

Barry Robinson
800, 744 – 4th Avenue SW
Calgary, Alberta T2P 3T4
Tel: (403) 705-0202
Fax: (403) 452-6574
Email: brobinson@ecojustice.ca
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Sent via E-mail: submissions@albertainquiry.ca

Steve Allan,
Commissioner, Alberta Public Inquiry into Anti-Energy Campaigns
Edmonton, Alberta

Dear Commissioner Allan:

**Re: Order in Council 125/2019 and Terms of Reference
Alberta Public Inquiry into Anti-Energy Campaigns**

We are legal counsel to the Ecojustice Canada Society (“Ecojustice”) with respect to the public inquiry (“Inquiry”) announced by the Government of Alberta in Order in Council 125/2019 (“Order”) issued on July 4, 2019. Ecojustice is a not-for profit charitable organization that uses the law to protect and restore Canada’s environment. Incorporated in 1990, Ecojustice is a registered society under the *Societies Act* (British Columbia) and is registered with the Canada Revenue Agency as a charitable organization.

Since 1990, Ecojustice lawyers have represented the interests of community groups, non-profit organizations, First Nations and individual Canadians in protecting Canada’s environment and upholding Canadian environmental laws. Since 2006, Ecojustice lawyers have represented clients in hearings convened under the federal *Canadian Environmental Assessment Act*, *Canadian Environmental Assessment Act, 2012* and *National Energy Board Act*, and the *Alberta Energy Resources Conservation Board Act* and *Responsible Energy Development Act*, with respect to the development and transportation of Alberta’s oil and gas resources. Ecojustice has also represented the interests of clients with respect to the development and transportation of Alberta’s oil and gas resources before the Alberta Court of Queen’s Bench, the Alberta Court of Appeal, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada.

Ecojustice submits that the Inquiry is an ill-conceived public inquiry, promulgated for purely political purposes, that does not meet the test of expediency or being in the public interest, as set out in the *Public Inquiries Act*, RSA 2000, c P-39.¹

Further, Ecojustice submits that, for the reasons set out in this letter, the political context of the Inquiry, the Order, and the Terms of Reference appended to the Order together give rise to a

¹ *Public Inquiries Act*, RSA 2000, c P-39, s 2.

reasonable apprehension of bias. Ecojustice, by way of this letter, requests an interlocutory decision from you, as Commissioner, on the question of bias.

Further, should the Inquiry proceed as ordered, Ecojustice submits that certain provisions of the Order and Terms of Reference raise issues of freedom of expression, freedom of association and procedural fairness.

A Bias

Ecojustice submits that the political context of the Inquiry, the Order, and Terms of Reference together lead to a reasonable apprehension of bias. Ecojustice submits that the reasonable apprehension of bias arises from the context of the Inquiry and the structure and operation of the Order and Terms of Reference.

The legal test for a finding of a reasonable apprehension of bias is as articulated by de Grandpré J in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 (“CJL”):

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”²

A reasonable apprehension of bias may be generated by “the structure or operation of a decision-making body, rather than by the words or actions of an individual decision-maker.”³ The appearance of impartiality is important for public confidence in the institutional system, and it is important for the public to have confidence not only in the impartiality of the individual decision-maker but in the system itself.⁴

The test for bias in the administrative setting is a flexible standard that will vary depending on the nature and function of the particular commission or board.⁵ The test in *CJL* has been applied in the setting of a public inquiry where, as in this case, issues of prejudgment and the reputations of participants are raised.⁶ Further, where *Canadian Charter of Rights and Freedoms* (“*Charter*”) rights are at stake, as discussed in Part B below, the reasonable apprehension of bias standard is set at a particularly demanding level.⁷

² *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at 394 [*CJL*].

³ David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed., (Toronto: Carswell, 2014) at 437 [Jones and de Villars].

⁴ *Ibid*, at 438.

⁵ *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at 638-639 [*Newfoundland Telephone*].

⁶ *Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, at para 73 [*Chrétien*], upheld on appeal in *Chrétien v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2010 FCA 283.

⁷ *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at para 46 [*Kozak*].

