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Justice Horner

COURT FILE NUMBER	1901-16255
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ECOJUSTICE CANADA SOCIETY
RESPONDENT	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, the LIEUTENANT GOVERNOR IN COUNCIL, the MINISTER OF JUSTICE AND SOLICITOR GENERAL FOR ALBERTA and JACKSON STEPHENS ALLAN in his capacity as Commissioner under the *Public Inquiries Act*
DOCUMENT	**APPLICANT'S WRITTEN BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT	Barry Robinson Barrister & Solicitor

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> **"Good faith" in this context...means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.**
>
> **Justice Rand, *Roncarelli v Duplessis*, [1959] SCR 121, at 143**

Part I INTRODUCTION

1 In this judicial review, Ecojustice Canada Society ("Ecojustice") challenges the public inquiry into anti-Alberta energy campaigns (the "Inquiry") on the grounds that the Inquiry has been brought for the improper purpose of targeting, intimidating and harming organizations that have raised concerns about the environmental impacts, including climate change impacts, of oil and gas development in Alberta. Even before the Inquiry was called, United Conservative Party ("UCP") Leader Jason Kenney and the UCP were clear that the purpose of the Inquiry would be to target, intimidate and harm organizations whose views on oil and gas development in Alberta differed from theirs.

2 The application for judicial review also raises a reasonable apprehension of bias and demonstrates that the subject matter of the Inquiry is outside of the jurisdiction of the Legislature of Alberta.

3 The purpose of a properly-constituted public inquiry is to apprise, inform and educate the government and the public on a matter of public importance, not to target, intimidate and harm individuals and organizations who are involved in public discourse on matters of public interest. Further, the process of a public inquiry must be unbiased and within the jurisdiction of the Province. The Inquiry fails to meet all of these standards.

4 This judicial review is informed by the statutory authority for a public inquiry, the political context in which this Inquiry was called, the political connections and contributions of the Inquiry commissioner, Order in Council 125/2019 (the "Order") as amended, with its appended Terms of Reference, and the certified records of the Commissioner of the Inquiry and the Lieutenant Governor in Council.

5 Ecojustice brings this application for judicial review on the grounds that:

(a) the Inquiry has been brought for an improper purpose and therefore is *ultra vires* the authority granted to the Lieutenant Governor in Council pursuant to section 2 of the Alberta *Public Inquiries Act*, RSA 2000, c P-39;

(b) the political context of the Inquiry, the Order and Terms of Reference of the Inquiry, and the Commissioner's political donations and connections to the political party at the forefront of calling for the Inquiry, lead to a reasonable apprehension of bias; and

(c) the Inquiry, as established by the Order and Terms of Reference for the Inquiry, is in pith and substance an inquiry into matters of exclusive federal jurisdiction and therefore *ultra vires* the jurisdiction of the Lieutenant Governor in Council to so order.

6 On these grounds, the Applicant seeks an order that the Order and Terms of Reference for the Inquiry are void or must be quashed, or prohibiting the commissioner from continuing with the conduct of the Inquiry.

Part II FACTS

A The Parties

7 The Applicant Ecojustice is a law firm registered with the Law Society of Alberta, an extraprovincial corporation registered under the Alberta *Business Corporations Act*, RSA 2000, c B-9, and a charity registered under the federal *Income Tax Act*, RSC 1985, c 1 (5th Supp.).

8 The Respondent Lieutenant Governor in Council is the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council of Alberta, and is the party who may establish a public inquiry and appoint a commissioner pursuant to section 2 of the *Public Inquiries Act*.

9 The Respondent Minister of Justice and Solicitor General for Alberta ("Minister") is the Minister responsible for the *Public Inquiries Act* pursuant to section 14(1)(ttt) of the *Designation and Transfer of Responsibilities Regulation*, AR 44/2019.

10 The Respondent Jackson Stephens Allan ("Steve Allan" or "Commissioner") is the commissioner appointed to conduct the Inquiry pursuant to the Order.

B Public statements leading to the launch of the Inquiry

11 As early as May 9, 2018, in a speech given at the founding annual general meeting of the UCP, UCP Leader Jason Kenney stated:

> Let me be very frank, friends. I think even my critics have learned that when I put my mind to something, I don't stop until I get it done, all right? So let me put it really plain to Justin Trudeau, to John Horgan, to the David Suzukis and the Elizabeth Mays, to the foreign funded special interests and all of the enemies of our economic progress: if I become premier of Alberta, I will not relent. I will go to the wall. I will form alliances. I will go to court. I will use every tool available to defend this province, our economy, our resources and our people...
>
> We will launch a special Alberta Legislature committee investigation into the sources of foreign funds behind the anti-Alberta special interests. The Tides Foundation doesn't have a lot of supporters over there. We will go to court if necessary, to get the federal government to strip charitable status from bogus charities like Tides Canada and the David Suzuki Foundation.

Ecojustice letter to Commissioner, 22 October 2019, Exhibit "C", Transcript of Jason Kenney speech, 9 May 2018, at 14-15 [Certified Record of Proceedings of Jackson Stephens Allan, filed 13 January 2020, Tab 14 [Allan Record]].

12 In an undated speech given in Edmonton, Mr. Kenney stated:

> So today, I am announcing additional steps that we will take to stand up against the highly coordinated campaign of foreign-funded special interests to landlock Alberta energy.
>
> Thanks to the intrepid reporting of independent Vancouver journalist Vivian Krause, amongst others, we now have undeniable proof that Alberta's interests are being challenged and thwarted, that this province is being blocked in and pinned down by well-funded foreign actors who have been waging a long-term campaign to landlock Alberta oil using partisan political tactics and outright misinformation in their campaign of defamation.
>
> ...we will challenge the charitable status of foundations that are funneling foreign money into the anti-Alberta campaign. We will build evidence of how they have violated Canadian charities law, share that with the Revenue Agency in Ottawa, and go to the Federal Court to demand enforcement of the law if necessary.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "C", Transcript of Jason Kenney speech, undated, at p 4, line 23 – p 5, line 8; p 13, lines 13-19 [Supplemental Certified Record of Proceedings of Jackson Stephens Allan, filed 27 January 2020, Tab 48 [Allan Supplemental Record]].

13 A media release issued by the UCP on March 22, 2019, during the 2019 provincial election campaign, stated:

> A United Conservative government will take immediate steps to stand up to the foreign influences working to land lock Alberta oil, and undermine our energy sector…
>
> Thanks to the intrepid reporting of journalist Vivian Krause, among others, Albertans now have proof that provincial interests are being challenged by well-funded foreign actors who have been waging a decade-long campaign to land lock Alberta's oil…
>
> To stand up to foreign influences, a UCP government will: …
>
> Challenge the charitable status of charitable foundations that are funneling foreign money into anti-Alberta campaigns. Challenges submitted to the CRA will be based in Canadian charities law, and if necessary will proceed to the Federal Court.

Ecojustice letter to Commissioner, 4 October 2019, Exhibit "B", *Alberta Strong and Free*, "UCP will Stand Up to Foreign Influences", press release, 22 March 2019, at 1-3 [Allan Supplemental Record, Tab 47].

14 These statements were also reflected in the UCP election platform, which stated:

> We will fight back against the foreign funded special interests who are trying to landlock our energy…
>
> A United Conservative government will: …
>
> - Challenge the charitable status of groups that are funneling foreign money into anti-Alberta campaigns …
> - Launch a public inquiry under the *Inquiries Act* into the foreign sources of funds behind the anti-Alberta energy campaign. The inquiry will have the power to compel witness testimony, and have a $2.5 million budget. The inquiry may follow up on investigations done in other jurisdictions...

Ecojustice letter to Commissioner, 4 October 2019, Exhibit "F", United Conservative Party, *Alberta Strong & Free*, at 9, 96 [Allan Supplemental Record, Tab 51].

15 In a May 6, 2019 posting on his Twitter account, following the election, Premier Jason Kenney stated:

> For too long, Albertans have been kicked while we were hurting; we've been locked in and pinned down.

It's time to fight back **against** foreign-funded groups that lead a campaign of **economic sabotage against our province.**

[Bold in original]

Ecojustice letter to Commissioner, 4 October 2019, Exhibit "G", Jason Kenney Twitter posting, 6 May 2019 [Allan Supplemental Record, Tab 52].

16 On July 4, 2019, the Alberta Lieutenant Governor in Council issued the Order launching the Inquiry. The Order performed two functions: it established the Terms of Reference for the Inquiry, and it appointed Jackson Stephens Allan as the commissioner of the Inquiry.

Order in Council 125/2019 ("Order") [Lieutenant Governor in Council's Record, filed 27 January 2020, Tab 1, p 1 [LGIC Record]].

17 At a press conference announcing the Inquiry on July 4, 2019, Premier Kenney stated:

> Here's what we know. For more than a decade, Alberta has been the target of a well-funded political propaganda campaign to defame our energy industry and to landlock our resources. The tar sands campaign was launched in 2008 with the express goal of shutting down investment, development, and export of energy from Alberta's oil sands, which represent the third largest recoverable oil reserves on the face of the earth.
>
> It is financed by multibillion-dollar US foundations like the Rockefeller Brothers Fund, the William and Flora Hewlett Foundation, the Oak Foundation, the Sea Change Foundation, and the Tides Foundation, amongst many others.
>
> The tar sands campaign developed a sophisticated multi-pronged strategy to landlock Alberta energy. Its main tactics have been disinformation and defamation, litigation, public protests, and political lobbying. It enlisted and financed dozens of Canadian and American interest groups to execute these activities, including the Tides Foundation and its Canadian subsidiary, Greenpeace, the Sierra Club, the World Wildlife Fund, the Pembina Institute, Environmental Defence, and Lead Now, amongst many others, all of those groups who participated in the original planning session to develop the tar sands campaign hosted by the Rockefeller Brothers Fund at their New York City offices in 2008.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, at p 2, line 26 – p 3, line 25 [Allan Supplemental Record, Tab 49].

18 Further, Premier Kenney stated:

> So I can enumerate two things that we committed to in our platform. One is to challenge the charitable status of groups that have been violating the Charities Act requirement to limit spending on political activity.
>
> **Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, at p 14, lines 11-15 [Allan Supplemental Record, Tab 49].**

19 At the same press conference, then-Alberta Minister of Justice and Solicitor General Doug Schweitzer stated:

> Albertans need to understand the facts and the extent of this foreign-funded misinformation campaign. By launching this Inquiry, we are fighting back against interests who are trying to landlock Alberta's energy.
>
> **Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, p 10, lines 17-20 [Allan Supplemental Record, Tab 49].**

20 In a press release also issued on July 4, 2019, Premier Kenney stated:

> As promised, our government is standing up for Alberta's interests by fighting the well-funded foreign campaign targeting our energy industry. This misinformation has been allowed to defame Alberta for far too long. It has seen foreign special interests secretively spending tens of millions of dollars to thwart Alberta's economic development by landlocking our energy – but it stops now.
>
> **Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "E", Government of Alberta, "Standing up to foreign influences", press release, 4 July 2019, at 1-2 [Allan Supplemental Record, Tab 50].**

C The Lieutenant Governor in Council's decision to establish the Inquiry

21 On June 27, 2019, Doug Schweitzer, Minister of Justice and Solicitor General at the time, provided an Advice to Cabinet in advance of the Order launching the Inquiry. The Advice to Cabinet framed the "Issue" to be addressed as follows:

> The Government has committed to hold a public inquiry into foreign funding of anti-Alberta energy campaigns.
>
> An Order in Council (OC) and a commission are needed to establish the inquiry and appoint the commissioner.
>
> **Minister of Justice and Solicitor General, "Advice to Cabinet – Public Inquiry into Foreign Funding of Anti-Alberta Energy Campaigns", 27 June 2019, at 1 [LGIC Record, Tab 4].**

22 The Advice to Cabinet stated that "[p]ublic inquiries are designed to air important issues in a public forum and serve fact-finding purposes". The Advice to Cabinet did not address why this Inquiry was in the public interest and did not provide any factual background on the nature or extent of the alleged "foreign funding of anti-Alberta energy campaigns" or the nature of the false or misleading information alleged to have been disseminated by such campaigns. The Advice to Cabinet was mainly concerned with logistical issues such as the Inquiry's structure and budget.

Minister of Justice and Solicitor General, "Advice to Cabinet – Public Inquiry into Foreign Funding of Anti-Alberta Energy Campaigns", 27 June 2019, at 2 [LGIC Record, Tab 4].

23 On July 2, 2019, then-Minister Schweitzer provided a memorandum to the Premier and Cabinet with respect to the request to establish a public inquiry, which indicated three "rationales" for launching the Inquiry. The first states:

> The Premier has promised that a public inquiry would be held into allegations that foreign organizations have been providing financial support to Canadian organizations, to encourage their engagement in anti-Alberta energy campaigns.

Minister of Justice and Solicitor General, "Memorandum to Premier and Cabinet", 2 July 2019, at 1 [LGIC Record, Tab 2].

24 The second rationale related to the qualifications of the proposed commissioner Steve Allan, and the third related to Mr. Allan's salary. No further explanation of those rationales was provided.

Minister of Justice and Solicitor General, "Memorandum to Premier and Cabinet", 2 July 2019, at 1 [LGIC Record, Tab 2].

25 Other records before Cabinet in deciding to establish the Inquiry were Steve Allan's biography and a "*Strategic Communications Plan.*" The *Strategic Communications Plan* contains the following as its "Primary Message":

> We will stand up for Alberta's interests, fight the well-funded foreign campaign targeting our oil industry, and expose the people behind that campaign.
>
> - A well-funded misinformation campaign has been allowed to defame Alberta's oil industry for far too long.
> - That campaign has seen American interests spend tens of millions of dollars to thwart Alberta's economic development.

