

Federal Court



Cour fédérale

**Date: 20240918**

**Docket: T-1319-23**

**Citation: 2024 FC 1468**

**Ottawa, Ontario, September 18, 2024**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**REBEL NEWS NETWORK LTD.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Respondent represents the Minister of National Revenue (Minister), who, through the Canada Revenue Agency (CRA), determined that the Applicant, Rebel News Network Ltd. (Rebel), was not engaged in the production of original news content and was not entitled to the “qualified Canadian journalism organization” (QCJO) designation under

subparagraph 248(1)(a)(v) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*Act*]. A QCJO designation provides certain tax benefits under the *Act*.

[2] Rebel challenges the CRA decision on several grounds. Rebel argues that the decision is not based upon the evidence that was before the CRA. Rebel argues that the CRA interpreted “original news content” in a manner that is not consistent with the purpose and intent of the *Act* or the CRA’s *Guidance on the income tax measures to support journalism* (Guidance).

[3] Rebel seeks an Order that this Court direct the CRA to reverse the QCJO denial and to designate Rebel as a QCJO pursuant to the *Act*. Rebel also raises a challenge under 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*]).

[4] For the reasons below, I am dismissing this judicial review because I have concluded that the CRA decision is reasonable. I am also dismissing Rebel’s *Charter* arguments.

#### I. Background to the QCJO application

[5] In May 2021, Rebel completed an online application for QCJO status. In August 2021, a CRA Determination Officer held that Rebel would meet the criteria for QCJO designation except that it did not engage in the production of original news content, a statutory criterion under subparagraph 248(1)(a)(v) of the *Act*. The Determination Officer found that less than 1% of the items reviewed were original news content.

[6] In February 2022, the CRA Advisory Board on Eligibility for Journalism Tax Measures (Advisory Board) issued a recommendation agreeing with the conclusions of the Determination Officer, noting that Rebel's news content focused on and promoted one perspective.

[7] In a decision dated February 14, 2022, the CRA advised Rebel that it was not eligible for QCJO designation.

[8] On May 6, 2022, Rebel requested a reconsideration of this CRA decision.

[9] On June 7, 2022, the CRA requested that Rebel identify a consecutive three-week period of digital content for each news-related website to be reviewed for the assessment of original news content. On July 11, 2022, Rebel replied confirming January 30 to February 19, 2022 as the three-week period for review.

[10] On November 1, 2022, a second CRA Determination Officer, independent from the original February 14, 2022 decision, reviewed additional submissions from Rebel including news content for the period January 30 to February 19, 2022. The Officer also referred to the CRA's Guidance on the meaning of the words "engaged" and "original news content". The Officer noted there was no threshold requirement for the production of original news content and that the case was "borderline". This Officer found that only 2% of the items during the aforementioned period constituted original news content.

[11] On February 23, 2023, the Advisory Board reviewed the second CRA Determination Officer's reconsideration, solely on the basis of whether Rebel was "engaged in the production of original news content," per subparagraph 248(1)(a)(v) of the *Act*. In their recommendation, the Advisory Board noted that Rebel took on an "activist" role specifically in reference to Rebel's founder and reporters appealing directly and repeatedly to the audience to contribute to a legal fund created by Rebel. The Advisory Board determined that crowdfunding requests for legal fees was contrary to the Guidelines and the *Act*.

[12] The Advisory Board issued a recommendation agreeing with the conclusions of the second CRA Determination Officer that Rebel was not "engaged in the production of original news content" pursuant to subparagraph 248(1)(a)(v) of the *Act*, and found that Rebel did not follow journalistic processes and principles. The Advisory Board concluded, in agreement with the second CRA Determination Officer, that Rebel did not meet the statutory requirements for QCJO designation.

[13] In March 2023, the CRA Determination Officer reviewed the Advisory Board recommendation and found that, since the production of original news content was "so low", Rebel could not be considered to be engaged in the production of original news content. The CRA Determination Officer similarly concluded that Rebel did not satisfy the conditions under subparagraph 248(1)(a)(v) of the *Act* because it was not engaged in the production of original news content, and, therefore, the original CRA decision not to grant QCJO designation should stand.

