTORNEY GENERAL OF CANADA
Department of Justice Canada
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Respondent

APPLICATION

This is an Application for judicial review of the decision of the Leaders' Debates Commission (the "**Commission**"), refusing the Applicant, Rebel News Network Ltd. ("**Rebel News**") the media representative accreditation ("**Accreditation**") required to cover the only official English Language Federal Leaders' Debate taking place on Monday, October 7, 2019, and the French Language Federal Leaders' Debate taking place on Thursday, October 10, 2019 (collectively, the "**Debates**"). The entirety of the denial of Accreditation was outlined in email correspondence sent from Mr. Collin Lafrance, the Chief of the Canadian Press Gallery, who did not form part of the Commission, to Rebel News at 9:08 a.m. EDT on Friday, October 4, 2019, stating as follows:

"Your request for media accreditation for the 2019 Federal Leaders' Debates has been denied. It is our view that your organization is actively involved in advocacy."

(the "**Decision**").

THE APPLICANT MAKES APPLICATION FOR:

1. leave to hear this judicial review Application on an urgent basis;
2. an Order quashing the Decision of the Commission, and replacing it with an Order granting the Applicant Accreditation to attend and cover the Debates;
3. in the alternative, an Order quashing the Decision and remitting the matter back to the Commission with a direction that it provide the Applicant with Accreditation to attend and cover the Debates;
4. a Declaration that the Commission acted unfairly, unreasonably, and unlawfully in making the Decision without a sufficient record, and for failing to provide sufficient reasons for the Decision;
5. a Declaration that the Commission acted unfairly, unreasonably, and / or unlawfully in refusing to grant Rebel News Accreditation for allegedly being involved in

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- advocacy, while granting other media outlets and representatives Accreditation who are involved in advocacy;
6. a Declaration that the Commission breached Rebel News' legitimate expectations that the Commission would review and consider its application in a fair and transparent manner unencumbered by political bias;
 7. a Declaration that the Commission breached the vested rights of Rebel News to have its application considered in a fair and transparent manner unencumbered by political bias;
 8. a Declaration that the Commission acted unfairly, unreasonably, and unlawfully in having an individual — Mr. Collin Lafrance — participate in and / or take the lead in making the Decision when he was not part of the Commission tasked with doing so;
 9. a Declaration that the Commission did not follow its own processes, procedures, protocols, or the Order in Council (defined below) which created the Commission;
 10. an Order directing the Commission to provide a copy of the complete record of the decision-making process leading up to, and including, the Decision, including but not limited to:
 - (i) the criteria used in making decisions on which media representatives should receive Accreditation;
 - (ii) the materials relied upon in making the Decision;
 - (iii) the emails or other forms of correspondence between members of the Commission regarding the Decision;
 - (iv) a tally of the vote of the members of the Commission;
 - (v) the involvement, title, and role of Mr. Collin Lafrance in the decision-making process and the Decision; and
 - (vi) any other documents relied upon or referenced in the decision-making process or in arriving at the Decision itself;
 11. an Order directing the Commission to provide a complete list of the selection criteria used by the Commission in determining the granting of Accreditation;
 12. an Order directing the Commission to advise when the Decision was made, given

that it was conveyed on the last business day before the English Language Debate, thereby preventing any meaningful opportunity to appeal, or seek judicial review, of the Decision;

13. an Order directing the Commission — whose objectives are increased transparency — to release a list of those that received Accreditation, and confirm that none are involved in any type of advocacy;
14. an Order directing the Commission to provide detailed information regarding the relationship between Mr. Collin Lafrance — the Chief of the Canadian Press Gallery — and the Commission, including a description of what capacity and under what authority Mr. Lafrance was working when he considered and denied the Applicant's requests for Accreditation;
15. costs of this Application; and
16. such other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF THE APPLICATION ARE:

The Parties

1. Rebel News is a federally incorporated company, carrying on business as a popular online news and media company operating across Canada. Rebel News' editorialists and commentators often take strong editorial positions on important public issues affecting Canadians, and convey those positions through different media, including on websites (<http://www.RebelNews.com>), podcasts, YouTube videos and ads, print media, paperback books, e-books, radio ads, and billboards.
2. Rebel News has been granted media accreditation by governments around the world, including the United States, the United Kingdom, the European Union, Sweden, the Netherlands, and India. Rebel News has also been granted accreditation in partly-free countries such as Iraq and Morocco.
3. The Commission is a body created by an Order in Council (PC Number: 2018-1322) dated

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October 29, 2018 (the “**Order in Council**”). According to paragraph 1 of the Order in Council, the Commission consists of the Debates Commissioner, the Advisory Board and the Secretariat. Mr. Collin Lafrance is not part of the Commission.

4. According to paragraph 2 of the Order in Council, the mandate of the Commission is to:
 - (a) Organize one leaders’ debate in each official language during each general election period;
 - (b) Ensure that the leader of each political party meet two enumerated criteria listed in paragraph 2 to be invited to participate in the Debates;
 - (c) Ensure that the Debates are broadcast and otherwise made available in an accessible way to persons with disabilities;
 - (d) Ensure that the Debates reach as many Canadians as possible, including those living in remote areas and those living in official language minority communities through a variety of media and other fora;
 - (e) Ensure that the Debates are broadcast free of charge, whether or not the broadcast is live;
 - (f) Ensure that any reproduction of the Debates is subject to only the terms and conditions that are necessary to preserve the integrity of the debates;
 - (g) Ensure that high journalistic standards are maintained for the Debates;
 - (h) Undertake an awareness raising campaign and outreach activities to ensure that Canadians know when, where and how to access the Debates; and,
 - (i) Provide advice and support in respect of other political debates related to the general election, including candidates’ debates, as the Debates Commissioner considers appropriate.