- We are establishing a public inquiry to expose these interests - and their motivations - to the light of day.

Alberta Communications and Public Engagement, *Strategic Communications Plan*, 27 June 2019, at 2 [LGIC Record, Tab 8].

26 The *Strategic Communications Plan* provides no mention of the independent fact-finding function that the Inquiry must carry out.

***Strategic Communications Plan*, 27 June 2019, at 2, 7 [LGIC Record, Tab 8].**

27 The *Strategic Communications Plan* identifies "Recommended Validators" who are expected to be supportive of the Government's messaging with respect to the Inquiry. It also includes a list of "Expected Critics" and their anticipated activities in response to the launch of the Inquiry. Ecojustice is listed as an expected critic that is likely to "state opposition to the oil sands and TMX" and "may physically protest". The *Strategic Communications Plan* demonstrates a fundamental misunderstanding of Ecojustice and its role as a law firm, a national public interest law organization, and a registered federal charity. Ecojustice's 23 lawyers across Canada engage in litigation and law reform on environmental matters. They are unlikely to "physically protest" other than possibly in their personal capacity.

***Strategic Communications Plan*, 27 June 2019, at 3-6 [LGIC Record, Tab 8]; Affidavit of Devon Page, affirmed February 6, 2020, at paras 2-4 [Page Affidavit].**

D The Order in Council establishing the Inquiry

28 The Order was made on July 4, 2019. 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;

Order [LGIC Record, Tab 1, p 1].

29 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;

Order [LGIC Record, Tab 1, p 1].

30 The Order appended the Terms of Reference which define an "anti-Alberta energy campaign" 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;

Terms of Reference, cl. 1(b) [LGIC Record, Tab 1, p 2].

31 On June 25, 2020, the Lieutenant Governor in Council issued Order in Council 191/2020 (the "June 2020 Order") amending the definition of "anti-Alberta energy campaign" as follows:

> ...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 by the dissemination of misleading or false information.

Order in Council 191/2020, 25 June 2020
[Applicants Book of Authorities "ABA", Vol 1, Tab 7].

32 On August 5, 2020, the Lieutenant Governor in Council issued Order in Council 249/2020 (the "August 2020 Order") further amending the definition of "anti-Alberta energy campaign" as follows:

> …~~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, by any means which may include, by the dissemination of misleading or false information.

Order in Council 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

33 The Terms of Reference define the "Alberta oil and gas industry" as including:

> (ii) any aspect of marketing and delivery of Alberta's oil and gas resources to commercial markets by any mode of transportation whatsoever, including both railways and pipelines falling under provincial or federal jurisdiction;

Terms of Reference, cl. 1(a)(ii) [LGIC Record, Tab 1, p 2].

34 Clause 2(1) of the Terms of Reference originally stated:

> **Mandate of commissioner**
>
> 2(1) The commissioner shall inquire into anti-Alberta 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 that has evinced an intent harmful or injurious to the Alberta oil and gas industry has provided financial assistance to a Canadian organization that has disseminated misleading or false information about the Alberta oil and gas industry;
>
> (b) whether any Canadian organization referred to in clause (a) has also received grants or other discretionary funding from the government of Alberta, from municipal, provincial or territorial governments in Canada or from the Government of Canada;
>
> (c) whether any Canadian organization referred to in clause (a) has charitable status in Canada.

Terms of Reference, cl. 2(1) [LGIC Record, Tab 1, p 2].

35 Following the June 2020 and August 2020 Orders, clause 2(1) now states:

> 2(1) The commissioner shall inquire into ~~anti-Alberta energy campaigns that are supported, in whole or in part, by foreign organizations~~ the role of foreign funding, if any, in anti-Alberta energy campaigns, and in doing so shall inquire into matters including, but not limited to, the following:
>
> (a) whether any foreign organization that has evinced an intent harmful or injurious to the Alberta oil and gas industry has provided financial assistance to a Canadian organization, which may include any Canadian organization that has disseminated misleading or false information about the Alberta oil and gas industry;
>
> (b) whether any Canadian organization referred to in clause (a) has also received grants or other discretionary funding from the government of Alberta, from municipal, provincial or territorial governments in Canada or from the Government of Canada;

(c) whether any Canadian organization referred to in clause (a) has charitable status in Canada.

Terms of Reference, cl. 2(1) [LGIC Record, Tab 1, p 2]; O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7]; O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

36 The Terms of Reference require the Commissioner to make such findings and recommendations as the Commissioner considers advisable with respect to, amongst other things, additional eligibility criteria that should be considered in issuing government grants and criteria for attaining or maintaining charitable status.

Terms of Reference, cl. 2(3)(c)-(d) [LGIC Record, Tab 1, p 3]; O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

E The Applicant's communications with the Commissioner regarding bias

37 On September 17, 2019, counsel for the Applicant wrote to the Commissioner raising a number of issues including the issue of a reasonable apprehension of bias based on the political context of the Inquiry and the Order and the Terms of Reference, as well as the risk of infringement of rights protected by the *Charter of Rights and Freedoms*, and certain procedural matters.

Letter from Ecojustice to the Commissioner, 17 September 2019 [Allan Record, Tab 8].

38 The Applicant asked the Commissioner to render a decision with respect to the reasonable apprehension of bias with reasons by October 17, 2019, in accordance with the guidance in *Eckervogt v British Columbia*, 2004 BCCA 398, that a party alleging bias should put that allegation to the tribunal and obtain a ruling before seeking the intervention of the court in order to provide a proper record for judicial review.

Letter from Ecojustice to the Commissioner, 17 September 2019, p 7 [Allan Record, Tab 8]; *Eckervogt v British Columbia*, 2004 BCCA 398, at paras 47-48 [*Eckervogt*] [ABA, Vol 1, Tab 21, p 251].

39 On October 4, 2019, the Applicant made a further submission to the Commissioner presenting additional evidence with respect to the reasonable apprehension of bias.

Letter from Ecojustice to the Commissioner, 4 October 2019, pp 1-8 [Allan Record, Tab 10].

40 On October 17, 2019, the Commissioner sent a letter to counsel for the Applicant stating, *inter alia*, that:

(a) the Applicant's correspondence was "premature";

(b) the Commissioner was considering whether any amendments to the Terms of Reference were necessary or desirable; and

(c) the parties were invited to submit relevant evidence or information to the Commissioner.

Letter from Commissioner to Ecojustice, 17 October 2019, p 1 [Allan Record, Tab 12].

41 On October 22, 2019, the Applicant sent a further letter to the Commissioner presenting evidence that the Commissioner had made political donations to the UCP in 2017 and 2018, and to the political UCP leadership campaign of Doug Schweitzer in 2017. In light of this new information, the Applicant requested that the Commissioner render a decision with respect to the reasonable apprehension of bias by November 6, 2019.

Letter from Ecojustice to the Commissioner, 22 October 2019(b), pp 1-2 [Allan Record, Tab 14].

42 The Applicant received no response to its letter dated October 22, 2019, with respect to the Commissioner's political donations, and has received no determination from the Commissioner with respect to the issue of reasonable apprehension of bias.

F The Commissioner's political donations and relationship with Doug Schweitzer

43 The Commissioner's certified record, received by the Applicant on January 13, 2020, confirmed that Steve Allan made donations to the UCP and supported the political campaign of Doug Schweitzer both financially and in a direct personal capacity. Specifically, the certified record confirmed the following facts:

(a) Steve Allan made a donation of $500 to the Progressive Conservative Association of Alberta in 2015;

Excerpt from Steve Allan 2015 Tax Return [Allan Record, Tab 16].

(b) Steve Allan made a donation of $1,250 to the UCP in 2017;

Excerpt from Steve Allan 2017 Tax Return [Allan Record, Tab 18].

(c) Steve Allan made a donation of $500 to the campaign of Doug Schweitzer for the leadership of the UCP on August 7, 2017 and a further donation of $500 to the campaign of Doug Schweitzer for the leadership of the UCP on October 26, 2017;

Receipts for Donations to Doug Schweitzer [Allan Record, Tabs 19-20].

(d) Steve Allan made donations totaling $750 to the UCP in 2018;

Excerpt from Steve Allan 2018 Tax Return and Official Contribution Receipt from the UCP [Allan Record, Tabs 23, 26].

(e) on June 11, 2018, Steve Allan sent an email invitation to numerous people to attend a reception with Doug Schweitzer to be held on June 19, 2018, at the Calgary Golf and Country Club, indicating that Allan was "supporting Doug Schweitzer as he seeks the Calgary-Elbow nomination for the United Conservative Party." Steve Allan paid a portion of the invoice for that reception in the amount of $414;

Email sent on behalf of Steve Allan to numerous parties (11 June 2018) [Allan Record, Tab 33]; Email from Steve Allan to Bob Taylor and Quincy Smith (28 June 2018) [Allan Record, Tab 34]; Invoice from Calgary Golf and Country Club (30 June 2018) [Allan Record, Tab 35].

(f) in July 2018, Steve Allan communicated with Doug Schweitzer with respect to the proposed Springbank dam as it related to UCP support in the Calgary-Elbow constituency, where Mr. Schweitzer was the nominated UCP candidate for Member of the Legislative Assembly ("MLA") in the upcoming election;

Email chain between Steve Allan and Doug Schweitzer (9 July 2018) [Allan Record, Tab 36]; Email chain between Steve Allan and Tony Morris (9 July 2018 – 10 July 2018) [Allan Record, Tab 37].

(g) on March 11, 2019, Steve Allan invited certain persons to attend a reception at his home for Doug Schweitzer to be held on March 21, 2019;

Email from Steve Allan to Paul Battistella and Brenda Leeds Binder (11 March 2019) [Allan Record, Tab 41].

(h) on April 7, 2019, Steve Allan sent an email to numerous people indicating support for the candidacy of Doug Schweitzer as the nominated UCP candidate for MLA in the Calgary-Elbow constituency; and

Email from Steve Allan to numerous parties (8 April 2019) [Allan Record, Tab 43].

(i) on April 15, 2019, Steve Allan sent an email to numerous people with respect to the Springbank dam and urging support for Doug Schweitzer as the nominated UCP candidate for MLA in the Calgary-Elbow constituency.

Email from Steve Allan to numerous parties (15 April 2019) [Allan Record, Tab 44].

Part III ISSUES

44 The Applicant submits that there are three issues to be determined by this Honourable Court:

(a) Has the Inquiry been brought for an improper purpose that is *ultra vires* the authority granted to the Lieutenant Governor in Council pursuant to section 2 of the *Public Inquiries Act*?

(b) Does the political context of the Inquiry, the Order and Terms of Reference of the Inquiry, and the Commissioner's political donations and connections to the political party at the forefront of calling for the Inquiry, result in a reasonable apprehension of bias?

(c) Is the Inquiry in pith and substance an inquiry into matters of exclusive federal jurisdiction and therefore *ultra vires* the Inquiry's constitutional and statutory jurisdiction?

Part IV SUBMISSIONS

1 THE INQUIRY HAS BEEN COMMISSIONED FOR AN IMPROPER PURPOSE

45 The Applicant submits that the Inquiry has been brought for an improper purpose, namely to target, intimidate and harm organizations that raise concerns about the environmental impacts, including climate change impacts, of oil and gas development, by negatively impacting their reputation and economic interests. Therefore, the Inquiry does not meet the test of public interest as set out in the *Public Inquiries Act*. The Premier's and the Minister's own words demonstrate a

lack of good faith and inconsistency with the purpose of the statute such that the Order should be found to be invalid.

A Standard of review

46 Whether a public body has acted for an improper purpose is a question of abuse of discretion. Challenges to decisions made on the basis of improper purpose have either been characterized as being brought based on an independent ground of review or determined through the standard of review analysis articulated in *Dunsmuir*.

***JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue),* 2013 FCA 250, at paras 71-73 [*JP Morgan*] [ABA, Vol 2, Tab 28, pp 333-334].**

47 Bad faith decisions made by public bodies had previously been characterized as being outside of their jurisdiction and therefore falling within a standard of correctness on judicial review.

***Gendre v Fort Macleod (Town),* 2015 ABQB 623, at paras 21-23 [ABA, Vol 1, Tab 23, p 276].**

48 As the category of pure jurisdictional questions has been removed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, bad faith decisions are now reviewed on a standard of reasonableness.

***Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, at para 65 [*Vavilov*] [ABA, Vol 1, Tab 13, p 124].**

49 Regardless of whether improper purpose is reviewed as an independent ground of review, or through the reasonableness review, a decision found to be made for an improper purpose will not be upheld. A decision made in bad faith is still considered to be unreasonable and "outside the *Dunsmuir* range of acceptability or defensibility."

***JP Morgan*, at para 73 [ABA, Vol 2, Tab 28, p 334].**

50 The context of a decision can demonstrate that the decision was made for an improper purpose. In *Vavilov*, referring to the process of reasonableness review where the administrative decision-maker failed to provide reasons, a majority of the Supreme Court of Canada stated: "[E]ven without reasons, it is possible for the record and the context to reveal that a decision was

made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*."

***Vavilov,* at para 137 [ABA, Vol 1, Tab 13, pp 131-132].**

B Legal analysis

i. Law on improper purpose

51 The *Public Inquiries Act* permits the Lieutenant Governor in Council to commission a public inquiry into matters connected with the good government of Alberta, the conduct of public business in Alberta, or other matters of public concern, when it is expedient and in the public interest to do so.

***Public Inquiries Act*, s. 2 [ABA, Vol 1, Tab 3, pp 40-41].**

52 While the Lieutenant Governor in Council has relatively broad discretion in commissioning a public inquiry, as with all manner of public regulation, that discretion is limited. As stated by Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption...
>
> "Good faith" in this context...means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

***Roncarelli v Duplessis*, [1959] SCR 121, at 140, 143 [*Roncarelli*] [ABA, Vol 2, Tab 50, pp 614-615].**

53 The Applicant submits that at their core both *Roncarelli* and the current matter are about the same wrongful state conduct: an attempt to punish persons or groups, including financially,

for exercising their legally-protected rights of freedom of expression and association. Notably, in the period since *Roncarelli*, these rights have received constitutional protection.

