

Federal Court



Cour fédérale

Date: 20220307

Docket: T-1364-21

Citation: 2022 FC 313

BETWEEN:

REBEL NEWS NETWORK LTD.

Applicant

and

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

Respondents

REASONS FOR ORDER

HENEGHAN J.

I. INTRODUCTION

[1] Rebel News Network Ltd. (the “Applicant”) filed an Application for Judicial Review on September 3, 2021, seeking review of the decision of the Canada (Leaders’ Debates Commission/Commission des Débats des Chefs) (the “Commission” or the “First Respondent”), denying accreditation for its media representatives that would allow them to attend the French language General Election Federal Leaders’ Debate scheduled for Wednesday, September 8,

2021 and the English language General Election Federal Leaders' Debate scheduled for Thursday, September 9, 2021.

[2] By a Notice of Motion filed on September 3, 2021, the Applicant sought a mandatory interlocutory injunction in the following terms:

- An Order requiring the Respondent, the Leaders' Debates Commission (the "Commission") to grant Rebel News Media Accreditation (the "Accreditation") required to attend and cover the only official French Language Federal Leaders' Debate taking place on Wednesday, September 8, 2021, and the English Language Federal Leaders' Debate taking place on Thursday, September 9, 2021 (collectively, the "Debates");
- In the alternative, the relief as particularized and sought by Rebel News in the Notice of Application in this action;
- Costs of this motion; and
- Such other relief as Counsel may advise and this Honourable Court deems meet and just given the circumstances.

[3] By an Order issued on September 8, 2021, a mandatory injunction was granted directing the Commission to grant media accreditation to journalists of the Applicant for the Leaders' Debates, on the basis of personal attendance of one (1) journalist and virtual attendance of ten (10) other journalists. The personal attendance of one journalist is the same right accorded to other accredited media organizations.

[4] The Order issued following a virtual hearing on Tuesday afternoon, September 7, 2021, held by videoconference between Edmonton and Calgary, Alberta; Toronto and Ottawa, Ontario; and St. John's, Newfoundland and Labrador.

[5] The terms of that Order provided that Reasons would follow.

[6] The hearing was held on short notice, with leave of the Court, due to the urgent nature of the Applicant's request for relief.

II. **THE PARTIES**

[7] The Applicant is a federally incorporated company carrying on business as an independent online news and media company operating across Canada and internationally.

[8] The Commission is a body created pursuant to the October 29, 2018 Order in Council, 2018-1322. It exists for the purpose of organizing one leaders' debate in each official language during the general Federal election period.

[9] The Attorney General of Canada (the "Attorney General" or the "Second Respondent") is a party pursuant to Rule 303(2) of the *Federal Courts Rules*, S.O.R. 98/106 (the "Rules").

III. **BACKGROUND**

[10] The facts and details below are taken from the motion records, including the affidavits filed by the parties.

[11] The Applicant filed the affidavits of Mr. Ezra Levant, sworn on September 5, 2021 and of Ms. Candice Malcolm, sworn on September 6, 2021.

[12] The Commission filed the affidavit of Mr. Michel Cormier, sworn on September 6, 2021.

[13] The Attorney General did not file an affidavit, although he filed a motion record.

[14] Mr. Levant is the founder and principal of the Applicant. He deposed to the events leading up to the request for accreditation of journalists, with the Applicant, for attendance at the Leaders' Debates scheduled for September 8 and September 9, 2021.

[15] Mr. Levant attached 59 exhibits to his affidavit including the Commission's call for accreditation applications, accreditation applications of the journalists, decision letters from the Commission and news articles.

[16] Ms. Malcolm is the President of the Independent Press Gallery of Canada ("IPG"). In her affidavit, she deposed that the Applicant is a member in good standing with the IPG.

[17] Mr. Cormier is the Executive Director of the Commission. He attached 10 exhibits to his affidavit and some of these exhibits had multiple parts. Among other things, he deposed that the Commission's mandate is to ensure high journalistic standards for the leaders' debates. He also deposed that when the election was called, the Commission published guidelines that would be used to accredit media.

