

Federal Court



Cour fédérale

Date: 20201222

**Dockets: T-1631-19
T-1633-19**

Citation: 2020 FC 1181

Ottawa, Ontario, December 22, 2020

PRESENT: The Honourable Madam Justice Roussel

Docket: T-1631-19

BETWEEN:

REBEL NEWS NETWORK LTD

Applicant

and

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

Respondents

Docket: T-1633-19

AND 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 AND REASONS

I. Nature of the Matter

[1] These reasons relate to four (4) motions heard together on June 18, 2020.

[2] The Leaders' Debates Commission [Commission] seeks an order striking in their entirety and without leave to amend, respectively, the notices of application for judicial review filed by Rebel News Network Ltd [Rebel News] in file T-1631-19 and by Andrew James Lawton and True North Centre for Public Policy [collectively True North] in file T-1633-19. The Commission is of the view that the applications are moot.

[3] True North seeks an order granting leave to amend its notice of application.

[4] Finally, Rebel News seeks an order pursuant to Rules 317 and/or 318 of the *Federal Courts Rules*, SOR/98-106 [FC Rules] requiring the Commission to produce a better Certified Tribunal Record.

[5] For the reasons set out below, the Commission’s motions to strike Rebel News and True North’s notices of application for judicial review are granted and True North’s motion to amend its notice of application for judicial review is dismissed. Given my conclusions on these first two (2) motions, it is not necessary for me to determine Rebel News’ motion for production of a better Certified Tribunal Record.

II. Background

A. *The Parties to the Motion*

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

[7] True North is a charity registered with the Government of Canada, with its head office located in Richmond, British Columbia. It provides coverage of Canadian and international affairs on its website.

[8] Andrew Lawton is a fellow and staff writer of True North.

[9] The Commission was created by Order in Council PC 2018–1322, as an independent body, whose mandate includes “organiz[ing] one leaders’ debate in each official language during the general election period”. The Commission organized the 2019 Federal Leaders Debates [Debates] that occurred in the English language on October 7, 2019, and in the French language on October 10, 2019.

[10] The Attorney General of Canada [AGC] is also a respondent in both T-1631-19 and T-1633-19. It submitted brief submissions, supporting the Commission's motions to strike the notices of applications of Rebel News and True North.

B. *The Leaders' Debates and the Accreditation Process*

[11] 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 accreditation portal [which] is now open and will close on October 4, 2019, at 11:59 p.m. EDT”. The press release did not provide additional information on the accreditation process or the criteria that would be used in deciding to accept or refuse an application for accreditation.

[12] During this application window, David Menzies and Kean Bexte of Rebel News and Andrew Lawton of True North applied for accreditation.

[13] In consultation with the Secretariat of the Canadian Parliamentary Press Gallery [Press Gallery Secretariat], the Commission developed and adopted an Accreditation Guideline on October 3, 2019, which was not made public. It stated that the Commission would “accredit journalists and media organizations that respect the recognized norms of independent journalism” and not “media organizations that engage in advocacy and political activism”.

[14] On October 4, 2019, the Chief of the Press Gallery Secretariat informed Rebel News and True North that they were denied accreditation. The decisions read as follows [Decisions]:

[To Rebel News:]

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.

C. *Applications for Judicial Review*

[15] On October 7, 2019, Rebel News commenced an application for judicial review, alleging that the Commission breached its procedural and substantive rights. Specifically, it argues that the Commission acted in an unfair, unreasonable, unlawful and arbitrary manner by: (1) failing to provide proper criteria for accreditation and assess the credentials of Rebel News; (2) allowing partisan politics to infiltrate and taint the Commission's review; (3) granting accreditation to other media representatives that are clearly "actively involved in advocacy"; and (4) failing to provide adequate reasons.

[16] In addition to seeking leave to have the judicial review heard on an urgent basis, Rebel News sought the following relief:

- a) an order quashing the Decision of the Commission and replacing it with an order granting Rebel News accreditation to attend and cover the Debates;

- b) in the alternative, an order quashing the Decision and remitting the matter back to the Commission with a direction that it provides Rebel News with accreditation to attend and cover the Debates;
- c) 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;
- d) 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;
- e) 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;
- f) 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;
- g) a declaration that the Commission acted unfairly, unreasonably, and unlawfully in having the Chief of the Press Gallery Secretariat participate in and/or take the lead in making the Decision when he was not part of the Commission tasked with doing so;

- h) a declaration that the Commission did not follow its own processes, procedures, protocols, or the Order in Council which created the Commission;
- i) 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 the Chief of the Press Gallery Secretariat 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;
- j) an order directing the Commission to provide a complete list of the selection criteria used by the Commission in determining the granting of accreditation;
- k) 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;

- l) 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
- m) an order directing the Commission to provide detailed information regarding the relationship between the Chief of the Press Gallery Secretariat and the Commission, including a description of what capacity and under what authority he was working when he considered and denied Rebel News' requests for accreditation.