54 The general principle is that decisions made by the Lieutenant Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. However, the powers of the Lieutenant Governor in Council are not unlimited. The Court will review the motives of a Lieutenant Governor in Council decision in egregious cases.

***Thorne's Hardware Ltd. v R*, [1983] 1 SCR 106, at 111 [ABA, Vol 3, Tab 59, p 731]; *Alberta Teachers' Association v Alberta*, 2002 ABQB 240, at para 50 [*Alberta Teachers' Association*] [ABA, Vol 1, Tab 9, pp 66-67]; *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062, at paras 57, 64 [*Tesla*] [ABA, Vol 3, Tab 57, pp 717-719].**

55 Moreover, the Court will review whether the Lieutenant Governor in Council has satisfied the conditions and limits to its decision-making power provided by statute, among other reasons, to ensure that discretion has not been exercised for political purposes. As stated by Justice Wachowich in *Alberta Teachers' Association* with respect to an Order in Council ordering striking teachers back to work:

> Where a statute sets out a requirement for the exercize [sic] of a statutory power, the LGIC cannot act on whim or, for example, for a political purpose, as in the case of *Thorne's Hardware* (*supra*) where there were no statutory criteria and the Supreme Court held that it would not question the motives, political or otherwise, behind making the order in council. Here, the LGIC must be of the opinion there are emergent circumstances in respect of unreasonable hardship. In my view that means the LGIC's opinion should be informed and reasonable, not whimsical, speculative or political.

***Alberta Teachers' Association*, at para 56 [ABA, Vol 1, Tab 9, p 68].**

56 In *Les Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, [2004] 3 SCR 304, Justice Deschamps, for the majority, established that the concept of bad faith is flexible and includes a range of activities:

> [T]he concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.

***Les Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 SCR 304, at para 26 [*Les Entreprises Sibeca*] [ABA, Vol 2, Tab 30, p 353].**

57 To establish bad faith, the applicant is required to demonstrate that the public body acted in bad faith, or where direct evidence is not available, demonstrate that circumstantial evidence leads to the conclusion that the public body acted in bad faith.

***Les Entreprises Sibeca Inc.*, at paras 25-27 [ABA, Vol 2, Tab 30, pp 353-354].**

58 Even if made in good faith, a departure by a decision-making body from the objects and purposes of a statute is objectionable and subject to review by the Court. State power must be exercised in accordance with the law and comply with the rationale and purposes of the statutory scheme under which it is granted. The Court can, in the current matter, review the decision of the Lieutenant Governor in Council to issue the Order to ensure that the discretion has been exercised consistent with the purposes of the *Public Inquiries Act*.

***Re Doctors Hospital and Minister of Health et al*, (1976) 12 OR (2d) 164 (ON HCJ) at 12 [*Doctors Hospital*] [ABA, Vol 2, Tab 43, p 529]; *Ritchie v Edmonton (City)*, [1980] 108 DLR (3rd) 694 (ABQB), at paras 48-49 [*Ritchie*] [ABA, Vol 2, Tab 48, pp 588-589]; *Halifax (Regional Municipality) v Canada*, 2012 SCC 29, [2012] 2 SCR 108, at para 55 [ABA, Vol 1, Tab 25, p 309].**

59 In reviewing whether a decision complies with its statutory grant of authority, the Court must satisfy itself that the decision-maker – here, the Lieutenant Governor in Council – limited its attention to relevant considerations and was not influenced by irrelevant factors. The Court must have evidence demonstrating that the decision-maker turned its mind to the factors relevant to the proper exercise of its statutory decision-making function and restricted its gaze to such matters.

***Ritchie*, at paras 45, 49 [ABA, Vol 2, Tab 48, pp 588-589]; *Campeau Corporation v Calgary (City)*, 1978 ALTASCAD 266, at paras 56-60, 72 [*Campeau Corporation*] [ABA, Vol 1, Tab 12, pp 96-97, 99]; *Oakwood Development Ltd. v St-François Xavier*, [1985] 2 SCR 164, at para 15 [*Oakwood*] [ABA, Vol 2, Tab 37, pp 437-438]; *Oil Sands Hotel (1975) Ltd. v Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218, at paras 37-38 [*Oil Sands Hotel*] [ABA, Vol 2, Tab 38, pp 452-453].**

60 It is a recognized principle that statutory discretion cannot be exercised for the purpose of harming an individual or discriminating against a class of people. If the evidence suggests that the true purpose of a statutory decision is to harm or discriminate against persons holding

differing religious, political or moral viewpoints from elected officials, then the decision cannot be upheld.

***Roncarelli*, at 140-141 [ABA, Vol 2, Tab 50, pp 614-615]; *Smith & Rhuland Ltd. v Nova Scotia*, [1953] 2 SCR 95 at 99-100 (per Rand J.) [ABA, Vol 3, Tab 54, p 663]; *Prince George (City of) v Payne*, [1978] 1 SCR 458, at 463 [ABA, Vol 2, Tab 41, p 507].**

61 In *Tesla Motors Canada ULC v Ontario (Ministry of Transportation),* 2018 ONSC 5062, Tesla challenged a program allegedly intended to protect electric vehicle dealers from the phase-out of a rebate program but which was designed to exclude Tesla from that protection. Justice Myers found that the means of implementing the protection program was arbitrary and unrelated to the supposed policy goal. In addition, basic fairness is called into question when a government policy or action taken purportedly for a public purpose actually targets a single organization or a small group of specific organizations for financial or reputational harm, as in the current matter.

***Tesla*, at paras 59-64 [ABA, Vol 3, Tab 57, pp 718-719].**

ii. Evidence of improper purpose

62 The Applicant submits that the purpose of the Inquiry is not to address a matter of pressing public interest, but to justify a predetermined intent to harm the reputations, economic interests and freedom of expression of organizations that raise concerns about the environmental impacts of oil and gas development.

63 The true intent of the Inquiry was stated most clearly and succinctly by the Premier and the Minister at the press conference announcing the launch of the Inquiry. Minister Schweitzer stated:

> Albertans need to understand the facts and the extent of this foreign-funded misinformation campaign. By launching this Inquiry, we are fighting back against interests who are trying to landlock Alberta's energy.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, p 10, lines 17-20[Allan Supplemental Record, Tab 49].

64 Premier Kenney stated:

> So I can enumerate two things that we committed to in our platform. One is to challenge the charitable status of groups that have been violating the Charities Act requirement to limit spending on political activity.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, p 14, lines 11-15 [Allan Supplemental Record, Tab 49].

65 The intent to use the Inquiry to "fight" against certain interests is repeatedly referenced in statements by the UCP and the Premier leading up to the launch of the Inquiry.

Ecojustice letter to Commissioner, 4 October 2019, Exhibit "F", United Conservative Party, *Alberta Strong & Free*, at 9, 96 [Allan Supplemental Record, Tab 51]; Ecojustice letter to Commissioner, 4 October 2019, Exhibit "G", Jason Kenney Twitter posting, 6 May 2019 [Allan Supplemental Record, Tab 52]; Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "E", Government of Alberta, "Standing up to foreign influences", press release, 4 July 2019, at 1-2 [Allan Supplemental Record, Tab 50].

66 The Government of Alberta's *Strategic Communications Plan* for the Inquiry states as its primary message: "We will stand up for Alberta's interests, fight the well-funded foreign campaign targeting our oil industry, and expose the people behind that campaign" (emphasis added). The *Strategic Communications Plan* further demonstrates the partisan nature of the Inquiry by identifying certain individuals and organizations as "Recommended Validators" or "Expected Critics". The *Strategic Communications Plan* reveals that the Inquiry has been established, not as an independent inquiry into a matter connected with the good government of Alberta, the conduct of public business in Alberta, or other matter of public concern as required by section 2 of the *Public Inquiries Act*, but as a weapon in a "fight" targeting certain listed organizations.

***Strategic Communications Plan*, at 1-8 [LGIC Record, Tab 8, pp 1-8].**

67 The purpose of a properly-constituted public inquiry is to apprise, inform and educate the government and the public on a matter of public interest. In the present case, the Government of Alberta intended from the outset to use the Inquiry as a weapon to "fight back" against certain interests and to challenge the charitable status of certain groups. The Government's intention to use the Inquiry to harm certain organizations is confirmed in the UCP's, Premier's and

Minister's use of the term "fight" as justification for the Inquiry. As stated in *Vavilov*, a decision-maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome. This Inquiry, through political rhetoric and the Terms of Reference, was from the outset reverse-engineered to be used as a weapon against those groups who raised concerns about the environmental impacts of oil and gas development.

***Vavilov*, at para 121 [ABA, Vol 1, Tab 13, p 128].**

68 Public comments by politicians are not proof that a government action has a colourable or improper purpose. However, the Court can look at extrinsic evidence, including what individuals making up the authority and their advisors had to say, in determining if a decision was made on the basis of an improper motive or another impermissible reason.

***Oil Sands Hotel*, at paras 4-5, 7, 40 [ABA, Vol 2, Tab 38, pp 441-442, 453]; *Ontario Provincial Police v The Cornwall Public Inquiry*, 2008 ONCA 33, at paras 27, 34-42 [ABA, Vol 2, Tab 39, pp 471, 472-475]; *Starr v Houlden*, [1990] 1 SCR 1366, at para 32 [*Starr*] [ABA, Vol 3, Tab 55, p 685]; *Les Entreprises Sibeca*, at para 26 [ABA, Vol 2, Tab 30, p 353]; *Vavilov*, at para 137 [ABA, Vol 1, Tab 13, pp 131-132]; *Ritchie,* para 50 [ABA, Vol 2, Tab 48, p 589]; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, at para 99 [ABA, Vol 3, Tab 62, p 792-793]**

69 More importantly, an improper purpose may be found when such political positions are codified, as in this case, into the Terms of Reference for this Inquiry. The terms of reference are the most important document in establishing the jurisdiction, substantive mandate and procedures of a public inquiry.

Madam Justice Freya Kristjanson, "Procedural Fairness and Public Inquiries", in Ronda Bessner and Susan Lightstone, eds, *Public Inquiries in Canada: Law and Practice*, (Toronto: Thomson Reuters, 2017) at 99 [Bessner & Lightstone] [ABA, Vol 3, Tab 69, p 839]; Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice*, (Toronto: Irwin Law, 2009) at 130 [Ratushny] [ABA, Vol 3, Tab 72, p 858].

70 The improper intent of the Government of Alberta to harm the reputations and financial support of the groups it opposes, as reflected in the public statements outlined above, have been incorporated into the Terms of Reference. The adversarial – rather than public interest – nature of the Inquiry is revealed by the fact that certain positions have been labelled as "anti-Alberta". The Terms of Reference direct the Commissioner to inquire into sources of funding and charitable status of organizations labelled "anti-Alberta" with the express purpose of recommending "additional eligibility criteria that should be considered when issuing government

grants" and "the creation of new eligibility criteria for attaining or maintaining charitable status". The result is government action framed in a manner that has a distinct and unique effect on targeted organizations and that does not reflect any legitimate public purpose.

***Tesla*, at para 58-59 [ABA, Vol 3, Tab 57, p 718]**

71 The improper purpose of the Inquiry has become even clearer since the June 2020 and August 2020 Orders. Under the original Terms of Reference, a Canadian organization had to be found to be spreading "misleading or false information" about Alberta's oil and gas sector in order to be a target of the Inquiry. This was consistent with the preamble of the Terms of Reference, which emphasizes concerns regarding anti-Alberta energy campaigns that disseminate misleading or false information. However, since the June 2020 and August 2020 Orders, receiving foreign funding and opposing developments in Alberta's oil and gas sector is, in and of itself, sufficient for a Canadian organization to become a target of the Inquiry under clause 2(1)(a) of the Terms of Reference, and to be subject to an investigation of their government funding and charitable status under clauses 2(1)(b) and (c). Spreading misleading or false information is not necessary. This provides even further indication that the true purpose of the Inquiry is to target, intimidate and harm organizations that espouse certain viewpoints, even where those viewpoints are factual and well-founded.

Terms of Reference, cl. 2(1)(a), as amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7] and O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

iii. **The Inquiry is *ultra vires* due to improper purpose**

72 The *Public Inquiries Act* allows the Lieutenant Governor in Council to establish an inquiry if it considers it to be in the public interest, and moreover, where the matter is either concerned with the conduct of good government or public business in Alberta or is declared to be a matter of public concern. It is contrary to the "public interest" requirement in the Act for the Government of Alberta to call a public inquiry with the purpose of targeting, intimidating and harming groups whose perspective it disagrees with.

***Public Inquiries Act*, s. 2 [ABA, Vol 1, Tab 3, pp 40-41].**

73 Inquiries pursuant to the *Public Inquiries Act* have been relatively rare. Most recent examples include inquiries into matters of public concern and interest such as the deaths and disappearances of Indigenous women and girls in Canada (2016) and the police treatment of

members of the Blood Tribe in the context of incidents of death in that community (1989-1991). The extrinsic evidence and Terms of Reference of the present Inquiry demonstrate that it was not called to address a similar matter of public interest.

Advice to Cabinet, at 1 [LGIC Record, Tab 4, p 1]; O.C. 232/2016, 8 September 2016 [ABA, Vol 1, Tab 6, p 55-59].