As stated by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, [2003] 3 SCR 259, the particular circumstances of a matter may lead to a reasonable apprehension of bias even where the decision-maker may be totally impartial.⁸ The test for a reasonable apprehension of bias is highly fact specific and the facts must be interpreted in light of the entire context of the matter.⁹ The test is based on the cumulative impression left by a series of events rather than by any single factor.¹⁰ The concept that “justice must be seen to be done” cannot be severed from the standard of a reasonable apprehension of bias.¹¹

With respect to the Inquiry, Ecojustice submits that a reasonable apprehension of bias arises from the cumulative effect of the political context of the Inquiry and the structure and operation of the Order and Terms of Reference which demonstrate the prejudgment of relevant issues and the use of pejorative language.

(i) Prejudgment of relevant issues

The prejudgment of relevant issues before hearing all of the evidence on those issues results in a reasonable apprehension of bias.¹² The issue of prejudgment in the Inquiry arises initially in political comments leading up to the Inquiry.

In introducing the Inquiry, Premier Jason Kenney referred to a “well-funded political propaganda campaign...Its main tactics have been disinformation and defamation, litigation, public protests and political lobbying.”¹³ Further Premier Kenney stated that Alberta had been “the target of a well-funded political propaganda campaign to defame our energy industry and to landlock our resources.”¹⁴ At the same time, Premier Kenney referred to “the valiant research of Vivian Krause.”¹⁵

In his Twitter feed on May 6, 2019, Premier Kenney stated: “It's time to fight back against foreign-funded groups that lead a campaign of economic sabotage against our province.”¹⁶ In an email dated July 26, 2019, Premier Kenney stated: “Thanks in large part to the research of Vivian Krause, we know that the foreign-funded ‘Tar Sands’ campaign has links to bills C-69 and C-48, which are detrimental to the interests of Alberta’s responsible energy sector.”

Therefore, prior to and shortly after the commencement of the Inquiry, the Premier has identified certain parties to the Inquiry as guilty of disinformation, defamation and economic sabotage. At the same time, the Premier has accepted a potential witness as a “valiant researcher” and stated that certain facts are known before any evidence has been presented to the Inquiry or tested under cross-examination. These and other statements from the Premier have created a political

⁸ *Wewaykum Indian Band v Canada*, [2003] 3 SCR 259, at 292.

⁹ *Ibid.*, at 295.

¹⁰ *Setlur v Canada (Attorney General)*, [2000] 194 DLR (4th) 465 (FCA), at para 26.

¹¹ *Wewaykum*, *supra*, note 8, at 292.

¹² *Chrétien*, *supra* note 6, at paras 80, 85.

¹³ Premier Jason Kenney, <https://www.youtube.com/watch?v=d8prcxDWzI4>, (4 July 2019) [Statement].

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Premier Jason Kenney, <https://twitter.com/jkenney/status/1125621371847864321> (6 May 2019)

context in which certain parties are presumed to have been involved in wrongdoing while others are accepted as valiant researchers. The entire context of the Inquiry is aimed at a vindication of certain unproven assumptions rather than an independent evidence-based fact-finding mission.

The reasonable apprehension of bias is further contributed to by the language of the Order and Terms of Reference themselves.

The second recital in the preamble to the Order states:

WHEREAS allegations have been made that foreign individuals or organizations have provided financial resources to Canadian organizations which have disseminated misleading or false information as part of an anti-Alberta energy campaign;

(Underlining added).

This recital can be broken down into three specific allegations:

- (a) that foreign individuals or organizations have provided financial resources to Canadian organizations;
- (b) that those Canadian organizations have disseminated misleading or false information; and
- (c) that the foreign funding and dissemination of misleading or false information was part of an anti-Alberta energy campaign.

The Order initially admits that these are allegations or unproven statements that would need to be established or refuted on the basis of evidence presented to the Inquiry.

However, other parts of the Order and Terms of Reference accept these allegations, without evidence, as true. For example, the third recital in the preamble to the Order states:

WHEREAS it is expedient and in the public interest of Albertans and Canadians to understand the facts about foreign funding of anti-Alberta energy campaigns, and to ensure Alberta's oil and gas industry is not hindered in its reasonable opportunity to compete in international oil and gas markets by the dissemination of misleading or false information.

This recital presumes, as proven facts precedent to the Inquiry, the existence of foreign funding of anti-Alberta energy campaigns and the dissemination of "misleading or false information" before any evidence has been put before the Inquiry to support those allegations. This recital contradicts the premise of the second recital that correctly states these are merely allegations.

Clause 2(1) of the Terms of Reference compounds this problem. Clause 2(1) states:

2(1) The commissioner shall inquire into anti-Alberta energy campaigns that are supported, in whole or part, by foreign organizations...

(Underlining added).

Again, the existence of foreign funded anti-Alberta energy campaigns, which were posed as mere allegations in the second recital quoted above, are treated in Clause 2(1) as proven and existing. The existence of such campaigns has been prejudged before any evidence has been put before the Inquiry to support the allegation.

Not only are anti-Alberta energy campaigns presumed to exist in Clause 2(1), the definition of anti-Alberta energy campaigns in Clause 1(b) of the Terms of Reference further compounds the prejudgment. An anti-Alberta energy campaign is defined as:

...any and all attempts to directly or indirectly delay or frustrate the timely, economic, efficient and responsible development of Alberta's oil and gas resources and the transportation of those resources to commercial markets.

The definition of anti-Alberta energy campaigns is itself based on a prejudgment that attempts were made to directly or indirectly delay or frustrate oil and gas development, prior to any evidence being provided to the Inquiry to that effect. The definition is also based on a prejudgment that the oil and gas development in question was "timely, economic, efficient and responsible development" prior to any evidence being led to that effect. Evidence may well establish that the referenced Canadian organizations attempted to prevent untimely, uneconomic, inefficient or irresponsible development, in the interests of all Albertans, and therefore such activities would not fall within the definition of an "anti-Alberta energy campaign".

In addition, the reference in Clauses 2(1)(b) and (c) of the Terms of Reference to the funding of organizations from the Government of Alberta, other municipal, provincial or territorial governments in Canada, or the Government of Canada, as well as to their charitable status, would lead a reasonable person to conclude that the Inquiry has been designed with an end goal in mind, namely to challenge the domestic funding and charitable status of organizations who receive foreign funding and oppose Alberta oil and gas development. This was also reflected in the Premier's comments when introducing the Inquiry.¹⁷ Such a linking of fact-finding to some predetermined purpose leads to reasonable apprehension of bias.¹⁸

It is Ecojustice's submission that these prejudgments in the Order and Terms of Reference, in addition to the Premier's comments, contribute to a reasonable apprehension of bias and are fatal to the conduct of the Inquiry.

¹⁷ Statement, *supra* note 13.

¹⁸ Kozak, *supra* note 7, at paras 37, 61-62, 65.

(ii) Pejorative comments

Pejorative comments about the potential witnesses or parties to a public inquiry, or the nature of the inquiry, that signal to the public a prediction that evidence of wrongdoing is forthcoming, contribute to a finding of a reasonable apprehension of bias.¹⁹ Such comments have “the effect of transforming the nature of the inquiry from one that was a fact-finding mission with the hallmarks of fairness into an ‘exhibition’ of misconduct.”²⁰

The labelling of certain positions as “anti-Alberta” is clearly pejorative language. Further, the prejudgment of many of the issues that may be raised in this Inquiry, including the Premier’s comments as discussed above, compounds this “anti-Alberta” language. According to the Terms of Reference, those who campaign against oil and gas development, or even those who raise reasonable concerns about oil and gas development that could indirectly lead to a delay in a regulatory process, are presumed to be “anti-Alberta” and therefore guilty of some form of misconduct.

For example, the definition of “anti-Alberta energy campaign” in Clause 1(b) of the Terms of Reference is of such breadth that a landowner organization that submits a statement of concern with respect to a proposed oil or gas development that leads to a hearing under the *Responsible Energy Development Act* could be found to be part of an “anti-Alberta energy campaign” by making an “attempt to...indirectly delay” the development of Alberta’s oil and gas resources.

This pejorative labelling of certain positions as “anti-Alberta” prior to the commencement of the Inquiry proceedings is reminiscent of the darkest days of the activities of the House Un-American Activities Committee which operated in the United States from 1938 until 1975. A public inquiry in 2019 that commences by labelling a party that raises concerns with oil and gas development as “anti-Alberta” surely contributes to a reasonable apprehension of bias.

Any informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude, based on the circumstances described above, that there is a reasonable apprehension of bias regardless of your best intentions as Commissioner. Further, the overall structure and language of the Order and Terms of Reference restrict your ability to pursue a true fact-finding mission as opposed to simply documenting prejudged and pejorative conclusions of misconduct.

(iii) Remedy for Bias

It is impossible to have a fair hearing or to have procedural fairness if the hearing is tainted by a reasonable apprehension of bias.²¹ The damage created by a reasonable apprehension of bias cannot be remedied. A hearing that is tainted by a reasonable apprehension of bias is void *ab initio*.²²

¹⁹ *Chrétien, supra* note 6, at para 88.

²⁰ *Ibid.*

²¹ *Newfoundland Telephone, supra* note 5, at para 441.

²² *Ibid.*

As stated in *Eckervogt v British Columbia*, 2004 BCCA 398 (“*Eckervogt*”), if a party apprehends bias during the course of a proceeding, they must put that allegation to the tribunal and obtain a ruling before seeking the intervention of the court.²³ In response to an allegation of a reasonable apprehension of bias, the decision-maker is required to render a decision and create a proper record for judicial review, including reasons, for the court’s consideration.²⁴ Further, allegations of bias should be raised at the earliest possible time.²⁵

Ecojustice, by way of this letter, requests your decision, as Commissioner, on the question of bias. If you determine that the circumstances discussed above give rise to a reasonable apprehension of bias, the proceedings of the Inquiry will be void *ab initio*.

It is not possible to remedy the Premier’s biased statements and those of other political leaders. However, it may be possible to recommence the proceedings in an unbiased manner if the Order and Terms of Reference are amended accordingly. Pursuant to Clause 4 of the Terms of Reference, you, as Commissioner, may request through the Minister that the Lieutenant Governor in Council amend any provision of the Terms of Reference if you are of the opinion that amendment is necessary for the proper conduct of the Inquiry. Therefore, Ecojustice submits that if the Inquiry is to proceed, the amendments to the Terms of Reference as laid out in Part D below must be made. Further, Ecojustice submits that the Lieutenant Governor in Council must amend the Order as laid out in Part D below.

If it is your determination that the circumstances described above do not give rise to a reasonable apprehension of bias, we require your written decision to that effect in accordance with *Eckervogt*, including reasons for that decision. We believe that such a decision would be an error of law and it would be Ecojustice’s intent to challenge that decision in a court of law.

We request your decision on this matter within 30 days. If you have not rendered a decision within 30 days, it will be Ecojustice’s position that you have not found a reasonable apprehension of bias and have made that decision without reasons.

B Freedom of Expression and Freedom of Association

Ecojustice is concerned that in issuing the Order, the Government of Alberta has created a process that will lead to violations of the *Charter*.²⁶

As stated in the preceding section, your mandate as Commissioner is to “inquire into any anti-Alberta energy campaigns” that receive support from foreign organizations, and whether that support includes “financial assistance to a Canadian organization that has disseminated misleading or false information about the Alberta oil and gas industry”.

²³ *Eckervogt v British Columbia*, 2004 BCCA 398, at para 47.

²⁴ *Ibid*.

²⁵ *Ibid*, at para 48.

²⁶ *Canadian Charter of Rights and Freedoms*, s 2(b), (d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

We believe this mandate will lead to violations of freedom of expression and freedom of association of Canadian organizations under subsections 2(b) and 2(d) of the *Charter*, which would be unconstitutional.

(i) Freedom of Expression

The stated purpose of the Inquiry is to inquire into a particular kind of anti-Alberta association—those between a foreign and a Canadian organization—in which campaigning has allegedly occurred using “misleading or false information”. It is impossible for you to exercise that mandate without making factual findings about whether a Canadian organization has or has not exercised its freedom of expression in a manner that is “misleading or false” toward the Alberta oil and gas industry. Indeed you must make that determination affirmatively to have jurisdiction over the Canadian organization.

However, we do not believe that it is constitutional for the Inquiry’s jurisdiction to be predicated upon the government deciding whether information is true or false. Section 2(b) of the *Charter* requires government neutrality on the content of expression.²⁷ Government can, where there is a pressing and substantial objective, place proportionate restrictions on the right of free expression — but that is not what the Inquiry will do.

To the contrary, the Inquiry will create the insidious effect of stigmatizing and chilling Canadian organizations who campaign and advance allegedly “anti-Alberta” beliefs about the oil and gas industry, which according to the Terms of Reference are falsely equated to any expression which directly or indirectly leads to delay any development of oil and gas resources, by subjecting them to government actions in which their associations with foreign organizations are stifled.

Government interference in this political discourse is an unconstitutional abuse of government power, and as the Supreme Court ruled in *R. v. Keegstra*, [1990] 3 SCR 697:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons...The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.²⁸

(Underlining added.)

Even if one of the targeted groups has made “misleading or false” statements, which is not admitted, restrictions on freedom of expression cannot be imposed by governments on that basis.

²⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, at para 60.

²⁸ *R v Keegstra*, [1990] 3 SCR 697, at 763-764.

The Alberta Court of Appeal has stated:

This decision makes the important point that s. 2(b) of the *Charter* protects unpopular and disturbing speech. Any restrictions on expression must be justified. The falsity of statements is not itself a sufficient justification, because false statements can themselves sometimes have value, and conclusively determining total falsity is inherently difficult...

The core of the right to free expression is to allow citizens to have different views about different facts. Any argument about inaccuracy must therefore be based on objectively verifiable facts, not opinions about those facts.²⁹

The Canadian and foreign organizations whose campaigns the Inquiry places under special scrutiny are lawfully participating in social and political decision-making about Alberta's energy resources and the environment. It is indisputably unconstitutional for the Government of Alberta to interfere with such organizations merely because the Terms of Reference deem and condemn their public expressions of belief as an "anti-Alberta energy campaign". The Inquiry's Terms of Reference are reminiscent of the historical, discredited pre-*Charter* suppression of communism, which Quebec's government failed to accomplish in *Switzman v. Elbling*, [1957] S.C.R. 285. As stated by Abbott J in concurring reasons:

Since in my view the true nature and purpose of the *Padlock Act* is to suppress the propagation of communism in the Province, the next question which must be answered is whether such a measure, aimed at suppressing the propagation of ideas within a Province, is within the legislative competence of such Province.

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.³⁰

The Inquiry's interference with freedom of expression itself may be enough to render it unconstitutional. However, the *Charter* concerns do not end there.

(ii) Freedom of Association

Given that the purpose of the Inquiry is to scrutinize Canadian organizations attempting to join together in collective expression, this may constitute, by design, a violation of freedom of association protected under subsection 2(d) of the *Charter*. As the Supreme Court ruled in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1:

[Freedom of association], viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to

²⁹ *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154, at paras 44, 73.

³⁰ *Switzman v Elbling*, [1957] SCR 285, at 326.

join with others to meet on more equal terms the power and strength of other groups or entities.³¹

The matters in this Inquiry fall under the three classes of activities set out in *Mounted Police*:

- (a) The freedom to join with others and form associations, including associations with foreign organizations;
- (b) When Canadian organizations campaign in relation to Alberta's energy resources, including with the support of foreign organizations, they do so "in the pursuit of" their freedom of expression. As such, subsections 2(d) and 2(b) operate synergistically, such that in pursuing the rights of association they are also pursuing another constitutional right; and
- (c) The freedom to join with others, including foreign organizations, to meet on more equal terms the power and strength of Alberta's extremely well-funded oil and gas industry including receiving funding from those foreign organizations.

It is, therefore, Ecojustice's submission that fulfillment of your mandate under the Inquiry, including any recommendations that may be made through this process, may represent government action that violates the *Charter* and is unconstitutional.

Section 4 of the Terms of Reference should be invoked by you to request that the Lieutenant Governor in Council amend the Terms of Reference as proposed in Part D below so as to steer clear of the above mentioned serious constitutional infirmities.

C Procedural Fairness

Should you determine that the Inquiry will proceed, regardless of the allegations of a reasonable apprehension of bias and the possible *Charter* implications, the conduct of the Inquiry raises further issues with respect to procedural fairness.

In *Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802 ("*Chrétien*"), Teitelbaum J stated:

Procedural fairness is a basic tenet of our legal system. It requires that public decision makers act fairly in coming to decisions that affect the rights, privileges or interests of an individual. There is no exception of the application of this principle for commissions of inquiry.³²

Similarly, Cory J, in *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System in Canada)*, [1997] 3 SCR 440 ("*Krever*"), stated: "This means that no matter how

³¹ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, at para 66.

³² *Chrétien*, *supra* note 6, at para 39.

important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.”³³

Procedural fairness is particularly essential where the findings of the inquiry may damage the reputation of a witness.³⁴ In fact, the protection of reputation has been elevated to quasi-constitutional status and may demand the highest levels of procedural fairness.³⁵

In *Chrétien*, Teitelbaum J stated:

I find that the applicant was entitled to a high level of procedural fairness before the Commission. Although the nature of the proceedings do not provide for the same level of procedural fairness required in a trial, the potential damage that the findings of the Commission could have on the reputations of the parties involved in the investigation was of such serious consequence that a high degree of fairness was required.³⁶

The current Inquiry is clearly a situation in which the reputations of various organizations are at stake and indeed have already been tarnished by unfounded comments of certain political leaders and others speaking out in the media. As noted in the discussion above, the use of pejorative language and prejudgment of certain allegations in the Order and Terms of Reference have compounded the risk of potential damage to reputations and therefore this Inquiry will require a high degree of procedural fairness to overcome those risks.

In *Krever*, Cory J set out indicia of procedural fairness in a public inquiry:

- (a) all parties with standing and all witnesses appearing before the inquiry have the right to counsel, both at the inquiry and during their pre-testimony interview;
- (b) each party has the right to have its counsel cross-examine any witness who testified, and counsel for a witness who did not have standing is afforded the right to examine that witness;
- (c) all parties have the right to apply to the commissioner to have any witness called whom commission counsel had elected not to call;
- (d) all parties have the right to receive copies of all documents entered into evidence and the right to introduce their own documentary evidence;
- (e) all hearings will be held in public unless application is made to preserve the confidentiality of information; and

³³ *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System in Canada)*, [1997] 3 SCR 440, at para 31 [*Krever*].

³⁴ *Krever*, *supra* note 33, at para 55; *The Southern First Nations of Care v The Honourable Edward Hughes*, 2012 MBCA 99, at para 69 [*Southern First Nations*].

³⁵ *Les Éditions Écosociété Inc. v Banro Corporation*, 2012 SCC 18, at para 57.

³⁶ *Chrétien*, *supra* note 6, at para 61.

- (f) although evidence could be received by the commissioner that might not be admissible in a court of law, the commissioner should be mindful of the dangers of such evidence, and in particular, its possible effect on reputation.³⁷

Further, the Manitoba Court of Appeal has determined that procedural fairness requires that the commissioner in a public inquiry provide all parties with detailed, meaningful summaries of any witness interviews held outside of a public hearing.³⁸

Further, Ecojustice maintains that all parties to this Inquiry have a right to know the particulars of the “misleading and false information” that they are alleged to have disseminated.

Further, section 13 of the *Public Inquiries Act* requires that no report of the commissioner that alleges misconduct by any person shall be made until that person has been given notice of the allegation and given an opportunity to give evidence, and at the discretion of the commissioner, to call and examine witnesses.³⁹

Finally, best practice for a public inquiry entails the commissioner developing draft rules of procedure and practice for the inquiry and providing an opportunity for all parties and intervenors to review and make submissions on those rules.⁴⁰

D Required Changes to the Order and Terms of Reference

In order to address, in part, the reasonable apprehension of bias found in the Order and Terms of Reference, to ensure that the *Charter* rights of parties to the Inquiry are not infringed during the Inquiry process, and to ensure procedural fairness, Ecojustice submits the Terms of Reference must be amended as follows:

- (a) Clause 1(b) be amended to read:

- (b) “energy campaign” means any and all attempts to influence the approval or rejection of applications to develop Alberta’s oil and gas resources or the transportation of those resources to commercial markets;

- (b) Clause 2(1) be amended to read, in its entirety:

- 2(1) The commissioner shall inquire into energy campaigns that are supported, in whole or in part, by foreign organizations, and in doing so shall inquire into matters including but not limited to the following:

- (a) whether any foreign organization has provided financial assistance to a Canadian organization to influence the approval or rejection of an application to develop a project in Alberta’s oil and gas industry and

³⁷ *Krever*, *supra* note 33, at para 67.

³⁸ *Southern First Nations*, *supra* note 34, at paras 39, 44

³⁹ *Public Inquiries Act*, *supra* note 1, s 13.

⁴⁰ *Southern First Nations*, *supra* note 34, at para 11.

whether such association is protected by section 2 of the *Canadian Charter of Rights and Freedoms*; and

(b) whether any Canadian organization receiving foreign funding has disseminated misleading or false information about the Alberta oil and gas industry and whether such expression is protected by section 2 of the *Canadian Charter of Rights and Freedoms*.

(c) Clause 2(3)(b) be amended to read:

(b) enable the Government of Alberta to consider the impact of any energy campaign funded, in whole or in part, in the manner described in subsection (1)(a).

(d) Clauses 2(3)(c) and (d) be deleted.

(e) the following Clause 5.1 be added following Clause 5:

5.1 The commissioner shall develop procedures for the conduct of the Inquiry, in consultation with interested parties, to ensure procedural fairness of the proceeding, including:

(a) the right of any person appearing before the commissioner to be represented by counsel, in accordance with section 11 of the *Public Inquiries Act*;

(b) the right of any party to the Inquiry to cross-examine any witness who provides testimony or evidence to the Inquiry;

(c) the right of any party to call any witness who has information or expertise relevant to the Inquiry;

(d) the right of all parties to receive written summaries of all interviews conducted by the commissioner or Inquiry counsel or staff outside of a public hearing;

(e) the right of all parties to receive copies of all documents entered into evidence and the right to introduce their own documentary evidence;

(f) the right of all parties to particulars of the false and misleading information alleged to have been disseminated by them;

(g) all hearings will be held in public unless application has been made and approved by the commissioner to preserve the confidentiality of information; and

(h) no report of the commissioner shall allege misconduct by any person until reasonable notice has been given to that person and the person has had an opportunity to give evidence and call and examine witnesses in accordance with section 13 of the *Public Inquiries Act*.

Further, to address, in part, the reasonable apprehension of bias, Ecojustice submits that the second and third recitals of the Order must be amended to read as follows:

WHEREAS allegations have been made that foreign individuals or organizations have provided financial resources to Canadian organizations which may have disseminated misleading or false information as part of energy campaigns; and

WHEREAS it is expedient and in the interest of Albertans and Canadians to understand that facts about foreign funding of energy campaigns and whether such campaigns disseminated misleading or false information, and whether such campaigns are protected under subsections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms*;

In the absence of such changes to the Order and Terms of Reference, it is Ecojustice's position that this Inquiry will be subject to legal challenges which respect to bias, *Charter* rights and procedural fairness. Further, to be clear, these proposed changes do not fully address other issues of jurisdiction or procedure that may be subsequently raised.


E Conclusion


As stated above, it is Ecojustice's submission that the Inquiry is ill-conceived, promulgated for purely political purposes, and does not meet the test of expediency or being in the public interest. In issuing the Order and the Terms of Reference in their current form, the Government of Alberta has established an Inquiry that is unlawful and potentially unconstitutional.

In order for this Inquiry to proceed, the Order and Terms of Reference must be amended as proposed in this letter. Otherwise, the Inquiry gives rise to a reasonable apprehension of bias, violates procedural fairness, and implicates the rights of freedom of expression and association protected under the *Charter*. As set out above, Clause 4 of the Terms of Reference for the Inquiry gives you the ability to request that amendments be made.

We request your decisions with respect to the reasonable apprehension of bias and the recommended amendments to the Order and Terms of Reference within 30 days. Further, Ecojustice reserves the right to make further submissions to you with respect to jurisdictional, factual or procedural matters.

Sincerely,


Barry Robinson
Barrister & Solicitor


Kurt Stilwell
Barrister & Solicitor