[17] The same day, True North commenced an application for judicial review. In its notice of application, it alleges that the Commission's process was unfair, the reasons were inadequate, and the Commission's conduct was "an attempt [...] to censor" and "arbitrary". 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 True North 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 Press Gallery Secretariat and the Commission, including a description of what capacity and under what authority he was working when he reviewed and denied True North's request for accreditation.

D. *Injunctive Relief*

[18] On October 7, 2019, Rebel News and True North also filed motions seeking (i) interlocutory injunctions for an order granting them the accreditation required to cover the Debates; or (ii) in the alternative, interlocutory injunctions for an Order requiring the Commission to grant them accreditation [Injunction Motions].

[19] Given that the English and French Debates were scheduled to occur, respectively, on October 7, 2019, and October 10, 2019, Justice Russel W. Zinn heard the Injunction Motions on October 7, 2019.

[20] On October 7, 2019, Justice Zinn found that Rebel News and True North had satisfied the tripartite test for granting the requested injunctions. He issued the following two (2) 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.

[21] The Commission accredited Rebel News and True North. They attended and covered the Debates and participated in the media scrum, which followed the Debates.

[22] On October 17, 2019, the Commission filed a notice of appeal, seeking to set aside the orders of Justice Zinn.

[23] On November 13, 2019, Justice Zinn provided written reasons for his orders.

[24] First, he found that Rebel News and True North's applications would likely succeed on the merits in setting aside the Decisions as unreasonable and procedurally unfair. He observed:

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

[...]

[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.

[...]

[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. [...]

[25] Second, Justice Zinn found that the Commission's Decisions would cause irreparable harm to Rebel News and True North by denying them the opportunity to participate in the media scrum.

[26] Third, Justice Zinn found that the balance of convenience favoured Rebel News and True North.

[27] The Commission discontinued its appeal on December 9, 2019.

E. *The Motions Before the Court*

[28] On January 23, 2020, the Commission filed motions seeking to strike, in their entirety and without leave to amend, Rebel News and True North's notices of application for judicial review on the basis that the applications are now moot. In general, the Commission submits that there is no longer a live controversy between the parties.

[29] On February 10, 2020, True North served the Commission with a motion for leave to amend its notice of application.

[30] The same day, Rebel News filed a motion for an order pursuant to Rules 317 and/or 318 of the FC Rules requiring the Commission to produce material relevant to its application for judicial review that, it claims, should have been included in the Certified Tribunal Record delivered by the Commission in December 2019.

[31] On March 11, 2020, Prothonotary Martha Milczynski issued an order that the four (4) motions be heard together.

III. Analysis

A. *Relevant Legal Principles*

[32] Rule 221 of the FC Rules allows the Court to strike a pleading if it “discloses no reasonable cause of action”. While it applies to actions, the Federal Court of Appeal has recognized that applications for judicial review may be struck by virtue of the Court’s plenary jurisdiction to restrain the misuse or abuse of its processes (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 at 600 (FCA) [*David Bull*]; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47-48 [*JP Morgan*]; *1397280 Ontario Ltd v Canada (Employment and Social Development)*, 2020 FC 20 at para 11).

[33] The Federal Court of Appeal recently confirmed that the threshold for striking an application for judicial review is the same as that for striking an action (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 32-33 [*Wenham*]). A motion to strike an application for judicial review should only be granted in those exceptional cases where the application is “so clearly improper as to be bereft of any chance of success” (*David Bull* at 600). The test for striking an application has also been articulated as follows: whether it is plain and obvious that the application is doomed to fail (*Wenham* at paras 33, 65) or whether there is “a ‘show stopper’ or a ‘knockout punch’ – an obvious, fatal flaw striking at the root of this Court’s power to entertain the application” (*JP Morgan* at para 47).