74 In *Roncarelli*, the majority of the Supreme Court of Canada found that Premier Duplessis acted outside of his authority in ensuring that Roncarelli would be refused a liquor license because the record demonstrated that this decision was motivated by considerations extraneous to the statute, namely Roncarelli's support for the Jehovah's Witnesses in a staunchly Catholic Quebec society. As in *Roncarelli*, Premier Kenney's and others' statements in the current matter indicate that the establishment of the Inquiry was informed not by the statutory requirements but by the Government of Alberta's desire to limit the free expression of groups that have different perspectives from it. As in *Roncarelli*, the decision to call this Inquiry is indicative of a lack of good faith, and even malice, such that this decision must be found *ultra vires*.

***Roncarelli*, at 131-132, 141-142 [ABA, Vol 2, Tab 50, pp 607-608, 614-616].**

75 As stated by Professor Martin Olszynski, the Inquiry's Terms of Reference suggest that the purpose of the Inquiry may be "the delegitimization and stigmatization of groups and persons whose views do not align with those of our current government." Further, Professor Olszynski indicates that "it is clear from the [Terms of Reference] (paras 2(3)(c) and (d)) that part of the goal here is to restrict the funding available to groups whose views on oil and gas development are not aligned with the current government."

Martin Olszynski, "Everything you wish you didn't need to know about the Alberta Inquiry into Anti-Alberta Energy Campaigns", 17 October 2019, online at https://ablawg.ca/2019/10/17/everything-you-wish-you-didnt-need-to-know-about-the-alberta-inquiry-into-anti-alberta-energy-campaigns/, at 1-3 [ABA, Vol 3, Tab 70, pp 840-841, 842].

76 Canadian organizations, including charities, have a right to speak out on matters of public concern including the environmental impacts of Alberta's oil and gas development. These organizations also have a legal right to accept funding from foreign sources in support of their expression of those views. Freedom of expression even extends to the dissemination of false and

misleading information in certain circumstances. It is therefore inappropriate for the government to single out organizations with certain viewpoints to become the target of a public inquiry.

Canadian Centre for Bio-Ethical Reform v Grande Prairie (City), 2018 ABCA 154, at paras 44, 73 [ABA, Vol 1, Tab 14, pp 136, 145].

77 In fact, a public inquiry may not have been required at all to achieve the public fact-finding objectives of identifying the foreign funding of Canadian organizations. Research by reporter Sandy Garossino demonstrates that this information was readily publicly-available without the need for a public inquiry. The Advice to Cabinet in establishing the Inquiry also indicates that the desired information was available in public records and could be gathered without the need for an inquiry, but "[t]his approach would not be as public a review". The Inquiry was not called for the purpose of gathering of publicly-available information, but to name and harm the reputations of organizations whose views differed from that of the Government.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "I", Sandy Garossino, "A data-based dismantling of Jason Kenney's foreign-funding conspiracy theory", National Observer, 3 October 2019 [Allan Supplemental Record, Tab 54]; Advice to Cabinet, at 1 [LGIC Record, Tab 4, p 1].

78 Indeed, Minister Schweitzer's Advice to Cabinet further confirms that the Inquiry was established for political purposes. The Advice to Cabinet stated the following "Issue" for decision: "The Government has committed to hold a public Inquiry into foreign funding of anti-Alberta energy campaigns." It is thus evident that the UCP's preexisting intent to conduct the Inquiry informed the Lieutenant Governor in Council's decision to do so. Contrary to the requirements of jurisprudence from the Supreme Court of Canada and all levels of courts in Alberta, the Lieutenant Governor in Council's decision was informed by irrelevant factors relating to a predetermined intent, rather than consideration of the relevant factors set out in the statute – here, the "public interest" requirement in section 2 of the *Public Inquiries Act*.

Advice to Cabinet, 27 June 2019, at 1 [LGIC Record, Tab 4, p 1]; _Oakwood_, at para 15 [ABA, Vol 2, Tab 37, pp 437-438]; _Campeau Corporation_, at paras 56-60, 72 [ABA, Vol 1, Tab 12, pp 96-97, 99]; _Ritchie_, at para 48 [ABA, Vol 2, Tab 48, pp 588-589]; _Oil Sands Hotel_ at paras 36-40 [ABA, Vol 2, Tab 38, pp 452-453].

79 In *Oil Sands Hotel (1975) Ltd. v Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218, the then-premier and cabinet ministers made statements in press releases and government documents committing to honour the results of municipal plebiscites on Video Lottery

Terminals. This Court was tasked with determining whether these prior commitments justified the Alberta Gaming and Liquor Commission's decisions to terminate certain retailer agreements following the conclusion of municipal plebiscites. The Court was unambiguous in finding that they did not:

> The process established by the Cabinet and the Minister has no legislative sanction. There is no provision in the Act which authorizes the Cabinet or any member thereof to give binding or any directions to the Commission and there is no provision which authorizes the Commission to delegate its decision-making powers concerning VLTs to any other body or to a portion of the public. The fact that the delegation is founded on a democratic vote does not make it statutorily authorized or proper. The terminations were made therefore for political reasons and certainly for reasons outside the provisions of the Act.

***Oil Sands Hotel*, at para 40 [ABA, Vol 2, Tab 38, p 453].**

80 In this case, too, it is clear that the Lieutenant Governor in Council's decision was based on the prior public commitments of the Premier and the UCP rather than the statutory requirement that the Lieutenant Governor in Council determine that the matter was in the public interest. Therefore, the decision cannot be upheld.

iv. Conclusion regarding improper purpose

81 Rather than fact-finding, the purpose of this Inquiry is clearly to target, intimidate and harm organizations that raise concerns about the environmental impacts of oil and gas development in Alberta. The targeting of organizations for purely political purposes with the intent of undermining the reputations of those organizations and negatively impacting their funding must be found to be an improper purpose and outside of the authority granted by section 2 of the *Public Inquiries Act*.

v. Remedy

82 The remedy where a decision-maker exercises a power for an improper purpose outside of the statutory authority granted to them is to find that the action is *ultra vires* and invalid. Therefore, the Applicant submits that the Order must be found to be *ultra vires* the authority granted to the Lieutenant Governor in Council pursuant to section 2 of the *Public Inquiries Act* and declared invalid or quashed.

***Doctors Hospital*, at 14 [ABA, Vol 2, Tab 43, p 531]; *Ritchie*, at para 68 [ABA, Vol 2, Tab 48, p 592].**

2 THE INQUIRY RAISES A REASONABLE APPREHENSION OF BIAS

83 The Applicant submits that the political context of the Inquiry, the language of the Order and Terms of Reference, and the Commissioner's political donations and connections to the political party at the forefront of calling for the Inquiry, lead to a reasonable apprehension of bias. The reasonable apprehension of bias is demonstrated by a prejudgment of the issues before the Inquiry, a predetermination of the outcome of the Inquiry, the use of pejorative language and the lack of independence of the Inquiry Commissioner.

84 As stated by Justice Côté in *Hutterian Brethren Church of Starland v Municipal District of Starland No. 47*, 1993 ABCA 76, the test for bias is based on the cumulative impression left by the totality of the facts rather than by any single act.

***Hutterian Brethren Church of Starland v Municipal District of Starland No. 47*, 1993 ABCA 76, at para 48 [*Hutterian Brethren*] [ABA, Vol 2, Tab 26, p 323].**

85 Therefore, in determining a reasonable apprehension of bias, the Court often must look beyond any single order, decision or statement. In *Chrétien v Canada (Ex-commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, the Court, in determining that there was a reasonable apprehension of bias, considered statements made by the commissioner during the hearing, statements made by the commissioner to the media, statements made by the commissioner after the conclusion of the hearing, and statements made by the commissioner's media spokesperson.

***Chrétien v Canada (Ex-commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, at paras 80-95, 98 [*Chrétien*] [ABA, Vol 1, Tab 18, pp 202-207]; (affirmed in *Chrétien v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2010 FCA 283).**

A Standard of review

86 A reasonable apprehension of bias is a matter of procedural fairness and natural justice. In *Slawsky v Edmonton (City)*, 2019 ABQB 77, Madam Justice Goss provided a useful analysis of the standard of review applicable to bias cases:

> Issues of procedural fairness and natural justice are not subject to the same standard of review analysis set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, but are subject to a determination of whether the proceedings met the level of fairness required by law...

> An allegation of reasonable apprehension of bias raises an issue of procedural fairness and, where found, results in a loss of jurisdiction, requiring a new hearing. The right to a fair hearing is an independent, unqualified right. The review for bias (whether apparent or actual) is carried out on a correctness standard and no deference is paid to the decision-maker's ruling. If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction...
>
> The reviewing court must scrutinize the record to determine if a fully informed and reasonable observer could reasonably believe, having thought the matter through, that the decision maker was not fair and impartial...
>
> [References omitted]

***Slawsky v Edmonton (City)*, 2019 ABQB 77, at paras 61-63 ["*Slawsky*"] [ABA, Vol 3, Tab 53, p 641].**

87 The Supreme Court of Canada's decision in *Vavilov* has affirmed that the standard of review analysis does not apply to breaches of natural justice and procedural fairness. Rather, procedural fairness continues to be determined on the factors in *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817, and determined by the context of the decision being made. As stated by Justice Slatter in *Robertson v Edmonton (City) Police Service (#10)*, 2004 ABQB 519, "[w]here there is an allegation of 'bias', the issue is simply whether there is or is not bias or a reasonable apprehension of bias."

***Vavilov*, at paras 23, 77, 137 [ABA, Vol 1, Tab 13, pp 120, 127, 131-132]; *Robertson v Edmonton (City) Police Service (#10)*, 2004 ABQB 519, at para 36 [*Robertson*] [ABA, Vol 2, Tab 49, p 597].**

88 Therefore, in the current matter, the Court must review the record and make an independent determination of whether a reasonable apprehension of bias is established. This is particularly the case given that the Commissioner, in this matter, has failed or refused to make a determination on the question of bias or to provide any reasons for that failure or refusal.

B The Commissioner's failure to render a decision

89 The Commissioner has failed or refused to render a decision on the reasonable apprehension of bias within a reasonable time period.

90 In *Eckervogt*, the British Columbia Court of Appeal commented on the need to bring an allegation of a reasonable apprehension of bias at the earliest possible time:

> If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed...
>
> I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

Eckervogt, at paras 47-48 [ABA, Vol 1, Tab 21, p 261].

91 Similarly, in *Robertson*, Justice Slatter discussed the advantages of bringing an allegation of bias first to the administrative tribunal in question. An application directly to the administrative tribunal allows him or her to place on the record the facts relevant to the bias application and provides a basis for subsequent judicial review or appeal.

Robertson, at paras 118, 120, 123 [ABA, Vol 2, Tab 49, pp 598-600].

92 In the Federal Court case of *Transport Car-Fré Ltée v David Lecours*, 2018 FC 1133, in a matter governed by the *Canadian Labour Code*, Justice Leblanc stated:

> This Court has already held that if the issue of bias is raised in a timely fashion, that is, during the proceedings over which the administrative decision maker is presiding, the latter must decide this issue, and a failure to do so is a reviewable error (*Bongwalanga v Canada (Minister of Citizenship and Immigration)*, 2004 FC 352, at paras 15–16). This principle was reiterated as recently as this year when this Court recalled that when an administrative decision maker receives a request for recusal, he or she "[can]not simply choose to ignore it" (*Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 353, at para 63).

Transport Car-Fré Ltée v Lecours, 2018 FC 1133, at para 42 [ABA, Vol 3, Tab 60, p 748].

93 A hearing that is tainted by a reasonable apprehension of bias is void *ab initio*. Therefore, the question of a reasonable apprehension of bias should be determined as early as possible in the proceeding before parties expend substantial time and effort on hearings that may be found to be void. In particular, where the reputations of parties are at stake, the issue of a reasonable

apprehension of bias should be determined before substantial evidence is gathered and before any interim or final reports are issued.

***Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at paras 40-41 [*Newfoundland Telephone*] [ABA, Vol 2, Tab 36, pp 428-429].**

94 Further, there was no reason to delay a determination with respect to bias in the current matter where the evidence of a reasonable apprehension of bias is found in public statements preceding the Inquiry, on the face of the Order and Terms of Reference, and in the past political donations and connections of the Commissioner. There was sufficient evidence on the record for the Commissioner to render a timely decision on bias.

95 The Applicant presented the Commissioner with an opportunity to render a determination on the question of bias within a reasonable period of time. The Commissioner failed or refused to respond. An unreasonable delay in rendering a decision may be taken as an implied refusal. Therefore, it is reasonable that the Applicant seek this Court's determination with respect to reasonable apprehension of bias at this time.

***Mersad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 543, at para 15 [ABA, Vol 2, Tab 34, p 391].**

C Legal analysis

i. Test for reasonable apprehension of bias

96 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:

> 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.

***Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at 394 [*CJL*] [ABA, Vol 1, Tab 20, p 243]; *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259, at para 60 [*Wewaykum*] [ABA, Vol 3, Tab 63, p 800].**

97 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. 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. The test is based on the cumulative impression left by a series of events rather than by any single factor.

Weywakum, at para 77 [ABA, Vol 3, Tab 63, p 804]; _Setlur v Canada (Attorney General)_, [2000] 194 DLR (4th) 465 (FCA), at para 26 [_Setlur_] [ABA, Vol 3, Tab 52, p 629]; _Hutterian Brethren_, at para 48 [ABA, Vol 2, Tab 26, p 323].

98 The allegation of bias cannot be made lightly. It cannot rest on mere suspicion, conjecture, insinuations or impressions. It must be supported by material evidence that contributes to the reasonable apprehension of bias.

Slawsky, at para 75 [ABA, Vol 3, Tab 53, p 644].

99 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. The particular circumstances of a matter may lead to a reasonable apprehension of bias even where the individual decision-maker may be totally impartial.