5. Significantly, the Order in Council provides at paragraph 4 that in fulfilling its mandate, the Commission is to be guided by the “*pursuit of the public interest* and by the principles of *independence, impartiality, credibility, democratic citizenship, civic education, inclusion* and *cost-effectiveness*.” Critically, the Order in Council makes no mention at all of “advocacy” or involvement therein by media organizations or representatives, and certainly does not reference

“advocacy” as a bar to media participation.

The Application Process

6. On or about September 23, 2019, the Commission published a press release providing details of the Debates, including the parties that were invited to participate. The press release also provided instructions to media representatives who wished to cover the debates, noting that they must apply for accreditation using the Government of Canada accreditation portal. The press release noted that the portal was open, and would close on October 4, 2019 at 11:59pm EDT.
7. Rebel News applied for Accreditation through the Government of Canada Accreditation portal.
8. At 9:08 a.m. on Friday, October 4, 2019, Rebel News received email correspondence from Mr. Collin Lafrance, the Chief of the Canadian Press Gallery, advising that its request for Accreditation was denied.
9. The entirety of the Decision was conveyed to Rebel News as follows:

Hello,

Your request for media accreditation for the 2019 Federal Leaders’ Debates has been denied. It is our view that your organization is actively involved in advocacy.

Regards.

Collin Lafrance

Chief | Chef
Press Gallery Secretariat
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10. By waiting until the last business day before the English Language Debate, the Commission acted unfairly and in bad faith in conveying to the Applicant that its application for Accreditation was denied. Similarly, the Decision was made and/or conveyed by an individual who was not part of the Commission.

11. The Commission breached the Applicant's procedural and substantive rights and acted in an unfair, unreasonable, unlawful, and arbitrary manner by:

- (a) failing to provide adequate reasons;
- (b) failing to provide criteria for Accreditation;
- (c) failing to properly assess the credentials of the Applicant;
- (d) allowing partisan politics to infiltrate and taint the Commission's review process;
and
- (e) granting other media representatives that are clearly "actively involved in advocacy".

12. Section 18.1 of the *Federal Courts Act* RSC 1985, c F-7.

13. As more specifically set out in the affidavit(s) filed in support of the within Application;

14. Such other grounds as counsel may advise and this Honourable Court deems just.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

15. The affidavit of Ezra Levant, to be sworn on October 6, 2019 and the exhibits thereto; and

16. Such other materials that counsel may advise and this Court deems just.

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October 5, 2019



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**CANADA (LEADERS' DEBATES
COMMISSION/COMMISSION DES DEBATS DES
CHEFS) ET AL**

Applicant

Respondents

Court File No.:

FEDERAL COURT

NOTICE OF APPLICATION

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FEDERAL COURT

B E T W E E N:

**ANDREW JAMES LAWTON and TRUE NORTH CENTRE
FOR PUBLIC POLICY**

Applicants

-and-

**CANADA (LEADERS' DEBATE COMMISSION/COMMISSION
DES DEBATES DES CHEFS) and THE ATTORNEY GENERAL
OF CANADA**

Respondents

**WRITTEN REPRESENTATIONS OF THE RESPONDENT,
CANADA (LEADERS' DEBATES COMMISSION/COMMISSION
DES DEBATS DES CHEFS)**

[Motion to Strike Notice of Application]

January 22, 2020

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PART I - STATEMENT OF FACTS

A. OVERVIEW

1. The Leaders' Debates Commission (the "**Commission**") seeks an order striking Andrew James Lawton's and True North Centre for Public Policy's (together, "**True North**") notice of application for judicial review (T-1633-19) and Rebel News Network Ltd.'s ("**Rebel News**") notice of application for judicial review (T-1631-19) as they are moot. The Commission files an identical factum in each of the proceedings on these motions.

2. As part of organizing the 2019 Federal Leaders' Debates (the "**Debates**"), the Commission determined which media entities should be accredited for the Debates. Accredited parties were permitted to (i) attend and cover the Debates on October 7, 2019 and October 10, 2019; and (ii) participate in a post-Debate "media scrum" where accredited media could pose questions to the party leaders.

3. On October 4, 2019, the Commission denied media accreditation to True North and Rebel News for the Debates on the basis that both entities engaged in advocacy, and not journalism.

4. True North and Rebel News brought applications for judicial review of the Commission's decisions (the "**Applications**"). In addition, they also brought urgent injunctions before this Court, seeking orders requiring the Commission to accredit True North and Rebel News.

5. Justice Zinn granted the injunctions on October 7, 2019 on the basis of “substantial motion records, including affidavits, jurisprudence, and memoranda.”¹ He issued oral Orders (the “**Orders**”) requiring the Commission to accredit True North and Rebel News for the English Debate that was scheduled that evening. Justice Zinn issued detailed written reasons for the Orders on November 13, 2019. In his reasons, Justice Zinn found that the Commission’s decisions to deny accreditation were likely unreasonable and procedurally unfair.