[34] This Court, as well as the Federal Court of Appeal, have found that notices of application for judicial review may be struck on the basis of mootness (*Cardin v Canada (Attorney General)*, 2017 FCA 150 at para 8; *Lukács v Canada (Transportation Agency)*, 2016 FCA 227 at paras 1, 6 [*Lukács*]; *Kardava v Canada (Citizenship and Immigration)*, 2016 FC 159; *Moses v Canada*, 2003 FC 1417 at para 11[*Moses*]; *Fogal v Canada*, [1999] FCJ No 788 [*Fogal*]).

[35] A matter is moot where there is no longer a live issue between the parties and an order will have no practical effect (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 15-16 [*Borowski*]; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*]; *Lukács* at para 7). If the matter is moot, the Court may still decide to hear the case if the circumstances warrant it. The factors relevant to the Court's exercise of discretion are: (1) the presence of an adversarial context; (2) the appropriateness of applying scarce judicial resources; and (3) the Court's sensitivity to its role relative to that of the legislative branch of government. The Court's analysis is not a mechanical process and its discretion should be exercised cumulatively, while recognizing that the factors may not all point in the same direction (*Democracy Watch* at para 13).

B. *The Applications Are Moot*

[36] I agree with the Commission and the AGC that the applications of Rebel News and True North are moot.

[37] In their respective notices of application for judicial review, Rebel News and True North argue 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 during the Injunctions Motions on October 7, 2019. He found that they satisfied the tripartite test for injunctive relief and ordered the Commission to accredit Rebel News and True North. They subsequently attended and covered the Debates. Justice Zinn also found that the Commission's finding that Rebel News and True North had engaged in "advocacy" lacked rationality and transparency and that the Commission likely breached procedural fairness.

[38] When Justice Zinn granted their injunctions on October 7, 2019, Rebel News and True North obtained the core of the relief they were seeking to receive through their applications. The underlying basis for the dispute between the parties no longer exists. Proceeding further with the applications would have no practical effect on the rights of the parties.

[39] Rebel News submits that live issues remain between the parties and points to its notice of application that contains other requests for relief beyond simply accreditation at the Debates. True North similarly submits that ancillary considerations remain, including a review of the circumstances leading up to the development of the policy on which it was allegedly based, which, in its view, could provide necessary guidance to the executive branch on future media accreditation decisions. True North submits that important questions about the propriety of the Commission's actions remain unaddressed.

[40] The ancillary relief requested by Rebel News and True North does not create a live issue between the parties.

[41] In its notice of application, Rebel News is seeking several declarations confirming that the Commission acted unfairly, unreasonably and unlawfully in the decision-making process. The declarations sought are more akin to findings a Court may make to quash a decision rather than relief on judicial review. For example, if the judge on the merits agreed with Justice Zinn that the Commission failed to provide sufficient reasons for the Decision, such finding would be included in the judge's reasons. A party cannot seek a declaration that the tribunal provide better reasons. Likewise, if the judge found that the Commission acted unfairly, the finding would likely be included in the reasons of the decision and not in the order by way of a declaration.

[42] That being said, even if the declarations sought by Rebel News were the types of declarations available on judicial review, this Court has held that the doctrine of mootness may not be avoided merely by seeking declaratory relief. Declaratory relief, in itself, does not provide a basis to establish a live controversy (*Moses* at para 13; *Pauktuutit, Inuit Women's Assn v Canada*, 2003 FCT 139 at para 14; *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 at para 21 [*Rahman*]; *Fogal* at paras 24-25).

[43] There is no guarantee that the judge hearing the merits would make findings on all of the issues raised by Rebel News. A judge is not required to address all the issues raised by the parties if one is determinative of the matter. In the case before me, Justice Zinn found that the Commission's decision lacked discernible rationality and logic on why advocacy would disqualify one from accreditation and therefore was neither justified nor intelligible. A judge on the merits could decide to set aside the decision on that basis alone, thus leaving the ancillary issues raised in the notice of application unanswered.

[44] As for the balance of the relief requested by Rebel News and True North in their notices of application, the relief sought is not the type generally available under judicial review. They are asking the Court to issue orders directing the Commission to provide information and documents as well as answers to several questions relating to the decision-making process. Upon review of the relief requested, I find that Rebel News and True North are attempting to turn their application for judicial review into a commission of inquiry. The orders they are seeking are also more akin to access to information requests. The fact that the Commission is not subject to the *Access to Information Act*, RSC 1985, c A-1 does not give Rebel News and True North a licence to convert an application for judicial review into an alternative mechanism for obtaining records beyond those contemplated under the FC Rules. Nevertheless, even if they were to obtain the requested orders, they would have no practical legal consequences or effect. Rebel News and True North have already obtained the ultimate relief they were seeking and the underlying challenge is entirely academic.