Wewaykum, at paras 67, 77 [ABA, Vol 3, Tab 63, pp 802, 804]; David Phillip Jones and Anne S. de Villars, _Principles of Administrative Law_, 6th ed (Toronto: Carswell, 2014) [Jones and de Villars], at 437-438 [ABA, Vol 3, Tab 68, pp 831-832]; _Tremblay v Quebec (Commission des affaires sociales)_, [1992] 1 SCR 952, at p 976-977 [ABA, Vol 3, Tab 61, pp 780-781].

100 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. The concept that "justice must be seen to be done" cannot be severed from the standard of a reasonable apprehension of bias. It is crucial that the Inquiry both be and appear to be independent and impartial.

Wewaykum, at paras 66-67 [ABA, Vol 3, Tab 63, p 802]; Jones and de Villars, p 438 [ABA, Vol 3, Tab 68, p 832].

101 The relevant test is not whether in fact there is conscious or unconscious bias on the part of the decision-maker, but whether a reasonable apprehension of bias exists in the circumstances.

Wewaykum, at para 66 [ABA, Vol 3, Tab 63, p 802]; _Setlur_, at para 27 [ABA, Vol 3, Tab 52, p 629].

102 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.

Chrétien, at para 73 [ABA, Vol 1, Tab 18, p 200].

103 The most important factor in assuring public confidence in a public inquiry is the independence of the inquiry. For this reason, judges are most often appointed as inquiry commissioners as they are perceived to have the necessary independence and impartiality.

Ratushny, at 17 [ABA, Vol 3, Tab 72, pp 857]; Ronda Bessner, "The Role of the Commissioner of a Public Inquiry", in Bessner & Lightstone, at 20 [ABA, Vol 3, Tab 64, p 811].

104 Where, as in the current matter, the Commissioner is not a judge, but is appointed by the executive branch of government that also sets the terms of reference for the Inquiry, the independence of the Commissioner is particularly essential. The power to appoint the commissioner is capable of being focused with the goal of achieving a desired result. This is the context in which the test for bias must be applied, noting that in this case, the Commissioner was not only appointed by the executive branch of government, but by the very person for whom he campaigned only months earlier in a provincial general election.

MacKeigan v Hickman, [1988] NSJ No. 448 (NSSC-AD), at 193 [ABA, Vol 2, Tab 31, p 357] (affirmed in _MacKeigan v Hickman_, [1989] 2 SCR 796); Simon Ruel, _The Law of Public Inquiries in Canada_, (Toronto: Carswell, 2010) at 138 [Ruel] [ABA, Vol 3, Tab 71, p 853].

i. Prejudgment of Inquiry findings raises a reasonable apprehension of bias

105 The prejudgment of relevant issues before hearing all of the evidence on those issues results in a reasonable apprehension of bias. In *Chrétien*, the inquiry commissioner formed conclusions about issues he was to investigate and report on before having heard all the

evidence, and made public comments communicating those premature conclusions. Justice Teitelbaum concluded that such prejudgment resulted in a reasonable apprehension of bias.

***Chrétien*, at paras 80-85 [ABA, Vol 1, Tab 18, pp 202-203].**

106 In the current matter, the Order and Terms of Reference direct the Commissioner to inquire into:

> …whether any foreign organization that has evinced an intent harmful or injurious to the Alberta oil and gas industry has provided financial assistance to a Canadian organization, which may include any Canadian organization that has disseminated misleading or false information about the Alberta oil and gas industry;...

Terms of Reference, cl. 2(1)(a) [LGIC Record, Tab 1, p 2]; as amended by O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

107 The nature of the Inquiry may be broken down into three components:

(a) whether a foreign organization provided financial assistance to a Canadian organization;

(b) whether the foreign organization has evinced an intent harmful or injurious to the Alberta oil and gas industry; and

(c) whether the Canadian organization may have disseminated misleading or false information about the Alberta oil and gas industry.

108 However, the Order and Terms of Reference, as well as the statements of political leaders leading up to the establishment of the Inquiry, demonstrate that these issues have in fact been predetermined before any evidence has been put before the Inquiry.

109 In announcing the establishment of the Inquiry, Premier Kenney stated as "known", that:

(a) Alberta has been the target of a political propaganda campaign to defame the energy industry and to landlock Alberta's resources;

(b) the campaign had the express goal of shutting down investment, development, and export of energy from Alberta's oil sands;

(c) the campaign was financed by certain U.S. foundations; and

(d) the campaign used defamation, litigation, public protests, and political lobbying as its tools.

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, at p 2, line 26 – p 3, line 25 [Allan Supplemental Record, Tab 49].

110 Therefore, the Premier has stated as "known" at the outset the very things that the Order requests the Commissioner to inquire into. Public statements of politicians do not, in and of themselves, give rise to a reasonable apprehension of bias. However, in this matter, the "known" facts have been built into the very structure of the Order and Terms of Reference and therefore do not allow for an independent finding by the Commissioner. If these facts are "known", what then is the purpose of the Inquiry other than to justify a predetermined position of the government?

111 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.

Order [LGIC Record, Tab 1, p 1].

112 The Order does not ask "whether" there has been foreign funding of anti-Alberta energy campaigns, but requests the "facts" about foreign funding of anti-Alberta energy campaigns that are presumed to exist. Further, the Order does not ask "whether" Canadian organizations disseminated misleading or false information, but requests "facts" about the dissemination of misleading or false information.

113 Clause 2(1) of the Terms of Reference compounded this problem. Prior to amendment in June 2020, clause 2(1) stated:

> 2(1) The commissioner shall inquire into anti-Alberta energy campaigns that are supported, in whole or part, by foreign organizations…
>
> [emphasis added]

Terms of Reference, cl. 2(1) [LGIC Record, Tab 1, p 2].

114 Again, the Terms of Reference did not ask "whether" "anti-Alberta" energy campaigns were funded by foreign organizations, but rather presumed the existence of "anti-Alberta energy campaigns that are supported, in whole or part, by foreign organizations" (emphasis added). The existence of foreign funded anti-Alberta energy campaigns was treated in clause 2(1) as proven and known. The existence of such campaigns was prejudged before any evidence had been put before the Inquiry to support the allegation.

115 Further, the definition of anti-Alberta energy campaigns in clause 1(b) of the Terms of Reference also contains a prejudgment. An anti-Alberta energy campaign is defined as:

> …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 by any means, which may include by the dissemination of misleading or false information.

Terms of Reference, cl. 1(b) [LGIC Record, Tab 1, p 2], as amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7] and O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

116 This definition is based on a prejudgment that the oil and gas development that was opposed was "timely, economic, efficient and responsible development" prior to any evidence being led to that effect. Evidence could 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 fall outside the definition of an "anti-Alberta energy campaign" and outside of the scope of the Inquiry. The Inquiry appears bound by a predetermined definition that Alberta energy development was "timely, economic, efficient and responsible."

117 Finally, prior to amendment, clause 2(1)(a) of the Terms of Reference presumed that organizations had disseminated misleading or false information, again before any evidence had been put before the Inquiry to support that predetermination.

Terms of Reference, cl. 2(1)(a) [LGIC Record, Tab 1, p 2].

118 The June 2020 Order incorporated the dissemination of misleading or false information into the definition of an "anti-Alberta energy campaign." Then, the August 2020 Order made the dissemination of misleading or false information a discretionary component of an anti-Alberta energy campaign. This reversal suggests that the Lieutenant Governor in Council became aware

that the predetermination in the original Terms of Reference that organizations had disseminated misleading or false information created a reasonable apprehension of bias and demonstrated a predetermined intent to reach a certain outcome, namely to cause harm to the reputation and interests of certain groups. However, the amending Orders fail to remedy the numerous other statements in the Terms of Reference which demonstrate a predetermination of the findings of the Inquiry. The amendments cannot fix the Inquiry, which has been plagued by issues of bias and improper purpose from its inception.

Terms of Reference [LGIC Record, Tab 1, p 2, amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7] and O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

119 In *Chrétien*, the Court found a reasonable apprehension of bias where "[t]he Commissioner had a plan or checklist of the evidence that was expected and which was required in order to support pre-determined conclusions." In the current matter, the Commissioner has been handed a checklist, in the form of the Terms of Reference, with the expectation that he will supply the necessary evidence to support the predetermined conclusions.

***Chrétien*, at para 86 [ABA, Vol 1, Tab 18, pp 203-204].**

120 As in *Chrétien*, all of these factors indicate a prejudgment of important issues and constrain the ability of the Inquiry to independently determine these matters. Such prejudgment contributes to a reasonable apprehension of bias.

ii. Prejudgment of evidentiary matters raises a reasonable apprehension of bias

121 Prior to and at the time of calling the Inquiry, the Premier and the UCP relied upon the unproven and untested evidence of Vivian Krause. In public comments, the Premier referred to

Ms. Krause as "a single enterprising reporter", producing "valiant research", "intrepid reporting" and "undeniable proof", indicating that considerable weight should be given to Ms. Krause's unproven evidence.

Letter from Ecojustice to Commissioner, 4 October 2019, at pp 2-3 [Allan Record, Tab 10]; Exhibit "A", United Conservative Party, "Standing Up for Alberta, Fighting the Foreign-Funded Special Interests", at pp 2, 4 [Allan Supplemental Record, Tab 46]; Exhibit "B", United Conservative Party, "UCP will Stand Up to Foreign Influences", at pp 2, 4 [Allan Supplemental Record, Tab 47]; Exhibit "C", Transcript of Jason Kenney speech, undated, at p 4, line 27 – p 5, line 8 [Allan Supplemental Record, Tab 48]; Exhibit "D", Transcript of press conference, 4 July 2019, at p 12, line 27 – p 13, line 4 [Allan Supplemental Record, Tab 49].

122 Ecojustice has not been granted access to evidence, if any, that Ms. Krause has put before the Inquiry, and has not been granted an opportunity to cross-examine or question Ms. Krause on her evidence.

123 The Premier's comments do not of course bind the Commissioner's hands or predetermine the weight to be given to Ms. Krause's evidence. However, as noted above, the particular circumstances of a matter may lead to a reasonable apprehension of bias even where the individual decision-maker may be totally impartial. The Premier repeatedly referring to the "valiant research", "intrepid reporting" and "undeniable proof" of a principal witness to the Inquiry contributes to a reasonable apprehension that this person's evidence has been predetermined to be valid.

iii. Prejudgment of misconduct raises a reasonable apprehension of bias

124 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. In *Chrétien*, the inquiry commissioner and commission media spokesperson made public comments indicating that the "juicy stuff" was yet to come and asking, "What's Chrétien got to hide?" As stated by Justice Teitelbaum, such comments had "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."

***Chrétien*, at paras 87-89, 99 [ABA, Vol 1, Tab 18, pp 204, 207].**

125 In calling the Inquiry, Premier Kenney publicly referred to "a well-funded political propaganda campaign to defame our energy industry" and "a campaign of defamation and disinformation."

Ecojustice letter to the Commissioner, 4 October 2019, Exhibit "D", Transcript of press conference, 4 July 2019, at p 2, line 26 – p 3, line 1; p 8, lines 23-24 [Allan Supplemental Record, Tab 49].

126 On other occasions, the Premier publicly referred to organizations leading "a campaign of economic sabotage against our province", carrying out campaigns of defamation against the Alberta energy industry, and violating Canadian charities law, signaling that misconduct was already established before any evidence was put before the Inquiry.

Letter from Ecojustice to the Commissioner, 4 October 2019, at p 7 [Allan Record, Tab 10]; Exhibit "C", Transcript of Jason Kenney speech, undated, at p 4, line 27 – p 5, line 8; p 8, line 27 – p 9, line 2; p 11, line 26 – p 12, line 1; p 13, lines 15-19 [Allan Supplemental Record, Tab 48]; Exhibit "G", Jason Kenney Twitter posting, 6 May 2019 [Allan Supplemental Record, Tab 52].

127 Again, the Commissioner is not bound by the Premier's intemperate remarks. However, the Premier's comments provide to the public a prediction that evidence of wrongdoing will be confirmed through the Inquiry, thus contributing to a reasonable apprehension of bias.

128 Further, a presumption of misconduct has been built into the Terms of Reference which do bind the Commissioner. The Terms of Reference define certain positions as "anti-Alberta". The prior labelling of certain positions as "anti-Alberta" is clearly pejorative language intended to indicate wrongdoing or misconduct. A public inquiry 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.

129 Further, as discussed above, prior to the amendments, the Order and Terms of Reference presumed, without evidence, that Canadian organizations have disseminated misleading or false information.

130 The entire context of the Inquiry therefore takes on the appearance not of an independent fact-finding mission but rather an "exhibition of misconduct."

iv. Prejudgment of the uses of Inquiry findings raises a reasonable apprehension of bias

131 The presumption of wrongdoing or misconduct further leads to a predetermination of the outcome of the Inquiry.

132 As early as May 2018, UCP Leader Jason Kenney stated, if elected, he would go to court to get the federal government to strip certain environmental organizations of their charitable status.

Ecojustice letter to the Commissioner, 22 October 2019, Exhibit "C", Transcript of Jason Kenney speech, 9 May 2018, at p 15 [Allan Record, Tab 14].

133 Jason Kenney and the UCP repeatedly stated their intention to challenge the charitable status of certain environmental organizations and to end any provincial government funding for those organizations based on the results of the Inquiry.

Letter from Ecojustice to the Commissioner, 4 October 2019, at pp 5-6 [Allan Record, Tab 10]; Exhibit "A", United Conservative Party, "Standing Up for Alberta, Fighting the Foreign-Funded Special Interests", at p 3 [Allan Supplemental Record, Tab 46]; Exhibit "B", United Conservative Party, "UCP will Stand Up to Foreign Influences", at p 3 [Allan Supplemental Record, Tab 47]; Exhibit "C", Transcript of Jason Kenney speech, undated, at p 13, lines 13-15 [Allan Supplemental Record, Tab 48]; Exhibit "D", Transcript of press conference, 4 July 2019, at p 14, lines 11-15 [Allan Supplemental Record, Tab 49]; Exhibit "F", United Conservative Party, *Alberta Strong & Free*, at p 96 [Allan Supplemental Record, Tab 51].