II. The CRA decision under review

[14] On May 18, 2023, the Minister’s Delegate at the CRA advised Rebel that the initial CRA Determination Officer’s decision to deny Rebel’s application for QCJO designation was being upheld (Decision). In response to Rebel’s position that they provide “another side” of the story and “rebuttal perspective”, the CRA found:

We agree that a perspective that may be broadly discernible in an organization’s content is irrelevant to whether that organization is eligible for QCJO designation. However, taking into account section 2.27(c) of the Guidance, the majority of Rebel News’ content is not based on facts and multiple perspectives that are analyzed and explained by a journalist for Rebel News.

[15] The Decision notes that to be eligible for QCJO designation, the organization’s content should be “based on input from a range of people, with a range of perspectives on issues or events,” [emphasis in original] and that in most instances, Rebel’s news content during the reviewed three-week period did not include this.

[16] By reference to sections 2.34 and 2.35 of the Guidance, the CRA noted that Rebel’s news content is often reproduced from other sources and thus would not be considered original news content. In response to Rebel’s position that selecting a three-week period was arbitrary, the CRA maintained in the Decision that it is standard practice at the CRA to request an organization to select a three-week period of content to be reviewed if an organization requests review of a QCJO designation decision. The CRA maintained that a three-week period is generally representative of an organization’s activities and allows the organization to present its case.

Finally, the Decision notes that it agrees with the Advisory Board's recommendation which is attached to the Decision.

III. Issues and standard of review

[17] There are three issues for determination.

- A. The first issue is the Respondent's objections to portions of the Affidavits filed by Rebel.
- B. Second is the judicial review of the merits of the Decision. On this issue, the parties agree that the standard of review is reasonableness as articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*].
- C. The third and final issue is if subsection 248(1) of the *Act* violates subsection 2(b) of the *Charter* as alleged by Rebel.

[18] Rebel does not raise any procedural fairness issues.

IV. Analysis

A. *Objections to Affidavits*

[19] The Respondent objects to various paragraphs of the Affidavits filed on behalf of Rebel.

[20] In support of this judicial review, Rebel filed an Affidavit of Ezra Levant sworn on September 7, 2023. Mr. Levant is the founder, President, and Chairperson of Rebel. The

Respondent objects to paragraphs 3-15 of Mr. Levant's Affidavit on the grounds that they repeat information already on the record. While I agree that these paragraphs are repetitive, I do not view that a basis to strike them.

[21] The Respondent further objects to paragraphs 22, 23, 29 and 30 of the Levant Affidavit because it introduces evidence that was not before the CRA decision maker. Similarly, the Respondent argues that paragraphs 25, 26, and 27 raise arguments that were not raised with the CRA.

[22] The Respondent also objects to the Affidavit of Sheila Gunn, the Editor in Chief of Rebel, sworn on September 7, 2023. The Respondent argues that paragraphs 3-30 of Ms. Gunn's Affidavit contain information that was not before the CRA, notably: Ms. Gunn's employment with Rebel, the training of Rebel news staff as well as the journalistic processes and principles followed at Rebel. The Respondent argues that paragraphs 37-40, 42-44 of Ms. Gunn's Affidavit contain opinion, new evidence and argument.

[23] Rebel argues that the evidence in the Affidavits that was not before the CRA is permissible on this judicial review because it is included to provide background information and, therefore, falls within the exception to the rule for the Court in receiving such information.

[24] However, based upon my review of the paragraphs objected to, the statements made in those paragraphs go beyond background or contextual information. Some of the information in the paragraphs is argument. Further, Rebel would have had an opportunity to provide this information to the CRA as the QCJO decision was reviewed by a second determination officer

and reconsidered on two separate occasions by the CRA's independent Advisory Board before rendering the Decision under review.

[25] I find that these paragraphs do not meet the exception to the rule that the evidence considered on the application for judicial review should be confined to the evidence that was before the decision-maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98). Accordingly, I will not consider the evidence contained in the Levant Affidavit at paragraphs 22, 23, 25, 26, 27, 29 and 30, and I will not consider the evidence in the Gunn Affidavit at paragraphs 3-30, 37-40 and 42-44.