6. Although interlocutory, the Orders provided True North and Rebel News with the ultimate relief that they sought on the Applications. The practical effect of Justice Zinn’s decision was to quash the Commission’s decisions and to allow True North and Rebel Media to attend the Debates and to participate in the media scrum.

7. The Applications are now moot. Justice Zinn provided the totality of the relief that True North and Rebel News sought through the Applications. Therefore, the Applications no longer have any practical effect on the parties’ rights and, at best, raise academic concerns. In other words, the Applications are bereft of any likelihood of success such that this Court should exercise its discretionary power to strike the Applications in their entirety on this motion.

¹ *True North Centre for Public Policy v. Canada (Leaders’ Debates Commission)*, 2019 FC 1424 at para 3 [“**Zinn J Reasons**”], Motion Record of Canada (Leaders’ Debate Commission/Commission des Debates des Chefs) [“**LDC Motion Record**”], Tab 4.

B. PARTIES TO THE APPLICATIONS

8. The Commission was created by Order in Council PC 2018–1322, as an independent body with a mandate including “organiz[ing] one leaders’ debate in each official language during the general election period.”² The mandate of the Commission, as set out in the Order in Council, includes ensuring both that the debates “reach as many Canadians as possible” and that “high journalistic standards are maintained.”³

9. The future of the Commission is uncertain past March 31, 2020. Its constating Order in Council, PC 2018-1322, requires the Commissioner to provide a report to the Minister of Democratic Institutions within five months of the 2019 election that “provides thorough advice with regard to the future of the Leaders’ Debates Commission, recommendations regarding the scope of the Commission’s mandate and a detailed rationale for those recommendations.”⁴ According to the Minister of Democratic Institutions, the Commission is experimental and its report will “inform the **potential** creation in statute of a built-to-last debates commission” [emphasis added].⁵ The term of the current Commissioner (as well as the associated allocation of funds to compensate the Commissioner) is due to terminate on March 31, 2020.⁶

² Zinn J Reasons at para 5, LDC Motion Record, Tab 4.

³ Privy Council, Order in Council PC 2018-1322 (October 29, 2018), LDC Motion Record, Tab U.

⁴ *Ibid*, s 10.

⁵ House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 42-1, No 133 (November 22, 2018) at 2, LDC Motion Record, Tab V.

⁶ Privy Council, Order in Council PC 2018-1469 (November 29, 2018), LDC Motion Record, Tab 23.

10. The Commission administered the “media accreditation” process for the Debates. Accredited media physically attend and cover the Debates. They were also permitted to attend a subsequent media scrum where each leader is available to the media for 10 minutes to respond to questions. This one-hour period “appears to be the only material benefit an accredited party receives.”⁷

11. True North is a charity registered with the Government of Canada. True North is headquartered in Richmond, British Columbia.⁸ It states that it provides coverage of Canadian and international affairs on its website.

12. Andrew Lawton is an individual residing in London, Ontario. He is a fellow and staff writer of True North.⁹

13. Rebel News is a federally incorporated company, “carrying on business as a popular online news and media company operating across Canada.”¹⁰

C. TRUE NORTH AND REBEL NEWS APPLY FOR ACCREDITATION

14. On September 23, 2019, the Commission published a press release setting out the dates of the Debates and a media advisory stating that “[m]edia representatives who wish to cover the debates must apply for accreditation using the Government of Canada

⁷ Zinn J Reasons, *supra* note 1 at para 18, LDC Motion Record, Tab 4.

⁸ Notice of Application of Andrew James Lawton and True North Centre for Public Policy (T-1633-19) at para 6, LDC Motion Record, Tab 5 [“**True North NOA**”].

⁹ *Ibid* at para 7.

¹⁰ Notice of Application of Rebel News Network Ltd (T-1631-19) at para 1, LDC Motion Record, Tab 6 [“**Rebel News NOA**”].

accreditation portal [which] is now open and will close on October 4, 2019, at 11:59 p.m. EDT.”¹¹

15. Shortly after this announcement, David Menzies and Kean Bexte of Rebel News and Andrew Lawton of True North applied for accreditation.

D. THE COMMISSION DENIES TRUE NORTH AND REBEL NEWS ACCREDITATION

16. On October 3, 2019, the Commission developed and adopted an Accreditation Guideline. The Guideline was not made public. It read as follows:

Journalistic independence is fundamental to the Commission. In order to protect this independence, the Commission has asked the Parliamentary Press Gallery Secretariat to be involved in media accreditation and to provide support and guiding principles. The Commission respects and maintains that accreditation will be granted to recognized professional media organizations.

This statement establishes clearly that the Commission will accredit journalists and media organizations that respect the recognized norms of independent journalism. It precludes media organizations that engage in advocacy and political activism. [italics in original]¹²

17. On October 4, 2019, the Commission denied accreditation to both Rebel News and True North. The decisions read as follows (the “**Decisions**”):

[To Rebel News]:

¹¹ Zinn J Reasons, *supra* note 1 at para 7, LDC Motion Record, Tab 4 [emphasis in original].

¹² *Ibid* at para 9.

“Your request for media accreditation for the 2019 Federal Leaders’ Debates has been denied. It is our view that your organization is actively involved in advocacy.”

[To True North]:

“Your request for media accreditation for the 2019 Federal Leaders’ Debates has been denied. The about section of tnc.news clearly states that True North is actively involved in advocacy.”¹³

E. TRUE NORTH AND REBEL NEWS COMMENCE THE APPLICATIONS

18. On October 4, 2019, True North commenced an application for judicial review. Among other things, it alleged that the Commission’s process was unfair, the reasons were inadequate, and the Commission’s conduct was “an attempt ... to censor” and “arbitrary.”¹⁴ On that basis it sought the following relief:

- (a) “An Order quashing the Decision of the Commission;”
- (b) “An Order directing the Commission to provide reasonable and meaningful feedback to the Applicants regarding the Decision including details of the decision-making procedure the Commission employs in reviewing applications for Accreditation, the reason(s) why the Commission made the Decision, including how the Decision is consistent with its mandate and particulars of who was involved in making the Decision;” and
- (c) “An Order directing the Commission to provide detailed information regarding the relationship between the Chief of the Canadian Press Gallery and the Commission [who communicated the Decision], including a description of what capacity and under what authority [he]

¹³ *Ibid* at paras 11-12.

¹⁴ True North NOA, *supra* note 8 at paras 13-15, LDC Motion Record, Tab 5.

was working when he reviewed and denied the Applicants' request for Accreditation.”¹⁵

19. On October 5, 2019, Rebel News commenced an urgent application for judicial review, alleging that the Commission breached its procedural and substantive rights. In particular, according to Rebel News, the Commission, failed *inter alia* to provide adequate reasons, proper criteria for accreditation, adequately assess Rebel News' credentials, and allowed “partisan politics to infiltrate and taint the Commission's review.”¹⁶

20. In terms of relief, Rebel News sought an order either substituting a positive accreditation decision or quashing the decision of the Commission and directing the Commission to accredit Rebel News. In addition, Rebel News sought numerous other subsidiary declarations. The relief sought are as follows:

- (a) “leave to hear this judicial review Application on an urgent basis;”
- (b) “an Order quashing the Decision of the Commission, and replacing it with an Order granting the Applicant Accreditation to attend and cover the Debates;”
- (c) “in the alternative, an Order quashing the Decision and remitting the matter back to the Commission with a direction that it provide the Applicant with Accreditation to attend and cover the Debates;”

¹⁵ *Ibid* at paras 1-3.

¹⁶ Rebel News NOA, *supra* note 10 at para 11, LDC Motion Record, Tab 6.

- (d) “a Declaration that the Commission acted unfairly, unreasonably, and unlawfully in making the Decision without a sufficient record, and for failing to provide sufficient reasons for the Decision;”
- (e) “a Declaration that the Commission acted unfairly, unreasonably, and / or unlawfully in refusing to grant Rebel News Accreditation for allegedly being involved in advocacy, while granting other media outlets and representatives Accreditation who are involved in advocacy;”
- (f) “a Declaration that the Commission breached Rebel News’ legitimate expectations that the Commission would review and consider its application in a fair and transparent manner unencumbered by political bias;”
- (g) “a Declaration that the Commission breached the vested rights of Rebel News to have its application considered in a fair and transparent manner unencumbered by political bias;”
- (h) “a Declaration that the Commission acted unfairly, unreasonably, and unlawfully in having an individual — Mr. Collin Lafrance — participate in and / or take the lead in making the Decision when he was not part of the Commission tasked with doing so;”
- (i) “a Declaration that the Commission did not follow its own processes, procedures, protocols, or the Order in Council (defined below) which created the Commission;”
- (j) “an Order directing the Commission to provide a copy of the complete record of the decision-making process leading up to, and including, the Decision, including but not limited to:
 - (i) “the criteria used in making decisions on which media representatives should receive Accreditation;”

- (ii) “the materials relied upon in making the Decision;”
 - (iii) “the emails or other forms of correspondence between members of the Commission regarding the Decision;”
 - (iv) “a tally of the vote of the members of the Commission;”
 - (v) the involvement, title, and role of Mr. Collin Lafrance in the decision-making process and the Decision;” and
 - (vi) “any other documents relied upon or referenced in the decision-making process or in arriving at the Decision itself;”
- (k) “an Order directing the Commission to provide a complete list of the selection criteria used by the Commission in determining the granting of Accreditation;”
- (l) “an Order directing the Commission to advise when the Decision was made, given that it was conveyed on the last business day before the English Language Debate, thereby preventing any meaningful opportunity to appeal, or seek judicial review, of the Decision;”
- (m) “an Order directing the Commission — whose objectives are increased transparency — to release a list of those that received Accreditation, and confirm that none are involved in any type of advocacy;” and
- (n) “an Order directing the Commission to provide detailed information regarding the relationship between Mr. Collin Lafrance — the Chief of the Canadian Press Gallery — and the Commission, including a description of what capacity and under what authority Mr. Lafrance was working when he considered and denied the Applicant’s requests for Accreditation.”¹⁷

21. On October 7, 2019, True North and Rebel News filed motions seeking (i) interlocutory injunctions for an Order granting them the accreditation required to cover

¹⁷ *Ibid* at paras 1-16 [see section on the relief sought].

the Debates; or, (ii) in the alternative, interlocutory injunctions for an Order requiring the Commission to grant them accreditation.

22. Given that the English and French Debates were scheduled to occur, respectively, on October 7, 2019 and October 10, 2019, Justice Zinn heard the injunction motions on October 7, 2019.

**F. JUSTICE ZINN GRANTS TRUE NORTH AND REBEL NEWS
INJUNCTIVE RELIEF**

23. Justice Zinn found that True North and Rebel News satisfied the tripartite test for injunctive relief. At the October 7, 2019 oral hearing, Justice Zinn issued two oral Orders:

- (a) the Leaders' Debates Commission / Commission des Debats des Chefs is to grant David Menzies and Keenan [*sic*] Bexte of Rebel News the media accreditation required to permit them to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language; and
- (b) the Leaders' Debates Commission / Commission des Debats des Chefs is to grant Andrew James Lawton of the True North Centre for Public Policy the media accreditation required to permit him to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language.¹⁸

24. On November 13, 2019, Justice Zinn provided written reasons for the Orders.

¹⁸ Zinn J Reasons, *supra* note 1 at para 69, LDC Motion Record, Tab 4.

25. First, Justice Zinn found that there was a strong *prima facie* case that the Decisions were unreasonable. He observed that the term “advocacy” is ill-defined and therefore the Commission’s finding that True North and Rebel News engaged in “advocacy” lacked rationality and transparency.¹⁹ Justice Zinn also found that the Commission likely breached procedural fairness because:

[under] a fair and open procedure, appropriate to the importance of the decision being made[,] [True North and Rebel News would have been informed]...that advocacy would negatively impact the decision to accredit, and [they would] then have be given an opportunity to put forward their views and evidence to the Commission on whether they were engaged in advocacy.²⁰

26. Second, Justice Zinn held that the Commission’s Decisions would cause irreparable harm to True North and Rebel News by denying them the opportunity to participate in the media scrum. Justice Zinn held that this lost opportunity was not “speculative,” nor could it “be ameliorated, addressed, or corrected in any way after the 2019 Debates have taken place.”²¹

27. Third, Justice Zinn found that the balance of convenience favoured True North and Rebel News. Among other things, he noted the urgency of the Applications and found that there was no “flood-gate” concern.²²

¹⁹ *Ibid* at paras 33-39.

²⁰ *Ibid* at para 57.

²¹ *Ibid* at para 62.

²² *Ibid* at para 65.

PART II - ISSUES

28. The issue on this motion is whether, in light of Justice Zinn's Orders, the Applications are moot and should be struck in their entirety.

PART III - ARGUMENT

A. APPLICABLE LAW

(a) *Residual authority to strike notices of application*

29. The Federal Court's jurisdiction to strike a notice of application is grounded in the Court's plenary jurisdiction to restrain the misuse or abuse of its processes.²³

30. The Court will strike a notice of application for judicial review where it is "so clearly improper as to be bereft of any possibility of success."²⁴ In other words, "[t]here must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application."²⁵

31. On a motion to strike an application for judicial review, the facts asserted by the applicant in its notice of application are presumed to be true.²⁶ The Court reads the notice of application "holistically and practically without fastening onto matters of

²³ *1397280 Ontario Ltd v Canada (Employment and Social Development)*, 2020 FC 20 at para 11, [**1397280 Ontario Ltd**], LDC Motion Record, Tab A.

²⁴ *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47 [**JP Morgan**], LDC Motion Record, Tab B. See also *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CarswellNat 1441 at para 15 (FCA), LDC Motion Record, Tab C.

²⁵ *JP Morgan*, *supra* note 24 at para 47.

²⁶ *Ibid* at para 52.

form” in order to gain “‘a realistic appreciation’ of the application’s ‘essential character.’”²⁷

(b) *Mootness*

32. This Court, as well as the Federal Court of Appeal, has established that notices of application for judicial review can be struck on the basis of mootness, and has repeatedly granted such motions.²⁸

33. As set out in *Borowski*²⁹ and recently reiterated by the Federal Court of Appeal in *Democracy Watch*,³⁰ the test for mootness is twofold:

- (a) First, the Court must determine whether the required tangible and concrete dispute has disappeared and the issues have become academic; and
- (b) Second, if there is no live controversy between the parties or, in other words, if the case is moot, the Court must evaluate whether it should exercise its discretion to hear the case despite the mootness. Three factors are relevant for the exercise of this discretion:

- (1) presence of an adversarial relationship between the parties,
- (2) concern for judicial economy, and

²⁷ *Ibid* at para 50.

²⁸ *Lukács v. Canada (Transportation Agency)*, 2016 FCA 227 at para 1, LDC Motion Record, Tab D; *Fogal v Canada*, 1999 CarswellNat 939 (FC) [*Fogal*], LDC Motion Record, Tab E; *Bullis v Canada (Solicitor General)*, 2000 CanLII 15879 (FC) [*Bullis*], LDC Motion Record, Tab F; *Nichol v Canada (Privacy Commissioner)*, 2001 CarswellNat 905 (FC) [*Nichol*], LDC Motion Record, Tab G; *Moses v Canada*, 2003 FC 1417 [*Moses*], LDC Motion Record, Tab H.

²⁹ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CarswellSask 241 [Cited to CarswellSask], LDC Motion Record, Tab I [*Borowski*].

³⁰ *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*], LDC Motion Record, Tab J.

(3) need for the Court to be sensitive to its role as the adjudicative branch in our political framework.³¹

34. Legally, an issue is “moot” when, as a result of changed circumstances, its disposition will have no practical effect on the parties. Justice Sopinka in *Borowski* set out how Courts should determine whether an impugned application is moot:

[t]he general principle [of mootness] applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot...the sub-stratum of the litigation has disappeared [emphasis added].³²

35. The mootness analysis “is not a mechanical process.”³³ Rather, the Court’s discretion should be “exercised cumulatively, recognizing that the factors may not all point in the same direction.”³⁴

B. THE APPLICATIONS ARE MOOT

36. In light of Justice Zinn’s Orders and the completion of the 2019 federal election, there is no longer a “live controversy” underpinning the Applications. Thus, continuing the Applications would not directly affect any parties’ rights. Continuing with the

³¹ *Borowski*, *supra* note 29 at paras 16, 31, 34, 40, LDC Motion Record, Tab I.

³² *Ibid* at para 15.

³³ *Democracy Watch*, *supra* note 30 at para 13, LDC Motion Record, Tab J.

³⁴ *Ibid*.

Applications would be an academic exercise. As such, this Court should exercise its jurisdiction to control its process and strike the Applications.

(a) *The substance of the relief sought has been obtained*

37. True North's and Rebel News' Applications are moot because they have already been granted the core of the relief that they sought through these Applications. True North's and Rebel News' core allegation in their respective notices of application was that the Commission acted unreasonably and in a procedurally unfair manner when it denied them media accreditation to attend and cover the Debates. Justice Zinn heard and addressed these allegations at the October 7, 2019 injunction motion. He found that True North and Rebel News satisfied the tripartite test for injunctive relief, and issued the Orders directing the Commission to accredit True North and Rebel News. True North and Rebel News subsequently attended and covered the Debates.

38. Based on the foregoing alone, there is no live legal issue in the Applications. True North and Rebel News's request was to be accredited to cover the Debates. Justice Zinn granted precisely that relief. While a genuine issue may have existed when True North and Rebel News filed their respective notices, having obtained the ultimate relief they were seeking, the Applications are now moot.

39. Striking True North's and Rebel News' respective notice of application is consistent with this Court's settled case law. This Court has repeatedly struck applications that had become moot because the substance of the relief requested by the applicant had already materialized prior to the hearing. The following examples are illustrative:

- (a) a notice of application concerning the implementation of a Multilateral Agreement on Investment that Canada was negotiating was struck because after the notice of application was filed, negotiations ended without the agreement being reached;³⁵
- (b) a notice of application seeking to compel an administrative body to provide a letter of finding under the *Privacy Act* was struck because the administrative delegate had given the letter to the applicant and the question of whether there was delay in providing the letter was not legally relevant;³⁶
- (c) a notice of application pertaining to gender-based differential registering as “Indian” under the *Indian Act* was struck when, after the application was commenced, the Registrar of the Department of Indian Affairs registered the applicant in a category that provided similar benefits to her as registered male “Indians;”³⁷
- (d) a notice of application requesting transfer from a minimum security detention facility to a medium security facility was struck because, after commencing the application and prior to its hearing, the applicant inmate was released;³⁸ the fact that the applicant alleged breaches of his constitutional rights did not make the application a “live controversy;” and³⁹
- (e) a notice of application pertaining to a refusal to grant a favourable Labour Market Impact Assessment (LIMA) required to hire a specific temporary foreign worker was struck because, after filing the

³⁵ *Fogal, supra* note 28 para 13, LDC Motion Record, Tab E.

³⁶ *Nichol, supra* note 28 at paras 4-7, LDC Motion Record, Tab G.

³⁷ *Moses, supra* note 28 at paras 6, 14-16, LDC Motion Record, Tab H.

³⁸ *Bullis, supra* note 28 at paras 1-3, LDC Motion Record, Tab F.

³⁹ *Ibid* at para 5.

application, the applicant sought and obtained a favourable LIMA which allowed for the specific temporary foreign worker to be hired.⁴⁰

40. Proceeding further with these Applications (i) has no practical effect on the parties' rights and (ii) has the potential to muddy this Court's settled approach of striking notices of application where the substance of the relief sought has been granted.

(b) *Pleading declaratory relief does not transform these moot Applications into "live controversies"*

41. Rebel News seeks multiple heads of declaratory relief with respect to the Decisions. Such relief is neither available nor does it make these moot Applications "live" proceedings.

42. A court may, in its discretion, grant declaratory relief where "it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought [emphasis added]."⁴¹ The phrase "real and not theoretical" requires that "declaratory relief should not be granted when the dispute is purely academic or has no practical effect."⁴²

43. Having obtained the ultimate remedy of attending and covering the Debates, Rebel News' pursuit of declaratory relief is purely academic and has no practical effect

⁴⁰ *1397280 Ontario Ltd*, *supra* note 23 at paras 11-19, LDC Motion Record, Tab A.

⁴¹ *Ewert v Canada*, 2018 SCC 30 at para 81, LDC Motion Record, Tab K.

⁴² *R v Shaw*, 2015 ABCA 300 at para 10, LDC Motion Record, Tab L.

on the parties before the Court. Such declaration would be a waste of the Court's resources.

44. In any event, this Court has consistently held that declaratory relief, in itself, does not provide a basis to establish a live controversy:

- (a) in *Fogal v Canada*, the applicants argued that because they sought declaratory relief, their application could not be struck on the basis of mootness. The Court expressly rejected this argument, holding that mootness "cannot be avoided" on the basis that declaratory relief is sought.⁴³
- (b) in *Rahman v Canada (Minister of Citizenship & Immigration)*, the applicant sought an order of mandamus and declaratory relief in relation to his application for permanent residence. The Minister subsequently granted the applicant permanent residence and moved to strike the application as moot. The Court held that there was no longer a live controversy in light of the granting of permanent residence, even though declaratory relief was sought.⁴⁴

45. The foregoing jurisprudence is consistent with *Borowski*, where the Supreme Court held that where "the central issue" of a case has been resolved, the existence of "ancillary" issues does not maintain a "live controversy."⁴⁵

46. The central issue of True North's and Rebel News' respective notices was resolved by the Orders of Justice Zinn. The remaining allegations of unfair procedure,

⁴³ *Fogal*, *supra* note 28 at paras 24-27, LDC Motion Record, Tab E.

⁴⁴ *Rahman v Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 354 at paras 17-21 (FC) [*Rahman*], LDC Motion Record, Tab M.

⁴⁵ *Borowski*, *supra* note 29 at para 26, LDC Motion Record, Tab I.

inadequate reasons, and biased decision-making are ancillary. Pursuant to *Borowski*, these ancillary concerns cannot function as life support for the moot Applications.

47. Conducting a merits hearing on the remaining allegations would be inconsistent with basic tenets judicial review. The Supreme Court recently held that “[t]he purpose of judicial review is to ensure the legality of state decision making.”⁴⁶ This purpose has *already* been served by the Orders of Justice Zinn. Moreover, according to the Federal Court of Appeal “applications for judicial review are meant to proceed expeditiously because they are summary proceedings.”⁴⁷ In the present Applications, Justice Zinn acted swiftly and decisively to review the impugned decisions of the Commission. Permitting any further steps in the Applications risks transforming an otherwise focused judicial review proceeding into an impermissible “fishing expedition”⁴⁸ or a “line-by-line treasure hunt for error.”⁴⁹

C. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO HEAR THE MOOT APPLICATIONS

48. As there is no live controversy between the parties, the second part of the *Borowski* test requires the Court to evaluate whether it should exercise its discretion to

⁴⁶ *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 13, LDC Motion Record, Tab N.

⁴⁷ *Ramos v. Canada (Attorney General)*, 2019 FCA 205 at para 33, LDC Motion Record, Tab O.

⁴⁸ *Pauktuutit, Inuit Women's Assn v Canada*, 2003 CarswellNat 1257 at para 28 (FC), LDC Motion Record, Tab P (“Speculation and fishing expeditions as a foundation for judicial review are to be disregarded”).

⁴⁹ *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, LDC Motion Record, Tab Q.

hear the moot Applications. The relevant factors found in *Borowski* support striking these Applications.

(i) The Applications lack an adversarial context

49. In a moot proceeding, an adversarial context may exist if there is some benefit to adjudicating the moot dispute. As this Court has explained, “if the resolution of an issue in an otherwise moot proceeding determines the availability of liability or prosecution in a related proceeding between the parties, there remains an adversarial context between them [emphasis added].”⁵⁰

50. There is no legally relevant adversarial context with respect to the issue for which relief is sought (i.e. accreditation). Justice Zinn ordered the Commission to reconsider its decision in a manner favourable to True North and Rebel News and accredit their journalists. The Commission did so; the Debates occurred; and there is nothing of substance left to litigate. Put another way, there is no liability or related prosecution that would provide an adversarial context for this Court entertain these Applications.

51. Moreover, if there are no longer parties on opposing sides that are keen to advocate their positions, the Court will be less willing to hear the matter.⁵¹

52. The future of the Commission is uncertain: whether it will exist in its current form in the future remains, at best, unclear. In such context, there is no active

⁵⁰ *Azhaev v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 219 at para 22, LDC Motion Record, Tab R.

⁵¹ *Borowski*, *supra* note 29 at para 31, LDC Motion Record, Tab I.

adversarial context on the basis of which this Court may exercise its discretion to hear these moot Applications.

(ii) Judicial economy would not benefit from hearing the Applications

53. The second factor relevant to the discretionary decision to hear the moot Applications is “judicial economy.” The Federal Court of Appeal has set out some principles on how to conduct this analysis:

[i]f a proceeding will not have any practical effect upon the rights of the parties, it has lost its primary purpose. The parties and the Court should no longer devote scarce resources to it. Here, the concern is judicial economy. However, in exceptionally rare cases, the need to settle uncertain jurisprudence can assume such great practical importance that a court may nevertheless exercise its discretion to hear a moot appeal [emphasis added].⁵²

54. In addition, under the “judicial economy” analysis, courts may consider (i) whether the matter is likely to recur and is evasive of review; and (ii) whether the moot matter is of national or public importance.⁵³

55. None of the factors under the judicial economy analysis suggest that this Court should use its scarce resources to hear the Applications. To the contrary, continuing the Applications violates principles of judicial economy.

56. First, True North and Rebel News have obtained the relief that they sought. Deciding the Applications at this point will have no practical effect on the parties’

⁵² *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at para 16, LDC Motion Record, Tab S.

⁵³ *Borowski*, *supra* note 29 at para 35, LDC Motion Record, Tab I.

rights. Quite simply, the Applications have lost their “primary purpose” and scarce judicial resources should not be devoted to such matters.

57. Second, these Applications are not among the “exceptionally rare cases” that raise “the need to settle uncertain jurisprudence.” To the contrary, the Applications involve the application of settled administrative law principles to the facts at bar.

58. Third, True North and Rebel News had their day in court and obtained effective relief. As this Court has explained, “...*Borowski* has its justification that there is not enough court time to hear every matter to a conclusion, merely because a party... wishes to have his or her day in court... overcrowded court dockets and overworked judges, resulting in the need to ration scarce judicial resources, make it necessary to find special circumstances in order to apply those resources to a moot case.”⁵⁴ Having had the benefit of appearing before Justice Zinn, receiving his reasons, and obtaining the ultimate relief sought, it is antithetical to the principles of judicial economy to persist with these Applications.

59. Fourth, there is no evidence that the Applications are likely to recur and are evasive of judicial review. The way these Applications have been litigated suggests otherwise. The Commission’s Decisions were subject to urgent injunction proceedings, where—in Justice Zinn’s words—the parties filed substantial motion records, including affidavits, jurisprudence, and memoranda.⁵⁵ There is no reason to presume that should something similar arise in the future, the parties will not have the

⁵⁴ *Rahman*, *supra* note 44 at para 24, LDC Motion Record, Tab M.

⁵⁵ Zinn J Reasons, *supra* note 1 at para 4, LDC Motion Record, Tab 4.

benefit of judicial oversight. As the Federal Court of Appeal noted in *Democracy Watch*, “[if] there may be ... other similar cases, then there may well be other opportunities to bring the issue before the Court in a case that presents a live dispute.”⁵⁶

60. Fifth, while issues of expression and press freedom are important, they do not automatically qualify as issues of “national importance” such that the Court should hear a moot application. Justice Sopinka in *Borowski* explained as follows:

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided [emphasis added].⁵⁷

61. The narrow issue of media accreditation to cover the Debates likely does not amount to an issue of “national importance.” Even if it did, there are no clear “social costs” on the record that would require this Court to hear the moot Applications.

(iii) Determining these Moot Applications may Encroach on Parliament’s Sphere of Authority

62. The third factor of the *Borowski* test pertains to the Court’s sensitivity to its role relative to that of the legislative branch of government. The Court in *Borowski* noted that in “considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role,” by intruding into the legislative sphere.⁵⁸

⁵⁶ *Democracy Watch*, *supra* note 30 at para 18, LDC Motion Record, Tab J.

⁵⁷ *Borowski*, *supra* note 29 at para 39, LDC Motion Record, Tab I.

⁵⁸ *Ibid* at para 41.

63. Where an issue has an underlying “political sensitivity”, the courts are hesitant to hear moot applications based on the third *Borowski* factor.⁵⁹ The British Columbia Court of Appeal held, which was endorsed by the Federal Court of Appeal,⁶⁰ as follows:

While courts must not be reluctant to address political issues where they are required to do so in order to resolve genuine legal disputes, they also need not go out of their way to deal with them. There is a real sense in which...the court is being asked to interfere with what are, at least arguably, privileges of the legislature. Given that it is unnecessary to enter into that area to resolve any live dispute, it is my view that we should not do so [emphasis added].⁶¹

64. The Applications have a strong political undercurrent. Establishing a commission to organize the Debates is a unique privilege that the executive branch holds. Moreover, True North and Rebel News have alleged that their exclusion was politically motivated. While the political dimension of the Applications are by no means determinative, it weighs against hearing the moot Applications.

⁵⁹ *Democracy Watch*, *supra* note 30 at paras 19-22, LDC Motion Record, Tab J.

⁶⁰ *Ibid* at para 22.

⁶¹ *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCCA 366 at para 14, LDC Motion Record, Tab T.

PART IV - ORDER REQUESTED

65. For the reasons set out above, this Court should strike True North's and Rebel News' notices of application in their entirety and award the Commission its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of January, 2020.



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PART V - LIST OF AUTHORITIES

Jurisprudence

1. *1397280 Ontario Ltd v Canada (Employment and Social Development)*, 2020 FC 20
2. *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250
3. *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CarswellNat 1441 (FCA)
4. *Lukács v. Canada (Transportation Agency)*, 2016 FCA 227
5. *Fogal v Canada*, 1999 CarswellNat 939 (FC)
6. *Bullis v Canada (Solicitor General)*, 2000 CanLII 15879 (FC)
7. *Nichol v Canada (Privacy Commissioner)*, 2001 CarswellNat 905 (FC)
8. *Moses v Canada*, 2003 FC 1417
9. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342
10. *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195
11. *Ewert v Canada*, 2018 SCC 30
12. *R v Shaw*, 2015 ABCA 300
13. *Rahman v Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 354 (FC)
14. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26
15. *Ramos v. Canada (Attorney General)*, 2019 FCA 205
16. *Pauktuutit, Inuit Women's Assn v Canada*, 2003 CarswellNat 1257 (FC)
17. *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34
18. *Azhaev v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 219
19. *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196

20. *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCCA 366

Privy Council Orders and Parliamentary Committee Meeting

21. Privy Council, Order in Council PC 2018-1322 (October 29, 2018)
22. House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 42-1, No 133 (November 22, 2018)
23. Privy Council, Order in Council PC 2018-1469 (November 29, 2018)