C. *Amending the Notice of Application Does Not Insulate from a Finding of Mootness*

[45] True North argues, by way of its motion for leave to amend, that it is seeking additional relief that is fundamental to the parties and in the public interest to resolve. In particular, it is asking the Court to issue:

- a) an order directing the Commission to provide “full details of the consultation(s) that the Commission alleges occurred between it and the Press Gallery Secretariat, or any members thereof, including but not limited to emails, particulars of meetings, and any other communications”; and

- b) a “Declaration that the Decision breached the Applicants’ freedom of the press and freedom of expression, as guaranteed by s. 2(b) of the [*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]]”.

[46] True North contends that the relief sought arises essentially out of the same facts as the relief claimed in the original notice of application and that the Court should nevertheless assess these allegations as part of its “holistic” review.

[47] Relying on *Canderel Ltd v Canada*, [1994] 1 FC 3 (FCA) at paragraph 10, True North submits that amendments to pleadings should be allowed at any stage of an action for the purpose of determining the real question in controversy between the parties. They should be allowed if they do not result in an injustice to the other party, which cannot be compensated by an award of costs, and if they serve the interests of justice.

[48] The Commission does not oppose True North amending its notice of application to plead subsection 2(b) of the *Charter*. However, it opposes several of True North’s other proposed amendments. It submits that on a motion to amend a notice of application, the Court must first consider the threshold issue of whether the amendment has a “reasonable prospect of success” in the context of the law and litigation process (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348 at para 67). In assessing whether the amendment has a reasonable prospect of success, the Court will consider the appropriateness of the pleadings.

[49] I agree with the Commission that True North's proposed amendments do not insulate its application from a finding of mootness. Even if I were to accept True North's amendment to include relief under the *Charter*, alleging a *Charter* violation does not automatically convert a moot application into a live controversy nor does it require the Court to exercise its discretionary authority to hear a moot application. A determination as to whether the Commission violated True North's *Charter* rights will have no practical effect on True North's rights. It has obtained the core of the relief it was seeking which was to be accredited and to participate in the Debates.

[50] Moreover, True North's request that the Court order the Commission to provide full details of the consultation that occurred between it and the Press Gallery Secretariat falls outside the ambit of a judicial review and runs contrary to its purpose. None of the remedies contemplated in subsection 18.1(a) of the *Federal Courts Act*, RSC 1985, c F-7 apply to True North's request, including a writ of *mandamus*, which requires several cumulative conditions be satisfied before the Court exercises its discretionary power.

[51] Several of the other proposed amendments that True North wishes to bring to its notice of application also fail to meet the basic requirements of pleadings in a notice of application and would be struck on the basis of mootness for the same reasons as the underlying application.

[52] For the foregoing reasons, I dismiss True North's motion to amend its notice of application for judicial review.

D. *The Applications Should Not Be Heard on the Merits*

[53] As I have concluded that the applications for judicial review are moot, I move on to the second stage of the analysis by examining whether I should exercise my discretion to allow the applications to be heard on their merits. As noted above, the factors relevant to the Court's exercise of discretion are: (1) the presence of an adversarial context; (2) the appropriateness of applying scarce judicial resources; and (3) the Court's sensitivity to its role relative to that of the legislative branch of government.

[54] The Commission argues that there is no legally relevant adversarial context with respect to the issue for which relief is sought, namely the accreditation of Rebel News and True North. Justice Zinn ordered the Commission to reconsider its decision in a manner favourable to them and accredit their journalists. The Commission did so. The Debates occurred. There is nothing of substance left to litigate. Moreover, 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 adversarial context upon which this Court may exercise its discretion to hear the moot applications.

[55] The Commission also argues that none of the factors under the judicial economy analysis – whether the matter is likely to recur and is evasive of review and whether the moot matter is of national or public importance – suggests that the Court should use its scarce resources.

[56] Finally, the Commission is of the view that determining the moot applications may encroach on Parliament's sphere of authority since establishing a commission to organize the Debates is a unique privilege that the executive branch holds.