[18] The mandate created by the October 29, 2018 Order in Council, mentioned above, was clarified by a second Order in Council, published on November 4, 2020. That Order in Council,

2020-0871, provided the Commission with the power to set the criteria to select the leaders of registered parties who should be invited to participate in the debates.

[19] A third Order in Council was issued on November 5, 2020, reappointing Mr. David Johnston (the “Commissioner”) as the Debates Commissioner for a term of four years.

[20] The Applicant had submitted requests for accreditation for eleven (11) of its journalists. All requests were denied by letters dated August 31, 2021. The letters constitute the decision that is the subject of the within application for judicial review.

[21] In those letters, the Commissioner set out the Commission’s mandate. He referred to the Canadian Association of Journalists (the “CAJ”) guidelines on conflict of interest (the “Guidelines”) and referred to the Media Accreditation document issued by the Commission by which the Commission adopted those guidelines.

[22] The Commissioner proceeded to identify elements of conflict of interest that include the participation of a journalist in demonstrations, endorsements of political candidates and written opinion pieces about subject matter addressed in the articles written.

[23] The Commissioner denied all of the Applicant’s requests for accreditation on the grounds that a review of the Applicant’s website disclosed a number of activities that show a conflict of interest. In particular, he identified the following:

- The Vaccine Passport Legal Fund;

- The Stop The Censorship petition;
- The No COVID Jails Lawsuit;
- The Bring Back Harper Petition;
- The Open Saskatchewan Lawsuit; and
- The Audit Tracker Letter.

[24] The Commissioner commented upon his mandate to uphold public trust in media coverage and expressed the view that activities giving rise to conflicts of interest would impair the public trust.

IV. **SUBMISSIONS**

A. ***The Applicant's Submissions***

[25] The Applicant argued that it met the test for injunctive relief, as addressed in the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 31, that is submission of a serious issue for trial; that the applicant will suffer irreparable harm that is not compensable in damages if the relief sought is denied prior to determination of the underlying application; and that the balance of convenience favours the applicant. This test is tri-partite and conjunctive.

[26] The Applicant acknowledged that because the relief it sought was in the nature of a mandatory injunction, it was required to show a strong *prima facie* case, not merely that there was an issue for trial that was neither frivolous nor vexatious. In this regard, the Applicant referred to the decision of the Supreme Court of Canada in *R. v. Canadian Broadcasting Corp.*, [2018] 1 S.C.R. 196.

[27] The Applicant submitted that the decision of the Commission was arbitrary and made in breach of procedural fairness. It also argued that the Commission showed bias in making its decision. Finally, it submitted that the decision was unreasonable. It pleaded that these flaws raise a serious issue for trial.

[28] The Applicant argued that irreparable harm would flow from the exclusion of one of its journalists from the Leaders' Debates.

[29] Finally, it submitted that in the circumstances, the balance of convenience weighed in its favour.

B. *The Commission's Submissions*

[30] The Commission argued, among other things, that the Applicant failed to establish a strong *prima facie* case, considering the fair and transparent process that was followed by the Commission in reaching its decision.

[31] As well, the Commission submitted that the Applicant failed to establish irreparable harm. It argued that the lack of accreditation did not prevent the Applicant from reporting on the Leaders' Debates and the election.

[32] The Commission also submitted that the balance of convenience favoured it. It argued that reversing the decision of the Commission would interfere with the accreditation process set out in its mandate.

C. *The Attorney General's Submissions*

[33] The Attorney General, in oral submissions, said that he takes no position on the motion. He then proceeded to address the alleged breach of procedural fairness and submitted that this did not raise a serious issue for trial, in light of the role of the Commission.

[34] The Attorney General also commented that generally, a judicial review application proceeds on the basis of the record that was before the decision maker but the record can be supplemented, in certain cases, when an issue of procedural fairness is raised.

V. **DISCUSSION AND DISPOSITION**

[35] Section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, allows the Court to grant interlocutory injunctive relief and provides as follows:

Interim Orders

On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

Mesures provisoires

La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[36] The test for such relief is addressed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*.

[37] As mentioned above, in *R. v. Canadian Broadcasting Corp.*, *supra*, the Supreme Court of Canada modified the test for a “serious issue” when a party sought mandatory injunctive relief. The modified test required the Applicant here to show a strong *prima facie* case.

[38] In assessing the strong *prima facie* case, the Court is to consider the likelihood of the Applicant’s success in its underlying application for judicial review.

[39] In my opinion, the Applicant has established a strong *prima facie* case that it was arbitrarily targeted from the group of accredited media outlets. The record shows that the Commission, in 2021, adopted the CAJ Guidelines.

[40] I agree with the submissions of the Applicant that in relying on the Guidelines, the Commission failed to exercise its independence over the accreditation process and it arbitrarily created two classes of applicants for accreditation.

[41] By means of a media statement, entitled Media Accreditation for the 44th General Election, the Commission set out three options as to how media representatives could apply for accreditation.

[42] Options 1 and 2 allowed for automatic accreditation for media representatives who were members of the Canadian Parliamentary Press Gallery or one of four professional media organizations.

[43] Any media representative who was not a member of the above mentioned groups could only apply under Option 3.

[44] Media representatives applying under Option 3 were not eligible for automatic accreditation. Instead, these applicants were evaluated pursuant to the Guidelines.

[45] The Commission adopted the Guidelines but only applied them to certain applicants. This looks like an arbitrary distinction between groups.

[46] In my opinion, this distinction between media representatives who applied under Options 1 and 2, as opposed to Option 3, raised a strong *prima facie* case about the fairness of the accreditation process.

[47] I note that the Commission is mandated to protect the public interest and this extends to the accreditation process. The independence of the Commission does not relieve it from the obligation to act fairly.

[48] Although the Applicant made submissions about the reasonableness of the Commission's decision, it is not necessary for me to comment on those arguments in providing my Reasons for the Order that was granted on September 8, 2021.

[49] The Applicant argued that barring one of its journalists from the Leaders' Debates would cause irreparable harm not only to it, but to a large proportion of the Canadian population who

would welcome the opportunity to hear difficult questions posed to those who sought high political office as the Prime Minister and leader of the country.

[50] The Applicant cast this issue in terms of freedom of the press and the ability to put critical questions to the leaders of the vying political parties.

[51] In my opinion, the Applicant established irreparable harm in terms of being prevented from participation in the political process, on behalf of the electorate. There is room in the nation for the expression of opposing points of view. The Applicant did not ask to impose its views, but for the opportunity to participate in coverage of matters of importance during a federal election.

[52] Obviously, the loss of that opportunity is in the nature of harm that cannot be compensated by money.

[53] It is not necessary for me to say much about the balance of convenience.

[54] The Applicant met its burden of showing a strong *prima facie* case arising from the underlying application for judicial review.

[55] The Applicant met its burden of showing that irreparable harm, that cannot be compensated in damages, would follow if the relief sought were denied. The relief sought was a mandatory interlocutory injunction accrediting one (1) journalist to attend the Leaders' Debates in person, with ten (10) other journalists participating virtually.

[56] Since the Applicant established the first two elements of the applicable tri-partite and conjunctive test, in my opinion the balance of convenience lay in its favour.

[57] For these Reasons, the Order was issued on September 8, 2021.

“E. Heneghan”

Judge

St John’s, Newfoundland and Labrador
March 7, 2022

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1364-21

STYLE OF CAUSE: REBEL NEWS NETWORK LTD. v CANADA
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PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE FROM
EDMONTON AND CALGARY, ALBERTA,
TORONTO AND OTTAWA, ONTARIO AND ST.
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