B. *Is the Decision reasonable?*

[26] Reasonableness review is explained in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]:

*Vavilov* also explained how a court should conduct reasonableness review. This Court stressed that reasonableness review and correctness review are methodologically distinct (para. 12). Reasonableness review starts from a posture of judicial restraint and focusses on “the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place” (paras. 15 and 24). When an administrative decision maker is required to provide reasons for its decision, reasonableness review requires a “sensitive and respectful, but robust” evaluation of the reasons provided (para. 12). A reviewing court must take a “reasons first” approach that evaluates the administrative decision maker’s justification for its decision (para. 84). An administrative decision will be reasonable if it “is based on an internally coherent and rational chain of analysis and . . . is justified in relation to the facts and law that constrain the decision maker” (para. 85). This Court also affirmed “the need to develop and strengthen a culture of justification in administrative decision making” (para. 2).



[27] Rebel argues the Decision – that Rebel was not “engaged” in the production of “original news content” as required by the *Act* for QCJO designation – is unreasonable on two grounds. First, the CRA took a narrow interpretative approach and erroneously read in an “activism” criterion under paragraph 248(1)(v) of the *Act*. Second, the CRA failed to assess all the evidence and unreasonably focused on a three-week period.

(1) Was the interpretative approach unreasonable?

[28] Rebel takes issue with CRA’s interpretation of the relevant provisions of the *Act* and the Guidance. Rebel submits that the *Act* is remedial legislation that must be interpreted in a liberal manner which best ensures the attainment of its objects (*Interpretation Act*, RSC, c I-21, s 12) and that broad, open-ended, and qualitative language affords greater flexibility in interpreting the governing statute (*Mason* at para 67).

[29] The relevant provisions of the *Act* are paragraph 248(1)(v) which state:

<b>qualified Canadian journalism organization</b> , at any time, means a corporation, partnership or trust that	<b>organisation journalistique canadienne qualifiée</b> Société, société de personnes ou fiducie qui, à la fois :
...	...
(v) it is engaged in the production of original news content, which	v) elle produit du contenu de nouvelles originales qui, à la fois :
(A) must be primarily focused on matters of general interest and reports of current events,	(A) doit être axé principalement sur des questions d’intérêt général et rendre compte

including coverage of democratic institutions and processes, and

(B) must not be primarily focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle or entertainment,

de l'actualité, y compris la couverture des institutions et processus démocratiques,

(B) ne doit pas être axé principalement sur un sujet donné, comme des nouvelles propres à un secteur particulier, les sports, les loisirs, les arts, les modes de vie ou le divertissement,

[30] In interpreting the *Act*, CRA confirms that it took into account section 2.27 of the

Guidance which states:

The original news content of an organization generally refers to reports, features, investigations, profiles, interviews, analyses or commentaries that are:

- a. news;
- b. written, researched, edited, and formatted by and for the organization;
- c. based on facts and multiple perspectives actively pursued, researched, analyzed, and explained by a journalist for the organization; and
- d. produced in accordance with journalistic processes and principles

De façon générale, le contenu de nouvelles originales d'une organisation comprend les reportages, les enquêtes, les portraits, les entrevues, les analyses ou les commentaires qui, à la fois :

- a. sont des nouvelles;
- b. sont rédigés, révisés et mis en forme par et pour l'organisation;
- c. sont basés sur les faits et sous différentes perspectives, qu'un journaliste de l'organisation s'efforce activement à approfondir, à rechercher, à analyser et à expliquer;
- d. sont produits conformément aux méthodes et principes journalistiques.

[31] Rebel argues that the *Act* and the CRA's Guidance set a very low threshold for "engaged" under paragraph 248(1)(v) of the *Act*. They point to the policy documents obtained through their access to information requests referenced at paragraph 28 of Levant Affidavit and attached as part of Exhibit I. A CRA document titled *Meaning of engaged Subparagraph (a)(v) of the definition of qualified Canadian journalism organization* states as follows on the meaning of "engaged:"

It should be noted that the legislation originally included a qualifier of "primarily" in reference to engaged. In April 2020, it was proposed that this be removed, and in June 2021, the legislative change received Royal Assent. Whereas under the original legislation, "primarily" had been interpreted to mean more than 50%; in the absence of such a qualifier, there is no legislative basis to set a quantitative threshold in order for an organization to be considered to be engaged in the production of [original news content(ONC)].