134 The Government of Alberta's intentions with respect to the outcome of the Inquiry do not dictate the Commissioner's findings and report. However, the Commissioner is bound by the Terms of Reference which reflect that the purpose of the Inquiry is to gather evidence to support these predetermined outcomes.

135 Clauses 2(1)(b) and (c) of the Terms of Reference require the Commissioner to inquire into whether any Canadian organization received grants or other funding from the government of Alberta or other governments in Canada and whether any Canadian organization has charitable status.

Terms of Reference, cl. 2(1)(b)-(c) [LGIC Record, Tab 1, p 2].

136 Further, clauses 2(3)(c) and (d) of the Terms of Reference require the Commissioner to provide findings and recommendations to the Government of Alberta that he considers advisable, including with respect to additional eligibility criteria that should be considered when issuing government grants and by recommending additional eligibility criteria for maintaining charitable status.

Terms of Reference, cl. 2(3)(c)-(d) [LGIC Record, Tab 1, p 3], amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7] and O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].

137 Again, the Commissioner is not being asked to conduct an independent inquiry into certain matters, but rather to provide evidence supporting outcomes that were predetermined well before the Inquiry was called. The Inquiry is being used as a political pawn to support pre-determined government actions.

138 The direction that the Commissioner make recommendations regarding eligibility criteria for government funding and charitable status that will support a pre-determined plan by the Government of Alberta to target certain groups contributes to a reasonable apprehension that the outcome of this Inquiry is predetermined.

v. The Commissioner's political donations and relationship with the Minister of Justice lead to a reasonable apprehension of bias

139 As noted above, Steve Allan, prior to his appointment as Commissioner, made financial contributions to the UCP leadership campaign of then-UCP leadership candidate Doug Schweitzer, who subsequently was appointed Minister of Justice and Solicitor General in 2017, and contributions to the UCP in 2017 and 2018. In addition, Steve Allan, prior to his appointment as Commissioner, sponsored campaign events for Doug Schweitzer and sent emails to numerous people indicating his support for Doug Schweitzer as the UCP-nominated candidate in the constituency of Calgary-Elbow in the April 2019 provincial general election.

140 Generally, political contributions by decision-makers and the political allegiances of decision-makers, in and of themselves, do not contribute to a reasonable apprehension of bias. In *Fletcher v Manitoba Public Insurance Corp.*, 2004 MBCA 192, the Manitoba Court of Appeal dealt with an appeal under the *Manitoba Public Insurance Corporation Act* in which the appellant was president of the Progressive Conservative Party of Manitoba and was seeking certain benefits under the *Act*. The chair of the appeal panel hearing the matter had made

political donations to the New Democratic Party. The appellant raised a reasonable apprehension of bias.

***Fletcher v Manitoba Public Insurance Corp.*, 2004 MBCA 192, at paras 1-3 [*Fletcher*] [ABA, Vol 1, Tab 22, p 264].**

141 In *Fletcher*, the Manitoba Court of Appeal dismissed the allegation of a reasonable apprehension of bias, stating:

> The allegation is simply too remote. The fundamental nature of the issue before the appeal panel was about benefits under the *Act*. It was not about politics. The political aspect to the case is merely incidental to the benefits issue.

***Fletcher*, at para 28 [ABA, Vol 1, Tab 22, p 270].**

142 In *Fletcher*, the Manitoba Court of Appeal also noted that it was a reasonable expectation that some persons in such appointments would support the party that appointed them, that the commissioners were subject to an oath of office, and that the decisions in question were the unanimous decisions of a three-person panel.

***Fletcher*, at paras 29-30 [ABA, Vol 1, Tab 22, p 270].**

143 By contrast, the current matter is clearly political. The Inquiry itself is based on highly-politicized statements made by political figures prior to the calling of the Inquiry. Therefore, politics are central, not incidental, to this Inquiry, and the Commissioner's political contributions should be viewed in that light. Further, the Commissioner has not sworn an oath of office and the Commissioner sits as a sole commissioner of this Inquiry. The bar for refuting a reasonable apprehension of bias in this matter must be higher than in *Fletcher*.

144 In the Ontario Supreme Court case of *Muscillo v Ontario (Licence Suspension Appeal Board)*, 1997 CanLII 12317 (ON SC), the applicant raised a reasonable apprehension of bias on the grounds that a tribunal member of the License Suspension Appeal Board established under the *Highway Traffic Act* was closely connected to and had politically supported the then-Minister of Transportation.

***Muscillo v Ontario (Licence Suspension Appeal Board)*, [1997] O.J. No. 3062 (ON SC), at paras 27-28 [*Muscillo*] [ABA, Vol 2, Tab 35, pp 401-402].**

145 In dismissing the allegation of a reasonable apprehension of bias, the Court in *Muscillo* considered that:

(a) the Board members were selected after review by a standing committee comprised of members from all three sitting political parties;

(b) the Board member sat as a part-time member and therefore any pecuniary interest was remote and speculative;

(c) the Board member's classification under the *Public Service Act* placed no restrictions on political activity; and

(d) the *Public Service Act* contemplated appointments by the Minister.

***Muscillo*, at paras 49, 53, 61 and 91-94 [ABA, Vol 2, Tab 35, pp 405-407, 412].**

146 However, in *obiter* in *Muscillo*, Justice Chapnik stated:

> At the same time, in this sophisticated age, it is possible for ministers of the Crown to abuse their position. In my view, public policy dictates against ministers recommending individuals for appointment to boards or tribunals within their jurisdiction. If an individual is related in any way to the minister under which the appointee will serve, the relevant Minister should have no involvement in the appointment process. That does not preclude, of course, a recommendation of that person to another board, tribunal or agency in an area over which the minister has no direct responsibility...
>
> I have already found no apprehension of bias in the particular circumstances surrounding the appointment of Ms. Bortolussi to the Board. Nevertheless, inherent in the process itself is a built-in structural bias or perception of unfairness by virtue of the fact that ministers are free to nominate or recommend friends, relatives and others to quasi-judicial bodies within their own ministry...
>
> To be sure, the courts must be wary about imposing their views of what may be reasonable or perceived as such on others, particularly in situations where the legislature has turned its mind to the issue; and that is not my intention. At the same time, the circumstances of this case highlight the need for change and the time may be right for the legislature to accept that challenge.

***Muscillo*, at paras 86, 91, 94 [ABA, Vol 2, Tab 35, pp 411-412].**

147 In the current matter, in contrast to the situation in *Muscillo*, the Commissioner has direct and recent political connections to Minister Schweitzer, who is himself a partisan player within the context of the Inquiry and who directly recommended Steve Allan for appointment. Persons appointed as commissioners should be free of past associations, including political associations, that raise a reasonable apprehension of bias. Commissions of inquiry should be free from partisan loyalties.

Ratushny, at 145-146 [ABA, Vol 3, Tab 72, pp 862-863].

148 From as early as May 2018 through to the April 2019 Alberta provincial general election, Jason Kenney and the UCP were calling for an investigation into an alleged anti-Alberta energy campaign, an end to foreign funding of "special interests", and the stripping of charitable status from Canadian organizations. Throughout that time, Steve Allan was financially supporting the UCP.

149 In addition, Steve Allan was financially supporting Doug Schweitzer in his bid for leadership of the UCP. During the 2019 provincial general election campaign, Steve Allan organized and financially supported campaign events for then-candidate Doug Schweitzer and sent emails in support of Schweitzer. Within four months of holding a campaign event for Doug Schweitzer at his home, Steve Allan was appointed as commissioner of this Inquiry on the recommendation of then-Minister Schweitzer.

150 This would cause a reasonable person to question whether the Commissioner can now be seen to impartially judge the allegations of the UCP, Premier Kenney and Minister Schweitzer against the evidence of the organizations that are the target of this Inquiry. Steve Allan's financial support of the UCP and political and financial support of the UCP leadership and general election campaigns of Minister Schweitzer contributes to a reasonable apprehension of bias.

D Conclusion regarding reasonable apprehension of bias

151 The right to appear before an administrative tribunal that is free from a reasonable apprehension of bias is a fundamental right and a basic tenet of our legal system. As stated by Madam Justice Goss in *Slawsky*:

> The right to a fair hearing is an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

***Slawsky*, at para 112 [ABA, Vol 3, Tab 53, p 651].**

152 Where reputations and *Charter* issues such as freedom of speech and the right of association are at stake, the test for freedom from a reasonable apprehension of bias must be set at a high bar.

***Chrétien*, at paras 39, 56, 61 [ABA, Vol 1, Tab 18, pp 192, 197-199]; *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at para 46 [ABA, Vol 2, Tab 29, p 343].**

153 As stated above, the relevant test is not whether in fact there was conscious or unconscious bias on the part of the Commissioner, but whether a reasonable apprehension of bias exists in the circumstances.

***Wewaykum*, at para 66 [ABA, Vol 3, Tab 63, p 802].**

154 As stated by Justice Côté in *Hutterian Brethren*, the test is based on the cumulative impression left by the totality of the facts, rather than by any single act. In this matter:

(a) the political context and the Order and Terms of Reference of the Inquiry have prejudged important issues including the alleged provision of foreign funding, the intent to harm the Alberta energy industry, and the dissemination of misleading or false information;

(b) the Premier's comments have prejudged the reliability of the evidence to be given by one witness;

(c) the political context and the Order and Terms of Reference have prejudged certain organizations as being guilty of spreading misinformation, defamation, economic sabotage or unlawful activities;

(d) the political context and Terms of Reference direct the Commissioner to provide the Government of Alberta with information that will assist the Government in implementing predetermined challenges to the funding and charitable status of certain environmental organizations; and

(e) the Commissioner made financial contributions to and has a relationship with the UCP and Doug Schweitzer, who are partisan players within the context of the Inquiry.

***Hutterian Brethren*, at para 48 [ABA, Vol 2, Tab 26, p 323].**

155 In *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567, the Director of Alberta Environment and Sustainable Resources Development adopted a policy of rejecting statements of concern from the Pembina Institute with respect to oil

sands development because the Pembina Institute had been uncooperative and published negative media about the oil sands.

***Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, 2013 ABQB 567, at paras 22, 35 [*Pembina Institute*] [ABA, Vol 2, Tab 40, pp 492-494, 499].**

156 In finding that the Director had breached procedural fairness in implementing this policy, Justice Marceau stated:

> The reasons given for the change—lack of cooperation by Pembina because they withdrew from CEMA and have been publishing negative media about the oil sands—clearly indicate Pembina in particular and OSEC generally were targeted. It is difficult to envision a more direct apprehension of bias unless it is the Premier of Quebec telling the Quebec Liquor Commission to revoke a restauranteur's liquor licence because the proprietor of the restaurant is a Jehovah's Witness as happened in *Roncarelli v Duplessis*, [1959] S.C.R. 121.

***Pembina Institute*, at para 37 [ABA, Vol 2, Tab 40, p 499]**

157 Justice Marceau found a reasonable apprehension of bias when a single organization was targeted and had its statements of concern rejected because they were uncooperative and made negative statements about the oil sands. To an even greater degree, a reasonable apprehension of bias should be found when an entire class of organizations is targeted and subjected to a public inquiry because their views of oil and gas development in Alberta differ from those of the government.

158 Applying the test from *CJL*, a reasonable and informed person, viewing the matter realistically and practically, and considering the cumulative evidence presented above, would conclude that there was a reasonable apprehension of bias in the establishment and conduct of this Inquiry.

E Remedy

159 It is impossible to have a fair hearing or to have procedural fairness if the hearing is tainted by a reasonable apprehension of bias. 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* or must be quashed.

***Newfoundland Telephone*, at paras 40-41 [ABA, Vol 2, Tab 36, pp 428-429]; *Chrétien*, at para 76 [ABA, Vol 1, Tab 18, p 201]; *Slawsky*, at paras 112-113 [ABA, Vol 3, Tab 53, p 651].**

3 THE INQUIRY IS *ULTRA VIRES* THE CONSTITUTIONAL POWERS OF THE PROVINCE

160 The Applicant submits that the Inquiry is *ultra vires* the powers of the Province of Alberta by reason both of exceeding the powers allocated to the Province under the *Constitution Act, 1867*, and by not satisfying the jurisdictional conditions required for a commission of inquiry to be appointed under section 2 of the *Public Inquiries Act*. The Inquiry therefore lacks any legal authority and must be quashed.

A Standard of review

161 The question before this Honourable Court is whether the Inquiry is in pith and substance an inquiry into matters of exclusive federal jurisdiction and therefore *ultra vires* the Inquiry's constitutional and statutory jurisdiction.

162 If the issue is viewed as one of constitutionality, the question of standard of review does not arise and the Inquiry should be quashed if it is found to be unconstitutional. In the alternative, if the issue is regarded as a judicial review of the Province's interpretation of section 2 of the *Public Inquiries Act* – i.e., the Province incorrectly judged that this was "a matter within the jurisdiction of the Legislature" – and its resulting delegation of powers to the Commissioner, then the standard of review for this constitutional question would be "correctness."

163 As stated by the Supreme Court of Canada in *Vavilov*:

> Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in

reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

[emphasis added]

***Vavilov*, at para 55 [ABA, Vol 1, Tab 13, p 121].**

164 Regardless of the approach taken, the result is the same: this Honourable Court must determine whether the matters put before the Inquiry by the Order and Terms of Reference are in pith and substance matters of exclusive federal jurisdiction and therefore *ultra vires* the Inquiry's constitutional and statutory jurisdiction.