[57] In response, Rebel News generally submits that a finding that the issues on the application are moot would have the practical effect of immunizing the Commission and similarly situated bodies from any type of judicial review. It further submits that the application raises matters of national interest and public importance because it has implications for media, journalism, democracy and the freedom of the press. In a minority government, an election could be called at any time and this compressed timeframe will reoccur. Both sides clearly have a stake in the outcome. It submits that at the very least, a decision should be made after reviewing all of the evidence to truly appreciate the importance of what is at stake for the litigants, and more broadly, democracy.

[58] True North argues that the parties continue to have an adversarial context with respect to the *Charter* breach and the dispute over the Decision itself. The "dispute is about the executive branch making a decision that was arbitrary, unreasonable, partisan, biased, lacking in procedural fairness and unconstitutional. The purpose of judicial review is to ensure the legality of state decision making, which includes upholding the rule of law and democracy. This necessitates a full hearing on the circumstances of the Decision".

[59] True North also argues that since it continues to report on the activities of Parliament and expects to participate in and report on future electoral debates, it is probable that this situation

will be repeated by the Commission or the entity which replaces it, or in a substantially similar manner, by the Government of Canada in any number of decisions it makes relating to accepting or accrediting media outlets and journalists. While the Debates are over, there has been no opportunity to review the Commission's Decisions, address the breach of the Applicants' rights as members of the press, and provide guidance on how to avoid this situation in the future. True North submits that the value of addressing these important public interest questions outweighs any concerns over judicial economy.

[60] After considering the submissions of Rebel News and True North, I am not persuaded that I should exercise my discretion in favour of continuing the applications.

[61] The "evasive review" exception to mootness described in *Borowski* and in *Democracy Watch* applies to matters that are, by their very nature, difficult to subject to judicial oversight given their exigent character (*Borowski* at 360-361, 364; *Democracy Watch* at paras 14, 18). Rebel News and True North were able to bring their applications to Court and were successful in obtaining the relief they were seeking. While their applications took place in a compressed timeframe, it is speculative to conclude that future accreditation decisions of the Commission would also occur in a condensed schedule.

[62] Moreover, it is entirely uncertain at this time whether an accreditation decision by the Commission will occur again in the future or that it will raise the same issues. As noted earlier, the Commission was created by Order in Council PC 2018-1322, as an independent body with a mandate that included "organiz[ing] one leaders' debate in each official language during the

general election period”. The Order in Council requires the Commissioner to provide a report to the Minister of Democratic Institutions within five (5) 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”. While the Commission may continue to exist and future accreditation cases may arise, it is entirely speculative and premature to presume Parliament will adopt the recommendations contained in the report. Parliament could decide to remove the responsibility of accreditation from the Commission and confer it upon a third party, in which case, this Court’s reasons would have no practical legal consequences. Even if Rebel News and True North obtained the declarations and information requested, it would not guarantee them the right to accreditation in the future.

[63] Given the scope of the relief requested and the grounds set out in the notices of application, there is a real danger that pronouncing a judgment on the underlying application could, in fact or in perception, intrude into the role of the legislative and executive branches of government with whom lies the responsibility of determining the existence and the scope of the Commission’s future mandate (*Rahman* at para 25). Once the Commission’s mandate and guiding principles have been established and a person or entity is aggrieved by the Commission’s actions, that person or entity may bring the matter before the Court. It is equally speculative to assume that a decision will be made based on the same facts, circumstances and context. In my view, allowing the applications to proceed would not be an efficient use of scarce judicial resources.

[64] As for True North's allegation with respect to the *Charter* breach, I recognize that the allegation is a serious one. However, it is not the role of this Court to decide purely abstract and academic questions when there is no obvious, useful purpose to be served by granting the declaratory relief sought by an applicant (*Lee v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 242 at para 9). The Supreme Court of Canada has held that courts should avoid expressing an opinion on a question of law where it is not necessary to do so to dispose of a case, especially when the question is constitutional in nature. This policy is based on the premise that unnecessary constitutional pronouncement may prejudice future cases, the implications of which have not been foreseen (*Phillips v Nova Scotia Commissioner of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97 at paras 9-12). In the circumstances of this case, the administrative law remedies were, in effect, granted by Justice Zinn and there is no need for a judge on the merits to decide the constitutional issue.

[65] For these reasons, I am not satisfied that I should exercise my discretion and allow the applications to proceed.