An organization cannot be considered to be engaged in the production of ONC based on an isolated act. Therefore, an organization must regularly produce the amount of ONC that one could reasonably expect from two arm's length journalists who are regularly employed by the organization (subparagraph (a)(vi) of the QCJO definition). This is not an onerous threshold given that the journalists may be part-time employees.

...

**Note:** Subparagraph (a)(v) focuses on whether an organization is engaged in the production of ONC. This requirement does not preclude an organization from being engaged in the production of other content or from being engaged in other activities. However, subparagraph (a)(vii) provides that an organization cannot be significantly engaged in the production of content (A) to promote the interests, or report on the activities, of an organization, an association or its members, or (B) for a government, Crown corporation or government agency.

[32] The presumption of reasonableness applies to an administrative decision-maker's interpretation of their enabling statute (*Vavilov* at para 25). Deference is owed to the CRA in this case, as the CRA may draw on its institutional expertise, experience and rely on considerations that a court would not have thought to employ, but which “enrich and elevate the interpretive exercise” (*Mason* at para 70). Thus, deference is owed to the CRA in its interpretation of paragraph 248(1)(v) of the *Act*, which is informed in part by the Guidance.

[33] In reviewing the reasonableness of the Decision, the Court must approach the Decision with “respectful attention” and consider the Decision “as a whole” (*Vavilov* at paras 84-85). The overall focus will be if the Decision is appropriately justified, transparent and intelligible. In other words, the Court must be able to understand the basis upon which the Decision is made to be able to determine if the decision falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Vavilov* at paras 86 and 97).

[34] Here, the CRA Decision found that Rebel was not “engaged in the production of original news content” and concluded, among other things, that Rebel did not “demonstrate consistent, intentional production of content that could be considered original news content” in accordance with the CRA’s interpretation of paragraph 248(1)(v) of the *Act* as informed by section 2.27 of the Guidance. The CRA justified this conclusion through their analysis of content spanning a three-week period that was selected by Rebel.

[35] In my view, the Decision is reasonable as it is justified, transparent and intelligible in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

[36] Rebel also argues that the Decision is unreasonable because it is based on the second Advisory Board's finding that Rebel took an "activist stance", which is not a criterion referenced in the *Act*. In effect, Rebel is arguing that the CRA 'read-in' and applied a criterion that does not exist in the statute.

[37] Rebel relies upon *Lawton v Canada (Leaders' Debates Commission)*, 2019 FC 1424 [Lawton] to argue that activism should not preclude that an organization engages in journalism. As *Lawton* does not deal with the interpretation of the *Act* in relation to original news content, this case is of little assistance to Rebel in this context. As an aside however, the Court in *Lawton* at paragraph 36 notes that Rebel was engaged in some form of "advocacy".

[38] I find that Rebel is misguided in their activism argument. I do not read the CRA Decision as being based solely upon the Advisory Board's finding that Rebel took an "activist stance". Rebel is accurate to suggest that an activist stance – which in this case specifically refers to the Advisory Board's finding that Rebel was soliciting legal fees via crowdfunding – does not on its own preclude Rebel from a QCJO designation. Indeed, CRA notes in their Decision that they agree with Rebel that a perspective that may be broadly discernible in an organization's content is irrelevant to whether that organization is eligible for QCJO designation. Regardless, if Rebel took an "activist stance", the CRA nevertheless refused QCJO designation on the grounds that the sample of news content was contrary to the relevant sections of the *Act* as informed by the Guidance.

[39] Based on the broader factual and legal constraints on the CRA Determination Officers and Advisory Boards, I find the Decision to be justified, transparent and intelligible, notwithstanding the Advisory Board's noting that Rebel took an "activist stance".

(2) Was there a failure to assess the evidence?

[40] Rebel argues that the CRA failed to reasonably consider the evidence it submitted to demonstrate that it is actively engaged in the production of original news content. Relatedly it argues that the CRA unreasonably constrained its assessment by focusing on a three-week window of news reports to make the assessment.

[41] In the Decision, the Respondent maintained that on requests to review decisions related to QCJO designation, the CRA generally requests that the organization select a three-week period to be reviewed. This aligns with the CRA's position that a three-week period is generally representative of an organization's activities and allows the organization to present its case.

[42] The three-week news content sample considered by the CRA included 423 news reports. Of this, the Officer on the second determination review found that 283 of the items were not based on facts, nor were multiple perspectives actively pursued, researched, analyzed, or explained by a journalist for the organization. A further 135 of the news items were identified as being curated content or material rewritten from other sources which is contrary to sections 2.34 and 2.35 of the Guidance. The Officer's report found that 10 of the 423 items reviewed over a three-week period could be considered original news content.

[43] The *Act* at subparagraph 248(1)(a)(v) requires a QCJO to be “engaged in the production of original news content.” The Guidance at section 2.25 says this is the case “where it demonstrates a commitment to producing original news content on an ongoing basis” and section 2.26 says that there is no “amount” of original news content required to be considered engaged in producing original news content.

[44] Despite its objections to CRA’s classification of its news content, Rebel has not identified any news reports that were overlooked. Nor has Rebel demonstrated that a three-week news cycle is an unreasonably narrow or short period of time from which to assess the originality of news content. Realistically, for an organization that is actively engaged in the dissemination of news, three weeks should be a sufficient time frame within which to demonstrate news generating activities. Finally, I would note that it was Rebel itself, and not the CRA, who selected the three-week period for review.

[45] Rebel has not satisfied me that the CRA Decision is unreasonable on the grounds that the assessment of originality of news content was confined to a consideration of news reporting during a three-week period or that the news content for this period was not reasonably considered.

C. *Does subsection 248(1) of the Act violate the fundamental freedom of the press and other media subsection 2(b) of the Charter?*

[46] Rebel filed a Notice of Constitutional Question on July 11, 2023, stating:

... the *Charter* protects the freedom of the press. Through the QCJO mechanism under section 248 of the *ITA*, the government has set out to explicitly approve or disapprove of certain media organizations, creating a government system of media accreditation, media censorship, and media control, which violates the principles of a free press.

[47] Rebel argues that freedom of the press is recognized in the *Canadian Bill of Rights*, SC 1960, c 44 at subsection 1(f) and in refusing QCJO status based on Rebel's perspectives and opinions, the CRA infringed subsection 2(b) of the *Charter*. Rebel notes that the Order in Council establishing the Advisory Board acknowledged that a "properly functioning democracy needs a strong, independent news media."

[48] Since the QCJO status affords tax benefits to designated "eligible news business" under the *Online News Act*, SC 2023, c 23, Rebel submits that Canada has created a two-tiered journalism system where the government can wield influence on the viability of news organizations, access to platforms, and financial aid. Rebel argues that news organizations are not independent from government but rather are reliant on and incentivized by government to conform to their standards.

[49] In my view, the *Charter* argument is lacking foundation for the following reasons. First this issue was not raised with the CRA directly. I do not accept Rebel's claim that it did not have the opportunity to do so as detailed submissions were made on behalf of Rebel by legal counsel. Second, in the context of this judicial review Rebel has not offered any evidence on how the Decision of the CRA impedes the freedom of the press generally as alleged. Third and final,



Rebel itself does not explain or offer any evidence on how the refusal of status to allow it to receive tax credits impedes its ability to work or impedes its freedom of the press.

[50] In conclusion, the *Charter* argument is made without any supporting evidence.

V. Costs

[51] The Respondent is entitled to costs.

**JUDGMENT IN T-1319-23**

**THIS COURT'S JUDGMENT is that:**

1. The judicial review is dismissed.
2. The Respondent is entitled to costs.

"Ann Marie McDonald"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**:** T-1319-23

**STYLE OF CAUSE:** REBEL NEWS NETWORK LTD V ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 17, 2024

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** SEPTEMBER 18, 2024

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