B Legal analysis

165 Canada is a federal state in which some governmental powers are allocated exclusively to the national federal government and other governmental powers are allocated exclusively to the provincial governments. The exclusivity of Parliament's powers is explicitly stated in the opening lines of section 91 of the *Constitution Act, 1867*, just as the exclusivity of the provinces' powers is in section 92.

***Reference re Pan-Canadian Securities Regulation*, [2018] 3 SCR 189, 2018 SCC 48, at para 56 [*Pan-Canadian Securities*] [ABA, Vol 2, Tab 46, p 567]; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, at para 11 [*Reference re Environmental Management Act*] [ABA, Vol 2, Tab 44, p 543] (affirmed in 2020 SCC 1); *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No. 5, s 91-92 [*Constitution Act, 1867*] [ABA, Vol 1, Tab 1, pp 2-5].**

166 It is the exclusive division of powers that gives rise to this part of the Applicant's submissions:

> In a federal state such as Canada, where legislative powers are distributed between a central legislative body (the federal Parliament) and regional legislative bodies (the provincial Legislatures), one function of judicial review is to enforce the distribution-of-powers rules (the rules of federalism).

Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2005 Student edition) at 130 [ABA, Vol 3, Tab 67, p 829].

i. Constitutional review of public inquiries

167 Although litigation regarding the division of powers has most often been about impugned legislation, there are also examples of inquiries or hearings that purported to have been authorized under provincial legislation being struck down because they were held to be *ultra*

vires. In the vast majority of cases, the federal power that was infringed was that over criminal law.

168 A review of the pre-1990 jurisprudence in this area can be found in *Starr v Houlden*, [1990] 1 SCR 1366. In that case, the Supreme Court of Canada held that an inquiry under the Ontario *Public Inquiries Act* into allegations of corruption involving charities and provincial officials was *ultra vires* the province, as a matter within the exclusive criminal law jurisdiction of the federal government under subsection 91(27) of the *Constitution Act, 1867*.

Starr, at paras 20-29 [ABA, Vol 3, Tab 55, pp 677-684].

169 In *Starr*, Lamer J, as he was then, lays out the process for determining if the subject of an inquiry is within the jurisdiction of the legislature establishing that inquiry:

> The first step in judicial review in the context of division of powers is to identify the "matter" of the law, in this case of the Order in Council establishing the inquiry. This is done by looking for the dominant feature of the law, or to use the term of art, its "pith and substance". Professor Hogg in *Constitutional Law of Canada* (2nd ed. 1985), at pp. 318-19, notes that pith and substance is determined by examining both the purpose and effect of the law. In undertaking the characterization of a law the Court must consider the legislative scheme, judicial precedent and what Professor Hogg refers to at p. 323 as a "concept of federalism" comprised of the enduring values in the allocation of power between the two levels of government. Once the matter or pith and substance of a law has been identified, it is necessary to assign it to a specific head of power under either s. 91 or s. 92 of the *Constitution Act, 1867*.

Starr, at para 18 [ABA, Vol 3, Tab 55, p 676].

170 In *Starr*, Justice Lamer found that the inquiry process circumvented the prescribed criminal procedure for conducting a police investigation and a preliminary inquiry, matters governed by the *Criminal Code*, and therefore was clearly *ultra vires* the province's authority. In the current matter, the Inquiry inquires into matters under federal authority, namely the international transfer of funds, the determination of charitable status, and matters pertaining to federally-regulated pipelines and railways.

171 A well-known case subsequent to *Starr* is *Stromberg v Law Society of Saskatchewan*, (1996) 132 DLR (4^{th}) 470 (SK QB), in which a disciplinary hearing against a lawyer was convened by the Law Society on the basis that he used his firm to disguise payments of money to a senator in breach of section 121 of the *Criminal Code*. The disciplinary proceedings were

quashed because they were *ultra vires* the province, on grounds that included the proceeding being in pith and substance a substitute police investigation and not a disciplinary proceeding.

***Stromberg v Law Society of Saskatchewan* (1996), 132 DLR (4th) 470, [1996] 3 WWR 389, at paras 40, 119, 127 (SK QB) [*Stromberg*] [ABA, Vol 3, Tab 56, pp 695, 703-704].**

172 The quashing of inquiries into non-criminal matters is rarer, but examples include the decision of the Supreme Court of Canada in *Canadian National Railway Co. v Courtois*, [1988] 1 SCR 868. In that case, an attempted provincial inquiry into a train collision was ruled *ultra vires* in that the provincial health and safety legislation that formed the basis for the inquiry was wholly inapplicable to an interprovincial railway undertaking. This was one of a trilogy of cases in which attempted provincial intrusions into matters of exclusive federal jurisdiction were struck down.

***Canadian National Railway Co. v Courtois*, [1988] 1 SCR 868, at para 68 [*Courtois*] [ABA, Vol 1, Tab 16, p 174].**

173 In *Mercier v Alberta (Attorney General)*, 1997 ABCA 161, the appellant argued that a provincial fatality inquiry into a parachuting incident was *ultra vires*, given that parachuting falls under exclusive federal jurisdiction over aviation. The Court of Appeal of Alberta denied the appeal on the grounds that the fatality inquiry had a double aspect, but noted that "the "double aspect" doctrine will only apply…if the dominant purpose or "pith and substance" of this provincial inquiry comes under the province's jurisdiction".

***Mercier v Alberta (Attorney General)*, 1997 ABCA 161 (leave to appeal to the Supreme Court of Canada refused, [1997] SCCA No 333), at para 13 [ABA, Vol 2, Tab 33, p 384].**

174 In *Quebec (Attorney General) v Canada (Attorney General)*, [1979] 1 SCR 218, dealing with a public inquiry by the provincial government into alleged criminal acts by members of the R.C.M.P., the Court examined the extent to which the inquiry could delve into the administration of that federal police force. Justice Pigeon, for the Court, stated:

> Great stress was laid by the appellants as well as by intervenants on Dickson's J. statement in *Di Iorio*, at p. 208, that "A provincial commission of inquiry, inquiring into *any* subject, might submit a report in which it appeared that changes in federal laws would be desirable". This was said *obiter* in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of "The Administration of

> Justice in the Province". The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.
>
> [emphasis added]

***Quebec (Attorney General) v Canada (Attorney General)*, [1979] 1 SCR 218, at 241-242 [*Quebec v Canada*] [ABA, Vol 2, Tab 42, p 517].**

175 Therefore, while a provincial public inquiry may result in recommendations that could have implications for federal laws, it cannot inquire into matters of federal jurisdiction. Neither can it make recommendations that are in pith and substance concerned with a matter within federal jurisdiction. Indeed, in both *Quebec v Canada* and *Courtois*, the Supreme Court of Canada found provisions of the terms of reference mandating the inquiry commission to make recommendations on matters within federal jurisdiction *ultra vires* the province.

***Quebec v Canada*, at 242 [ABA, Vol 2, Tab 42, p 517]; *Courtois*, at paras 8, 66-67, 70 [ABA, Vol 1, Tab 16, pp173-174].**

176 In the current matter, the Government of Alberta has ignored the distribution of powers under the *Constitution Act, 1867*. It has purported to call an inquiry into matters that are beyond its powers, including matters that are exclusively within the jurisdiction of the Government of Canada. As set out below, this includes matters pertaining to:

(a) the international and interprovincial movement of funds;

(b) the charitable status of organizations under the federal *Income Tax Act*, RSC 1985, c 1 (5th Supp.); and

(c) railways and pipelines, explicitly including those under federal jurisdiction.

177 Because the Province has purported to authorize an inquiry into matters outside its jurisdiction, it has caused the Inquiry to be *ultra vires* in two distinct ways. First, a provincial inquiry into matters of exclusive federal jurisdiction or extraterritorial matters is *ultra vires* in the sense that it directly violates the distribution of powers under the *Constitution Act, 1867*. Second, the Inquiry is also *ultra vires* in a statutory sense, in that the enabling legislation for the Inquiry, specifically section 2 of the *Public Inquiries Act*, specifies that inquiries can only be held into

matters within the jurisdiction of the provincial Legislature. The fact that the Inquiry is *ultra vires* in a constitutional sense therefore also makes it *ultra vires* in a statutory sense.

ii. Test for assessing constitutionality

178 As indicated in *Starr* and further Supreme Court jurisprudence, determining the constitutional validity of the Order and Terms of Reference involves a two-step process:

(a) the first step is to identify the matter addressed by the Order and Terms of Reference in establishing the Inquiry. This is done by identifying their dominant feature, the "pith and substance"; and

(b) the second step is to classify the matter, or pith and substance, by reference to the heads of power under sections 91 and 92 of the *Constitution Act, 1867*.

Starr, at para 18 [ABA, Vol 3, Tab 55, p 676]; _Reference re Firearms Act (Can.)_, 2000 SCC 31, at para 15 [_Firearms Reference_] [ABA, Vol 2, Tab 45, p 555]; _Pan-Canadian Securities_, at para 86 [ABA, Vol 2, Tab 46, p 569]; _Reference re Securities Act_, 2011 SCC 66, at paras 63-65 [_Re Securities Act_] [ABA, Vol 2, Tab 47, pp 573-574].

179 Characterizing the pith and substance of the Order and Terms of Reference and then classifying that matter under the heads of power in sections 91 and 92 of the *Constitution Act, 1867* demonstrates that the Inquiry falls within the exclusive jurisdiction of the Parliament of Canada and outside the jurisdiction of the Legislature of Alberta.

iii. Characterization of the pith and substance of the Order and Terms of Reference

180 The Order and Terms of Reference indicate that the Inquiry is principally concerned with inquiring into the transfer of funds from outside Canada to organizations within Canada that use those funds for public campaigns contrary to the interests of Alberta's oil and gas industry.

181 The pith and substance of an impugned law is determined with reference to its purpose and effects. The Inquiry's purpose can be ascertained from the preamble of the Order, which explains the mischief, or the problem, that the Inquiry is intended to address. The preamble to the Order indicates that the Inquiry's purpose is to address "allegations…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."

Firearms Reference, at paras 16, 21 [ABA, Vol 2, Tab 45, pp 511, 513]; _Re Securities Act_, at paras 63-64 [ABA, Vol 2, Tab 47, p 573]; _Reference re Environmental Management Act_, at paras 13-14 [ABA, Vol 2, Tab 44, p 544]; Order, at preamble [LGIC Record, Tab 1, p 1].

182 This purpose is confirmed by the Terms of Reference. Clause 2(1) of the Terms of Reference states that the mandate of the Inquiry Commissioner is to "inquire into the role of foreign funding, if any, in anti-Alberta energy campaigns", and lists specific matters the Commissioner shall inquire into, which all relate to the transfer of funds from foreign organizations to Canadian organizations that disseminate information contrary to the interests of Alberta's oil and gas industry.

Terms of Reference, cl. 2(1) [LGIC Record, Tab 1, p 3], as amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7].

183 As held in the *Firearms Reference*, determining the effects of an Act requires considering "how [it] will operate and how it will affect Canadians." The Inquiry subjects organizations from across Canada – that is, not just Alberta organizations, but organizations that are registered and operate outside of Alberta's boundaries – to an investigation into their sources of funding. Canadian organizations may be compelled, under section 5 of the *Public Inquiries Act*, to give evidence and produce documents to the Inquiry. The Inquiry's findings will be used to inform Albertans about the use of foreign funding for purposes contrary to the oil and gas industry and to enable the Government of Alberta to respond to such use of foreign funding, in particular by recommending eligibility criteria for government grants and charitable status.

Firearms Reference, at para 18 [ABA, Vol 2, Tab 45, p 556]; _Public Inquiries Act_, s. 5 [ABA, Vol 1, Tab 3, p 41]; Terms of Reference, cl. 2(3) [LGIC Record, Tab 1, p 3].

iv. Classification of the Order and Terms of Reference under heads of power

vi. International and interprovincial transfer of funds is exclusively within federal powers

184 The pith and substance of the Order and Terms of Reference – the transfer of funds from outside Canada to organizations within Canada that use those funds for public campaigns

contrary to the interests of Alberta's oil and gas industry – falls under the federal head of power over trade and commerce (subsection 91(2)) under the *Constitution Act, 1867*. It cannot be classified under provincial heads of power.

185 The transfer of monies across international boundaries is an aspect of interprovincial and international trade and commerce, a matter of exclusive federal jurisdiction pursuant to subsection 91(2) of the *Constitution Act, 1867*.

***Constitution Act, 1867*, s 91(2) [ABA, Vol 1, Tab 1, p 2].**

186 Subsection 91(2) has two branches: (1) matters pertaining to the general regulation of trade affecting the whole dominion; and (2) matters pertaining to interprovincial and international trade and commerce.

***Citizens Insurance Co. of Canada v Parsons*, [1881] 7 App Cas 96 (PC) at para 25 [*Parsons*] [ABA, Vol 1, Tab 19, p 219]; *Re Securities Act*, at para 75 [ABA, Vol 2, Tab 47, p 575].**

187 The regulation of trade and commerce under the first branch – the general regulation of trade and commerce – has been the subject of much jurisprudence and requires a balancing against the section 92 powers of the provinces.

***Parsons*, at para 15 [ABA, Vol 1, Tab 19, pp 216-217]; *Re Securities Act*, at paras 76-85 [ABA, Vol 2, Tab 47, pp 575-577].**

188 Matters of interprovincial or international trade are not subject to such analysis and are clearly within exclusive federal jurisdiction. For example, in *Saputo Inc. v Canada (Attorney General)*, 2011 FCA 69, the Federal Court of Appeal confirmed that standards for cheese marketed in international or interprovincial trade were within the constitutional and legislative authority of the federal government. The Court in *Saputo* found that while Canadian courts have had to struggle with the difficult interrelation of federal and provincial authorities under the general trade and commerce power, federal authority with respect to international and interprovincial trade and commerce has "stood the test of time."