E. *Lawton Affidavit*

[66] In its reply submissions on the motions to strike, the Commission submitted that the affidavit of Mr. Lawton, adduced by True North was improperly placed before the Court, having been adduced by a responding party on a motion to strike (*JP Morgan* at para 52). It also argued that the affidavit is non-probative and that it is replete with speculation and hearsay. Considering my decision to order that Rebel News and True North's notices of application be struck, it is not

necessary for me to consider this question. I did not rely on the affidavit when preparing these reasons.

IV. Conclusion

[67] Given my decision to grant the Commission's motions to strike the applications of Rebel News and True North and to dismiss True North's motion for leave to amend its notice of application, Rebel News' motion for production of a better Certified Tribunal Record is accordingly dismissed.

[68] The applications of Rebel News and True North are therefore struck out, as moot, without possibility to amend.

V. Costs

[69] The Commission seeks the following costs:

- a) Motions to strike: the sum of \$4,551.72 (inclusive of HST and disbursements) paid jointly and severally by Rebel News and True North;
- b) Motion to amend True North's pleadings: the sum of \$2,881.50 (inclusive of HST);
- c) Rule 318 motion: the sum of \$5,593.50 (inclusive of HST).

[70] The AGC is not seeking costs given its limited role and minimal submissions in the motions.

[71] In response to the Commission's bill of costs, True North submits that costs should not be awarded against them. They argue that where the subject litigation involves a matter of general public interest, courts will, where appropriate, exercise their discretion and decline to award costs.

[72] After considering True North's submissions, I am not persuaded that I should depart from the well-established practice that the losing party pay costs to the successful party. Although the Commission's motions to strike are brought in respect to two (2) applications for judicial review and the Commission could claim costs against Rebel News and True North individually, the Commission has agreed to reduce the amount it is seeking because it took the same position regarding both motions. I find this to be a good compromise. Costs are awarded to the Commission in a fixed amount of \$4,551.72 payable jointly and severally by Rebel News and True North.

[73] That being said, under Rule 400 of the FC Rules, I have full discretion in the allocation of costs. As True North's motion to amend and the Commission's motions to strike are inextricably related, I have decided that no costs will be awarded to the Commission in respect to True North's motion to amend its notice of application. There will also be no costs on Rebel News' motion for the production of a better Certified Tribunal Record given that Rebel News was successful in obtaining additional documents in response to the motion.

ORDER in T-1631-19 and T-1633-19

THIS COURT ORDERS that:

1. The Commission's motions to strike are allowed;
2. The notice of application in Court File T-1631-19 is struck out, without possibility to amend;
3. The notice of application in Court File T-1633-19 is struck out, without possibility to amend;
4. True North's motion to amend its notice of application for judicial review is dismissed;
5. Rebel News' motion to obtain an order that a better Certified Tribunal Record be produced is dismissed; and
6. Costs are awarded to the Commission in a fixed amount of \$4,551.72 payable jointly and severally by Rebel News and True North.

"Sylvie E. Roussel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1631-19

STYLE OF CAUSE: REBEL NEWS NETWORK LTD v CANADA
(LEADERS' DEBATES
COMMISSION/COMMISSION DES DEBATS DES
CHEFS) ET AL

AND DOCKET: T-1633-19

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

PLACE OF HEARING: HELD BY VIDEOCONFERENCE IN OTTAWA,
ONTARIO

DATE OF HEARING: JUNE 18, 2020

ORDER AND REASONS: ROUSSEL J.

DATED: DECEMBER 22, 2020

APPEARANCES:

Aaron Rosenberg
David Elmaleh

FOR THE APPLICANT
REBEL NEWS NETWORK LTD

Lisa Bildy
Marty Moore

FOR THE APPLICANTS
ANDREW JAMES LAWTON AND TRUE NORTH
CENTRE FOR PUBLIC POLICY

Ewa Krajewska
Mannu Chowdhury

FOR THE RESPONDENT
CANADA (LEADERS' DEBATE
COMMISSION/COMMISSION DES DEBATS DES
CHEFS)

John Provard
Benjamin Wong

FOR THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Re-Law LLP
Toronto, Ontario

FOR THE APPLICANT
REBEL NEWS NETWORK LTD

Borden Ladner Gervais LLP
Toronto, Ontario

FOR THE RESPONDENT (CANADA (LEADERS'
DEBATE COMMISSION/COMMISSION DES
DÉBATS DES CHEFS)

Justice Centre for Constitutional
Freedoms
Calgary, Alberta

FOR THE APPLICANTS
ANDREW JAMES LAWTON AND TRUE NORTH
CENTRE FOR PUBLIC POLICY

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA