Court of Queen's Bench of Alberta

Citation: Rebel News Network Ltd v Alberta (Election Commissioner) 2020 ABQB 687

Date: 20201105
Docket: 1903 01625
Registry: Edmonton

Between:

Rebel News Network Ltd.

Applicant

- and -

Election Commissioner of Alberta

Respondent

- and -

Minister of Justice and Solicitor General of Alberta

Intervenor

- and -

Justice Centre for Constitutional Freedoms

Prospective Intervenor

Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] The Justice Centre for Constitutional Freedoms applies to intervene in a ***Charter*** challenge by Rebel Media to certain provisions of the ***Election Finances and Contributions Disclosure Act***. Those provisions oblige third parties who engage in "political advertising" and "election advertising" above certain monetary thresholds to register with and make certain disclosures to the Election Commissioner.

[2] Invoking the ***Charter***'s protection of freedom of expression, Rebel impugns the ***EFCDA***'s definition of "political advertising" as both overbroad and vague and the registration requirement as unduly onerous and intrusive. It sees the associated penalties as unreasonable and disproportionate. In concert, according to Rebel, the impugned provisions constitute a serious and unjustified curtailment of freedom of expression.

[3] The ***Charter*** challenge is nascent, currently limited to an (amended) originating application filed by Rebel in February 2019.

[4] I find that the JCCF has not satisfied the test for intervention, as explained below.

B. Background

[5] In November 2018, Rebel arranged and paid for a side-of-Highway-2 billboard ad criticizing Alberta's then Education Minister. The ad came to the Election Commissioner's attention. He investigated and ultimately found the ad to be "political advertising" within the meaning of the ***EFCDA***, that the ad did not fit any of the statutory exemptions, that Rebel had exceeded the monetary threshold ($1,000) in paying for the ad, and that, in not registering as a "third-party advertiser", Rebel had contravened the statute. He issued a letter of reprimand to Rebel as a result.

[6] Between the Commissioner providing his investigative and ultimate findings, Rebel filed an originating notice seeking judicial review of what it perceived as the effectively final (i.e. only-apparently-investigative) findings. As alternative relief, Rebel sought ***Charter*** invalidation of the impugned ***EFCDA*** provisions, as further detailed in the originating notice.

[7] After the Commissioner issued his ultimate decision, Rebel amended its originating notice in various respects, but none materially changing the proposed constitutional challenge.

[8] The judicial review, featuring counsel for Rebel and for the Election Commissioner, was argued on October 28, 2020. The next day, I heard the JCCF's application to intervene in the as-yet-unscheduled constitutional challenge.

[9] In a decision released yesterday (2020 ABQB 682), I dismissed Rebel's judicial-review application, finding that the ad in question was "political advertising" and that none of the statutory exemptions applied. As a result, I upheld the Commissioner's contravention decision and the letter of reprimand.

C. Issue

[10] The issue is whether the JCCF has satisfied the intervention test.

D. Analysis

Applicable rule

[11] Rule 2.10 states:

> On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Test for intervention (case law)

[12] The Alberta courts have frequently examined applications to intervene. In ***Pedersen v Alberta***[1], the Court of Appeal identified these intervention factors:

1. will the intervener be directly affected by the appeal;
2. is the presence of the intervener necessary for the court to properly decide the matter;
3. might the intervener's interest in the proceedings not be fully protected by the parties;
4. will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. will the intervention unduly delay the proceedings;
6. will there possibly be prejudice to the parties if intervention is granted;
7. will intervention widen the *lis* between the parties; and
8. will the intervention transform the court into a political arena?

[13] And gave this additional guidance:

> The applicant submits that leave is more leniently granted in cases with a **constitutional issue**. That may have been the response when judicial consideration of the *Charter* was in its infancy. However, there is **now a considerable body of authorities on the *Charter* and less need for assistance from an intervener**. This Court in a recent appeal involving a *Charter* issue, *Telus Communications Inc. v. Telecommunications Workers Union*, 2006 ABCA 297, stated at para. 4 that "**Granting intervener status is discretionary and ought to be exercised sparingly**." [emphasis added]

[14] The Court of Appeal found that the applicants would be directly affected by the outcome of the appeal (para 6). They had argued that that was sufficient. However, in denying leave, the Court emphasized the need for differential perspective and arguments (paras 10-11):

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[1] 2008 ABCA 192 at para 3. For a detailed application of the ***Pedersen*** factors, see Dario J.'s decision in ***SM v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2019 ABQB 972 at paras 70-116.

> … The [intervention] test requires demonstration of **fresh information or a fresh perspective**. …
>
> The applicant asserts that it **wishes to bring an alternative and unique perspective to the [ss 7 and 15] constitutional argument**. It submits that it **does not agree with the approach that the IBC took** in the proceedings below. **However, neither the applicant's material nor its oral submissions articulate where the difference lies nor do they demonstrate any special expertise or fresh perspective**. [emphasis added]

[15] In ***Orphan Well Association v Grant Thornton Ltd***[2], S. Martin JA (as she then was) applied the ***Pedersen*** test for intervention, adding this guidance:

> The power to allow interveners is **discretionary and should be exercised sparingly**: *R v Neve* (1996), 1996 ABCA 242 at para 16, 184 AR 359. However, interveners have been allowed when they **add significantly to complex constitutional issues, especially those, like the case at bar, with serious and wide-ranging policy implications**.
>
> **The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance**. The Supreme Court requires applicants to identify the **position of the intervener intends to take, set out the submissions to be advanced, the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and differen**t from those of the other parties. See rule 57(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74. **This level of specificity is to be encouraged in this court as well**. [emphasis added]

[16] The successful applicants there outlined their "differential" arguments in detail. See, for instance, British Columbia's position (as summarized by S. Martin J., paras 15-16):

> … they submit they can bring a perspective on the **extra-provincial implications of the interpretation of section 14.06 of the BIA**, and address Alberta legislative provisions similar to British Columbian's regarding the **liability management rating system and provisions permitting the regulator's imposition of conditions on transfers of licenses**, as well as the **practical effect of a trustee or receiver being able to disclaim or renounce oil and gas licenses**. They submit this will assist the court in understanding how its decision will potentially affect the oil and gas industry in British Columbia, including potential unanticipated consequences.
>
> They expect to advance arguments on the **interpretation of section 14.06 of the BIA, which are different from those of the parties**. In particular, **they would address the interpretation of section 14.06(7) of the BIA regarding ownership rights and the definition of "contiguous". They would also make submissions**

[2] 2016 ABCA 238 at paras 10 (reproduction of ***Pedersen*** test), 11 and 13.

> **on the interpretation of section 20 of the BIA as it informs renouncement rights**, which they claim did not receive a lot of focus in the decision under appeal. As well, they submit they **would advance a different argument on the errors in the interpretation of the decisions in *AbitibiBowater Inc.* and *Northern Badger Oil & Gas Ltd*.** [emphasis added]

[17] Granting intervention leave in ***Wilcox v HMQ Alberta***[3], Feehan JA noted this proposed differential argument:

> The Society's position on whether initial detention is subject to review by *habeas corpus* appears to align with that of Mr. Wilcox [a party]. However, **the Society also expects to advance arguments on the threshold to strike *habeas corpus* applications for the deficiency of pleadings and costs therein, which could impact counsel's ability to conduct future applications. This broader interest will not be fully protected by the parties without the Society being present as intervenor.** [emphasis added]

[18] In ***AUPE v Alberta***[4], Macklin J. recognized a proposed differential argument:

> UNA states that it will limit its submissions to the issue of whether there is a serious issue to be tried. Counsel for UNA indicated that the special expertise or insight it will bring to bear relates specifically to **its perspective on the application of the duty to consult requirement** which forms part of the s. 2(d) ***Charter*** right to freedom of association. UNA states that **its position, while similar to that of AUPE, does take a broader view of the scope and intent of the duty to consult as an aspect of the freedom of association right protected in 2(d) of the *Charter*.**

[19] As did Horner J. in ***Ecojustice Canada Society v Alberta***[5]:

> In the discussion of the second, third and fourth ***Pedersen*** factors above, **I considered whether the Industry Consortium's intervention would be useful and different** or bring particular expertise to two issues raised on the Application for Judicial Review. Those findings are useful to answer the second branch of the test.
>
> I found that the Industry Consortium could provide expertise and **that its submissions would be useful and different on the issue of whether the Inquiry was brought for an improper purpose. The perspective of the Alberta oil and gas industry is necessary for a proper consideration of the public interest aspect of this issue, and it is not clear that this perspective would otherwise be provided on the Application for Judicial Review**. [emphasis added]

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[3] 2019 ABCA 385 (in chambers) at para 17

[4] 2019 ABQB 553 at para 20

[5] 2020 ABQB 364 at paras 80-81 (conclusion following detailed discussion of ***Pederson*** factors in paras 49-75). See also ***University of Alberta v Alberta (Information and Privacy Commissioner)***, 2011 ABQB 389, where Lee J. granted leave to intervene, in part, "on the basis that [the proposed intervenor] can bring an important and different perspective to the Court on [identified university-related issues]" (para 19).

"Directly affected"

[20] The JCCF asserted that many of its client individuals and organizations are directly affected by the impugned legislation, but it did not provide any evidence of who they are and how they are affected. Its counsel described a handful of them in his oral submissions, but (as the Minister pointed out) that is not evidence. Accordingly, I place no weight on those comments or on the related JCCF submissions (brief and oral argument) about the need for a JCCF perspective anchored on the particular needs, views, and concerns of its client organizations.

[21] It did not assert that the JCCF itself would be directly affected.

[22] However, the Minister acknowledged, and I accept, that a direct impact is not necessary, with the focus shifting to the "useful and different perspective" element.

"Special expertise"

[23] The JCCF submitted that it has special expertise in constitutional litigation, particularly freedom-of-expression issues.

[24] I will proceed on the basis that it has such expertise. The question becomes whether its proposed input will be useful and different.

"Useful and different perspective"

[25] Here are the JCCF's submissions on this aspect, first from the "Grounds for Making this Application" in its notice of motion filed February 14, 2019:

> This Application to Intervene is made on the grounds that the Justice Centre will be able to assist the Court in possessing the fullest perspective from which to rule on the above matter by providing the Court with useful and different submissions from the perspective of a non-party who has special expertise on a subject matter central to this case, freedom of expression.

[26] In his affidavit in support of the application, John Carpay (JCCF president) swore (paras 18 and 19) that:

> If granted leave to intervene, the Justice Centre will make useful and different submissions regarding the constitutional validity of the [***EFCDA***], specifically sections 9.1 and 44.1(1)(g) (the "Sections"). The Sections prohibit individuals and organizations – unless they register with Elections Alberta and fulfil onerous and privacy-violating reporting requirements – from spending more than $1,000 to express their thoughts, opinions, beliefs and ideas regarding a large number of issues and topics relating to matters of public policy, society and governance. These restrictions do not apply narrowly; they are not limited to election campaign periods. Rather, the freedom of expression of all citizens is restricted at all times, 365 days a year, every year. The Justice Centre will argue that the Sections infringe section 2(b) of the *Charter* and are not saved by section 1.

The Justice Centre's unique submissions will focus on the known and foreseeable impacts of the Sections, including the chilling effect on political expression and the resulting impact on the free and democratic society, including the protected right of listeners to hear. The Justice Centre believes this case is of significant import in Alberta, but also nationally. Canada historically has steadfastly preserved its status as a liberal democratic state that jealously guards its citizens' rights to free expression, including criticism of government and advocacy on matters of public policy. A failure to successfully defend the constitutional right of Canadians from the legislative encroachment of the Sections would have serious repercussions on political discourse across the country.

[27] Per the JCCF's brief:

> … [the JCCF] will assist the Court … by bringing a fresh perspective as a non-party to the constitutionality of the EFCDA
>
> … unlike [Rebel Media], which is a media business concerned with distributing its content and the freedom of the press required to do so, the [JCCF] is a non-profit organization concerned with advocating for a free and democratic society, and the rights of individuals to freely express themselves, in the democratic process or otherwise.
>
> If granted leave to intervene, the [JCCF] will provide the Court with useful and unique submissions regarding:
>
> a. The detrimental impacts from restricting political expression, whether directly or through the creation of a chilling effect;
>
> b. How expression on matters of public concern contributes to the maintenance of a free and democratic society in Canada;
>
> c. How the Impugned Sections impair the right to hear, an important but often overlooked aspect of freedom of expression as protected by section 2(b) of the *Charter*; and
>
> d. How such impairment is not justified in a free and democratic society. [para 15]
>
> The [JCCF] will submit that the limitations placed on Rebel's freedom of expression resulting from the Election Commissioner's Decision [are] rooted in the inherent unconstitutionality of the provisions of the EFCDA which enable the Election Commissioner to make the type of decision he did, specifically sections 9.1 and 44.1(1)(g), and that this Court should not decline the opportunity to rule on the constitutionality of these sections of the EFCDA. [para 16]
>
> [The JCCF then reproduced the para 44.1(1)(g) definition of "political advertising" and summarized the impact of that definition and the s. 9.1 requirement to register.] … Supreme Court of Canada jurisprudence on freedom of expression indicates that such restrictions will likely not withstand *Charter* scrutiny, and courts in BC have found that *lesser* restrictions are not *Charter*-compliant.

[The JCCF then referred to a number of freedom-of-expression-related decisions by the Supreme Court of Canada and other Canadian courts, quoting from some of them, in support of its position that the impugned provisions are not *Charter*-compliant.]

[28] The JCCF also submitted in its brief that:

> [Rebel Media] is a media organization that is concerned, first and foremost, with a decision by the Elections Commissioner to impose an administrative penalty on it. [As it turned out, the Commissioner instead imposed a letter of reprimand.] Of importance in this case, however, is the constitutionality of legislation that restricts the ability of everyday Albertans to engage in political expression, whether directly themselves or indirectly through collectively supporting organizations that share their views.
>
> The type of expression limited by the legislation at issue in this case is political expression, which lies at the core of what is protected by freedom of expression; and freedom of expression lies at the core of the [JCCF's] mission and purpose. Freedom expression on matters of public concern – the lifeblood of democracy – empowers all Albertan, some of whom donate to and rely on the [JCCF] to advocate for and defend their continued right to express their views regarding the government or their thoughts on matters of public policy.

[29] At the leave-to-intervene application, the JCCF's counsel argued (in part):

> Rebel cares about free speech, [but] it is a media organization … it is not a public-interest law firm … it does not have the same perspective [as the JCCF] … not the same deep, broad perspective we have.
>
> Rebel's counsel is competent … we saw that yesterday [during the judicial-review application] … he is aware of the issues of freedom of expression. But there is still only one party [i.e. Rebel] … lots of ground to cover on a freedom-of-expression constitutional issue … [we are] doubtful all of the ground will be covered as well as it could be by Rebel only … particularly on the "right to hear" or the "right to listen." [This is an] often overlooked aspect of freedom of expression … see ***Edmonton Journal*** and ***Harper*** [decisions] … the public has a right to hear, to see, to listen to political expression.
>
> When government limits freedom of expression, it is [both] the "view expresser] and the public who suffer … extremely important … and easy to overlook … the public does not know what it does not know … not as obvious, but it is important, especially with political expression.
>
> Rebel … does not stress this … [it] does not need to do so to strike down this legislation.
>
> [The] Court needs to look at this as in ***Harper*** … this needs to be factored into the section 1 [*Charter*] analysis.
>
> Whether any infringement [of freedom of expression] is minimally impairing or proportionate needs to be considered … the [JCCF] has a fresh perspective from

its legal expertise, from situations we've encountered [across] the country. No one else can bring that perspective. …

We don't actually agree with the view [or all of the views] advanced by Rebel so far … but our arguments will be independent … will not duplicate.

On the section 1 analysis, we will not duplicate on the section 2(b) test … no need to.

We will focus on overall proportionality and the s. 1 analysis, especially "minimal impairment."

[Referring to Rebel's proposed *Charter* arguments (per synopses in its amended originating application), the JCCF's counsel said] paragraph 12 sets out various arguments that will be part of the challenge … on the "political advertising" definition [para 12(a)], [the JCCF] will make submissions … lots to be said about that. We give a good preview of what will we argue [in our brief i.e. the submissions summarized above] … [here we emphasize] ***Harper*** … the regulation of political expression outside [the] election period … that's the crux.

[Concerning para 12(b) – vagueness of "political advertising" definition] – [the JCCF will offer] no position whether the provision is vague or not. … same for [Rebel]s arguments on the penalty provision.

Looking at some of the proposed [Rebel] arguments … some of them we will offer no position on … we will make no submissions on them. It is difficult to say [much] based on Rebel's "couple of sentences" [i.e. the brief synopses of the proposed arguments] …

We will not raise any other *Charter* rights or step outside the section 1 analysis … we do not propose to introduce any new evidence, socio-economic or otherwise.

We do not intend to "pile on" or duplicate … per the anticipated usual approach of brief filing on a staggered approach, Rebel would file first, we would file later … [this is] a very effective way to avoid duplication.

There is quite a bit involved to establish a section 2(b) violation … [the JCCF] will not be involved in many of the aspects. [We] will focus on the key elements … once we see [Rebel's submissions] … we will steer clear of issues fully canvassed by Rebel … we will aim at filling in gaps.

These are deep, philosophical issues … lots of things to consider … we can fill in the gaps effectively in an efficient manner … [there will be] no duplication … our [core] submissions will be on the right to hear and the chilling effect on advocacy organizations.

Minister's position on "useful and different"

[30] The Minister argued (in part) that:

- the JCCF has no "special viewpoint" here;
- any "lower bar" for intervention in constitutional cases, stemming from early *Charter* days, no longer exists;

- a proposed intervention must be "grounded in the issues actually before the Court." In this case, the narrow focus is the three impugned ***EFCDA*** provisions (definition of "political advertising", requirement for third-party advertisers to register, and penalties). With the JCCF not addressing penalties, only two provisions remain in the possible "intervention zone";
- to further provide context, note that no advertising spending limits are at issue here, only the requirement to register and the knock-on "attribution and disclosure" requirements;
- those requirements have already been considered by the courts, notably by the Supreme Court of Canada in ***Harper***;
- granted, the focus there was election-period advertising, not the full-calendar political-advertising period here;
- it is "incumbent on a [proposed] intervenor to show how what it proposes to argue is different than what the parties will argue." It has to "put its best foot forward and be specific about what it will argue and how that is a new perspective …";
- the best description of the JCCF's proposed submissions is its brief (paras 15 and 16 – reproduced above). These are "incredibly broad proposed submissions", which "show no unique perspective ...." [There is] "no reason to expect that these broad topics … will not be covered by Rebel";
- [the JCCF] is bringing "nothing new or different";
- "we need to look at the existing parties [Rebel and the Minister] to assess what space or room there is … we are doing this 'in the air' … this is somewhat speculative … it is often the case that intervention applications [are made] once written arguments or factums are filed, especially in the appeal context … that is not always the case … at the trial level, [we recognize that] we are [engaging in] some speculation. But here, the Court is assessing a proposed intervention at an early stage … all we have is the [amended originating application] from [Rebel] … it is still incumbent on the proposed intervenor to put its best foot forward, to be specific, to show [a] unique and different perspective … that is what the test requires";
- it "strains credibility" to suggest that Rebel will not cover the core issues [described at para 15 of the JCCF brief] e.g. the chilling effect, which Rebel [expressly] refers to in its amended originating application [paras 12(d) and (e)];
- "Rebel is clearly going to argue the importance of freedom of expression in a democratic society and also the 'right to hear'";
- "this case will likely come down to the s. 1 justification exercise … Rebel will speak to this";
- "the heart of the [intervention] case is: [the JCCF] needs to show what unique perspective it will bring. And it has not done so";
- concerning the staggered-brief-filing aspect, the test for intervention is applied now, not after briefs are filed. Otherwise, proposed intervenors would always "file early" i.e. before the parameters of the parties' arguments are known;

- the impact of ***Harper*** (particularly the balancing of the public's respective interests in being informed about the political process *and* in knowing who is funding political advertising) will be front and center here, and will be addressed by Rebel;
- "Rebel is a sophisticated organization, with broad expertise in freedom-of-expression issues … it is represented by a firm [with expertise and prominence] on such issues … we can be confident that Rebel will make submissions on these issues";
- incidentally no particular illumination of the issues comes from Rebel's notice of constitutional questions, which largely adopts and reproduces the issue synopses from its amended originating application;
- the JCCF has not particularized what different submissions will result from its "advocacy organization" perspective, compared to Rebel's "media organization" perspective; and
- Rebel's *Charter* focus is indeed freedom of expression, not freedom of the press.

[31] At bottom, the Minister "should not have to respond to highly-likely-to-be-repetitive or -duplicative arguments from the JCCF, which has not shown any differential perspective …."

[32] Here the Minister emphasized these observations of Slatter JA in ***Reference re Greenhouse Gas Pollution Pricing Act***[6]:

> It has not been established that the Canadian Constitutional Foundation will bring a different perspective or expertise to the appeal. One would assume that the principal protagonists will analyze, and attack or support the majority or the minority opinions in the two reference decisions previously rendered. The other participants will undoubtedly examine the impact of the issues on federalism, the structure and integrity of the constitution, the rule of law, and the importance of maintaining jurisdictional legislative boundaries. **This application for intervention must be based on the premise that the Canadian Constitutional Foundation has constitutional lawyers who are aware of, or can advance arguments that will elude the lawyers retained by the other parties. Providing "second counsel" to one or the other of the parties is not, however, the purpose of intervention**: ***R. v Ndhlovu***, 2019 ABCA 132 at para 4. The Canadian Constitutional Foundation has not met the test for intervention. [emphasis added]

[33] The Minister also invoked Schutz JA's decision in ***Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)***[7], where she considered, and rejected, intervention arguments by JCCF akin to those it makes here:

> …it was argued that JCCF should be granted intervenor status because of its **special expertise in constitutional matters relating to freedom of expression**. The applicant submits that **its expertise will assist the Court in coming to a "well-informed and well-reasoned decision", and otherwise falls within its**

[6] 2019 ABCA 349 (in chambers) at para 35
[7] 2017 ABCA 280 at paras 12-14, 16-17, and 25-28

mandate to "[defend] the fundamental freedoms of Canadians protected by s 2".

The application is supported by the affidavit of one of JCCF's directors, who deposes that JCCF is a non-profit organization focused on free speech education and litigation, and has a material interest in the precedential value of this appeal.

JCCF's **proposed submissions address four topics: (a) freedom of expression protects speech that may disturb, offend, cause emotional responses, or cause fear and confusion; (b) the legality of abortion should be subject to debate in the public square without arbitrary censorship by government; (c) justifiable limits on expression should be objective, consistent, and minimally impairing; and (d) the government is required to be neutral when it comes to regulating the content of expression.**

I am **not persuaded that JCCF's contributions would be useful, different or bring a particular expertise to the subject-matter of the appeal. Although JCCF submitted in oral argument that they possessed "highly relevant expertise on the key issue in this appeal", namely, s 2(b) of the *Charter*, their proposed argument is broad and general.**

In 2017, moreover, **this Court is well-equipped to judicially consider the parties' *Charter* arguments about the scope and content of freedom of expression since there is a substantial volume of Supreme Court of Canada and other appellate authority relating to both s 2(b) and s 1 of the *Charter*.**

In my view, JCCF has also failed to show that they will bring a fresh perspective to the litigation under either of these [justifiable limits on expression and government-neutrality] arguments. **While its submissions differ from those contained in the appellant's submissions, they are not a fresh perspective; substantively, the same submissions have been put before the courts on multiple occasions, and have been the subject of academic debate and discussion. Providing the Court with additional jurisprudence and commentary on that jurisprudence does not constitute a fresh perspective**: ***Stewart Estate*** at para 13.

Further, given the **generality of the proposed submissions, allowing the applicant to intervene will potentially widen the dispute between the parties**, such that the Court becomes a forum for debate that reaches far beyond the scope of the parties' litigation in circumstances where JCCF's presence is not necessary for the Court of Appeal to properly decide this matter.

Although in the early days of *Charter* litigation there may well have been a more relaxed approach to intervenors in cases with a constitutional dimension, in *Pederson* at para 4, this Court held that such an approach was no longer necessary, given that "there is now a considerable body of authorities on the *Charter* and less need for assistance from an intervener."

JCCF submitted that this Court has continued **to allow intervenors where "complex constitutional issues … with serious and wide ranging policy implications" are in play**, citing ***Orphan Well Association v Grant Thornton***

> ***Ltd***, 2016 ABCA 238 at para 11 ("***Orphan Well***"). However, I am not convinced that case works in favour of the applicant. ***Orphan Well*** involved the interplay between two complicated legal regimes and the precedence that should be given to competing claims under those regimes. The case had implications for the oil and gas industry, the bankruptcy and insolvency bar, and provincial regulators in Alberta and other provinces. It was a case in which there was a palpable need for specialized policy and legal experts to advise on the intra and extra provincial implications of a decision. **No such complexities arise in this appeal**. [emphasis added]

Application of the "useful and different" principle here

[34] I find that the JCCF has not cleared the "useful and different" hurdle here, largely for the reasons urged by the Minister. Per the authorities reviewed above, a proposed intervenor has to go beyond asserting "useful and different" submissions and actually show what **particular** different submissions or analyses it proposes to make and why they would be useful.

[35] Here, and again accepting that the JCCF has a special expertise in freedom-of-expression issues, it has not shown how that expertise would manifest in different submissions.[8]

[36] As the Minister described, the JCCF provided a broad-brush description of the issues with particulars lacking.

[37] The primary obstacle for the JCCF is its **speculation** that its submissions will **end up** being useful and different. At this early stage, with Rebel having only started to lay down tracks to the constitutional challenge (filing an amended originating application), we do not know what particular arguments Rebel will mount and what "gaps might remain to be filled" by the JCCF.

[38] More fundamentally, the "different and useful" test has to be applied now. In the same way the JCCF had a practical duty to put its "best foot forward" on this application (detailing its proposed arguments), Rebel will have the same duty when it assembles its brief on the eventual challenge. I do not see the general law of interventions as effectively creating a "safety net" for Rebel i.e. as possibly encouraging less-than-robust submissions by it in the expectation that an intervenor (here, the JCCF) will save the day with fill-in-the-gap submissions.

[39] Effectively, two core problems exist: (1) the JCCF has not provided detailed particulars of its proposed arguments (instead only broad issue descriptions) and (2) even if it had provided

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[8] By contrast, see ***Trinity Western University v Law Society of Upper Canada***, 2014 ONSC 5541, where Nordheimer J. (at para 48) recognized a "differential" role for the JCCF in giving it leave to intervene:

> Unlike the organizations that I have just dealt with, JCCF is a non-religious organization. As such, it brings a different perspective to the issues. It concentrates its submissions on the freedom of association issue as it may relate to any group that holds and espouses views that may be unpopular or controversial. In my view, **its view point is sufficiently distinct that it may be valuable to the court hearing this matter**. [emphasis added]

details, we cannot know if they are, or will be, different without seeing the Rebel's own to-be-provided-later submissions.

[40] I note that counsel for Rebel Media was present at the JCCF's application for leave to intervene, but made no submissions, whether endorsing the JCCF's bid for leave, expressing a need for its assistance, or otherwise, instead merely observing the application.[9]

[41] Here I reproduce (from above) and adopt the comments of S. Martin JA in ***Orphan Well Association***:

> The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance.

[42] I also adopt the overall analysis of Schutz JA in ***CCBER***, particularly her comment on arguments grounded in existing case law and academic commentary. The JCCF did not articulate what differential perspective, arguments, or analyses it would bring not planted in ground already thoroughly tilled by the courts.

E. Conclusion

[43] All to say, it was insufficient for the JCCF to point to important freedom-of-expression issues and to assert it would make "useful and different" submissions where we have no baseline submissions from Rebel and nothing to signal that Rebel will not cover all the bases in its eventual submissions. Nothing shows that Rebel will not marshal all available, plausible, and material constitutional arguments in support of its challenge.

[44] For all these reasons, I dismiss the JCCF's application to intervene in Rebel's constitutional challenge.

[45] The parties shall bear their own costs of this application.

Heard on the 29th day of October, 2020.
Dated at the City of Edmonton, Alberta this 5th day of November, 2020.

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[9] By contrast, see ***Dichmont Estate v Newfoundland and Labrador***, 2019 NLSC 25, where McGrath J. (at para 80) granted the JCCF leave to intervene, emphasizing its proposed differential focus:

> … The Justice Centre has identified a different perspective it can bring by focusing on the evolution of case law, particularly from the Supreme Court of Canada, on the issue of how the *Charter* applies to public servants. **Its application to intervene is supported by counsel for the Estate who were not relying on this case law and who agree on the different perspective and experience the intended intervenor can bring**. [emphasis added]

M. J. Lema
J.C.Q.B.A.

Appearances:

James Kitchen
Justice Centre for Constitutional Freedoms
for the Proposed Intervenor

Leah M. McDaniel and Nicholas J. Parker
Alberta Justice (Constitutional and Aboriginal Law)
for the Minister of Justice and Solicitor General of Alberta