***Saputo Inc v Canada (Attorney General)*, 2011 FCA 69, at paras 49-50, 55 [ABA, Vol 3, Tab 51, pp 619-620] (leave to appeal to the Supreme Court of Canada denied, [2011] SCCA No 188).**

189 In *Manitoba (Attorney General) v Manitoba Egg and Poultry Assn.*, [1971] SCR 689, the Court considered a provincial regulation and order intended to govern the sale of all eggs within Manitoba, whether produced in Manitoba or elsewhere. The Court found that the regulation and order were designed to restrict or limit the free flow of trade between provinces and, as such, were an invasion of the exclusive legislative authority of the Parliament of Canada to regulate interprovincial trade and commerce. Justice Laskin, as he then was, stated in a concurring opinion:

> It has been put beyond doubt that Parliament's power under s. 91(2) is exclusive so far as [it] concerns the prohibition or regulation of exports to or imports from other countries, and that a province may not, as legislator, prohibit the exports of goods therefrom.

***Manitoba (Attorney General) v Manitoba Egg and Poultry Assn.*, [1971] SCR 689, at 703 (Martland J) and 709 (Laskin J) ["*Manitoba Egg*"] [ABA, Vol 2, Tab 32, pp 368, 371].**

190 In other jurisprudence, the courts have confirmed that transfers across interprovincial or international borders are within exclusive federal jurisdiction and *ultra vires* provincial jurisdiction. This includes not only such tangible products as timber (*Timberwest Forest Corp. v Canada*, 2007 FC 148) and oil (*Caloil Inc. v Canada (Attorney General)*, [1971] SCR 543), but provincial legislation and regulations purporting to set export prices for oil (*Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan et al.*, [1978] 2 SCR 545) and potash (*Central Canada Potash Co. Ltd. et al. v Government of Saskatchewan*, [1979] 1 SCR 42).

***Timberwest Forest Corp. v Canada*, 2007 FC 148, at paras 111-115 [ABA, Vol 3, Tab 58, p 727]; *Caloil Inc. v Canada (Attorney General),* [1971] SCR 543, at 550-551 [*Caloil*] [ABA, Vol 1, Tab 11, p 80-82]; *Central Canada Potash Co. Ltd. et al. v Government of Saskatchewan*, [1979] 1 SCR 42, at 75 [ABA, Vol 1, Tab 17, p 181]; *Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan et al.*, [1978] 2 SCR 545, at 567-568 [ABA, Vol 1, Tab 15, pp 159-161].**

191 In addition, the federal government regulates the international transfer of funds through various measures. Pursuant to subsection 149.1(14) of the *Income Tax Act*, registered charities must file annual information returns reporting all revenue sources from outside Canada. Article XXI of the *Canada-U.S. Income Tax Convention (1980)* regulates the tax treatment of donations from residents of the United States to Canadian charitable organizations. The FINTRAC system under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17,

and the Regulations thereunder, have comprehensive reporting requirements for certain foreign transactions.

Income Tax Act, RSC 1985, c 1 (5th Supp), s 149.1(14) [ABA, Vol 1, Tab 2, p 28]; Canada Revenue Agency, Form T3010 (ABA, Vol 3, Tab 65, pp 815, 820]; _Canada – United States Income Tax Convention (1980)_, Article XXI [ABA, Vol 3, Tab 66, pp 824-826]; _Proceeds of Crime (Money Laundering) and Terrorist Financing Act_, SC 2000, c 17, s 9(1) [ABA, Vol 1, Tab 4, p 49]; _Proceeds of Crime (Money Laundering) and Terrorist Financing Regulation_, SOR/2002-184, s 12(1)(c) [ABA, Vol 1, Tab 5, p 54].

192 Therefore, to the extent that the Inquiry purports to inquire into the transfer of funds from outside Canada to organizations within Canada, the Inquiry would be inquiring into matters that are clearly within exclusive federal jurisdiction pursuant to the subsection 91(2) international trade and commerce head of power of the *Constitution Act, 1867*, and thus *ultra vires* the legislature of the Province of Alberta.

193 It may be asked whether the Inquiry's investigation into the transfer of funds from outside of Canada to Canadian organizations could be interpreted as being either about matters of a purely local nature pursuant to subsection 92(16) of the *Constitution Act, 1867*, or being about property and civil rights in the Province pursuant to subsection 92(13) of the *Constitution Act, 1867*. The answer is that it cannot.

Constitution Act, 1867, s 92(13), 92(16) [ABA, Vol 1, Tab 1, p 5].

194 That the Inquiry is about the international transfer of funds self-evidently means that it cannot be about matters of a purely local nature. In addition, not only do the funds in question come <u>from</u> outside of Alberta, they also go <u>to</u> recipients that will in some or most cases be located outside of Alberta. That is, the second paragraph of the preamble to the Terms of Reference indicates that the Inquiry is about "foreign individuals or organizations [that] have provided financial resources to <u>Canadian</u> organizations", rather than to Alberta organizations.

Terms of Reference, preamble [LGIC Record, Tab 1, p 1].

195 Similarly, even if the Inquiry could be correctly characterized as being about property and civil rights – which it cannot – it is certainly not about property and civil rights "in the Province." Again, the second preamble to the Terms of Reference alleges that "foreign individuals or organizations have provided financial resources to <u>Canadian</u> organizations." It is

clearly intended that the Inquiry will deal with matters that are outside of the Province of Alberta rather than being restricted to matters that are "in the Province." While the provincial power over property and civil rights is broad, it does not enable the Province to enact measures that are essentially directed at interprovincial and international matters. The power only confers jurisdiction to enact measures that are in true character "in relation to" property and civil rights within the province.

Manitoba Egg, at 703 [ABA, Vol 2, Tab 32, p 368]; _Caloil_, at 550 [ABA, Vol 1, Tab 11, pp 80-81].

vii. Determination of charitable status is exclusively within federal powers

196 The case law establishes that the Court must consider the "net effect" of a provincial inquiry in assessing its constitutionality. If the Inquiry's "net effect", whether intended or not, is concerned with areas of federal jurisdiction, then the Inquiry is *ultra vires*. The Court may also consider the degree of overlap of a provincial inquiry with exercise of federal powers. Fundamentally, a provincial inquiry cannot inquire into matters of federal jurisdiction, as a province only has jurisdiction in relation to matters affecting that province in creating an inquiry.

Starr, at para 30 [ABA, Vol 3, Tab 55, p 684]; _Stromberg_, at paras 40, 43, 48 [ABA, Vol 3, Tab 56, pp 695-697]; _Godbout v Alberta (Driver Control Board)_, 1998 ABQB 141, at paras 18-19 [ABA, Vol 1, Tab 24, p 290-291]; _Reference re Environmental Management Act_, at para 84 [ABA, Vol 2, Tab 44, p 545]; _Quebec v Canada_, at 240-242 [ABA, Vol 2, Tab 42, p 517]; Ruel at 13 [ABA, Vol 3, Tab 71, p 852].

197 The Inquiry concerns other matters within federal jurisdiction, in addition to international and interprovincial trade and commerce. Most notably, the Inquiry is deeply concerned with the matter of charitable status. Clauses 2(1)(c) and 2(3)(d) of the Terms of Reference specifically reference the charitable status of the organizations that are the subject of the Inquiry:

> 2(1) The commissioner shall inquire into the role of foreign funding, if any, in anti-Alberta energy campaigns, and in doing so shall inquire into matters including, but not limited to, the following:
>
> **…**
>
> (c) whether any Canadian organization referred to in clause (a) has charitable status in Canada…
>
> (3) The commissioner shall make such findings and recommendations as the commissioner considers advisable, and may make findings and recommendations to achieve the following:
>
> **…**

> (d) assist the Government of Alberta by recommending the interpretation of existing eligibility criteria or the creation of new eligibility criteria for attaining or maintaining charitable status.
>
> **Terms of Reference, cl. 2(1), (3) [LGIC Record, Tab 1, p 2-3], as amended by O.C. 191/2020, 25 June 2020 [ABA, Vol 1, Tab 7] and O.C. 249/2020, 5 August 2020 [ABA, Vol 1, Tab 8].**

198 Further, as discussed above, Premier Kenney and the UCP have indicated that a purpose of the Inquiry is to provide information to assist in stripping certain organizations of their charitable status.

199 While the provinces have exclusive jurisdiction over the "establishment, maintenance and management of …charities" pursuant to subsection 92(7) of the *Constitution Act, 1867*, the determination of "charitable status" is a matter within the exclusive jurisdiction of the federal government, in that its defining characteristic is that it exempts organizations that possess that status from being taxed under the *Income Tax Act*.

> ***Constitution Act, 1867*, s 92(7) [ABA, Vol 1, Tab 1, p 5];**
> ***Income Tax Act*, s 149.1 [ABA, Vol 1, Tab 2, pp 9-11].**

200 In *International Pentecostal Ministry Fellowship of Toronto (IPM) v Canada (Minister of National Revenue)*, 2010 FCA 51, the appellant argued that the regulation of charities was *ultra vires* the Parliament of Canada because of the exclusive provincial authority for the regulation of charities under subsection 92(7) of the *Constitution Act, 1867*. The Federal Court of Appeal found that the registration and deregistration of charities (that is, their "charitable status") under the *Income Tax Act* related to the exclusive taxation powers of the federal Parliament pursuant to subsection 91(3) of the *Constitution Act, 1867*, and not the provincial powers pursuant to subsection 92(7).

> ***International Pentecostal Ministry Fellowship of Toronto (IPM) v Canada (Minister of National Revenue)*, 2010 FCA 51, at paras 7-9 [ABA, Vol 2, Tab 27, pp 329-330].**

201 In *Starr*, the Court prevented the inquiry from making a determination of criminal responsibility by "irresistible inference." The Court prevented the inquiry from doing indirectly what it could not do directly, which was to find criminal intent. In the present case, the Inquiry does not have the ability to strip organizations of their charitable status, but the implication and

"irresistible inference" of the Terms of Reference for the Inquiry is that certain organizations should be stripped of their charitable status.

***Starr*, at para 37 [ABA, Vol 3, Tab 55, p 687].**

202 Therefore, to the extent that the Inquiry purports to inquire into the charitable status of a Canadian organization or to propose new eligibility criteria for attaining or maintaining charitable status, it would be *ultra vires* the provincial jurisdiction.

viii. Approval and regulation of interprovincial railways and pipelines are exclusively within federal powers

203 Subsection 92(10)(a) of the *Constitution Act, 1867* explicitly excludes from provincial powers:

> Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.

***Constitution Act, 1867*, s 92(10)(a) [ABA, Vol 1, Tab 1, p 5].**

204 The Terms of Reference define the "Alberta oil and gas industry" as "including both railways and pipelines falling under provincial or federal jurisdiction" (emphasis added).

Terms of Reference, at cl. 1(a)(ii) [LGIC Record, Tab 1, p 2].

205 On its face, this leads the Inquiry to inquire into a matter of federal jurisdiction. The British Columbia Court of Appeal in *Reference re Environmental Management Act*, 2019 BCCA 181 (affirmed by the Supreme Court of Canada), confirmed that the approval and regulation of interprovincial pipelines falls exclusively within federal jurisdiction. Similarly, in *Courtois*, the Supreme Court of Canada confirmed that a province has limited powers of inquiry with respect to matters pertaining to interprovincial railways.

***Reference re Environmental Management Act*, at paras 101-105 [ABA, Vol 2, Tab 44, pp 546-547]; *Courtois*, [1988] 1 SCR 868, at paras 48-53, 68 [ABA, Vol 1, Tab 16, pp 170-171, 174].**

206 Therefore, to the extent that the Inquiry purports to inquire into the influence that foreign funding of Canadian organizations had on the approval or rejection by federal authorities of proposed interprovincial pipelines or railways, it is entirely *ultra vires* the powers of the Province.

C Conclusion regarding constitutional powers

207 The Inquiry – which in pith and substance is concerned with the foreign funding of public campaigns run by Canadian organizations – is *ultra vires* provincial jurisdiction. It cannot be upheld under provincial heads of power, and instead directly concerns matters under exclusive federal jurisdiction, including trade and commerce (subsection 91(2)) and charitable status (subsection 91(3)). The Order is both *ultra vires* the Province's jurisdiction and contrary to section 2 of the *Public Inquiries Act*, which stipulates that an inquiry can only be made into matters "within the jurisdiction of the Legislature."

***Public Inquiries Act*, s 2 [ABA, Vol 1, Tab 3, pp 40-41].**

D Remedy

208 Since the Inquiry is in pith and substance an inquiry into matters not within the constitutional jurisdiction of the provincial Legislature, the Inquiry is *ultra vires* both the *Constitution Act, 1867*, and contrary to section 2 of the *Public Inquiries Act*, and must be quashed.

***Starr*, at para 40 [ABA, Vol 3, Tab 55, p 689]; *Atco Gas Pipelines Ltd. v Alberta Energy and Utilities Board*, 2006 SCC 4, at para 35 [ABA, Vol 1, Tab 10, p 75] [*Atco Gas*]; *Stromberg*, at para 127 [ABA, Vol 3, Tab 56, p 704].**

Part V REMEDY REQUESTED

209 The remedy where a decision-maker exercised a power for an improper purpose outside of the statutory authority granted to them is to find that the action is *ultra vires* and invalid. Therefore, the Applicant submits that the Order must be found to be *ultra vires* the authority granted to the Lieutenant Governor in Council under section 2 of the *Public Inquiries Act* and declared invalid or quashed.

***Doctors Hospital*, at 14 [ABA, Vol 2, Tab 43, p 531]; *Ritchie*, at para 65 [ABA, Vol 2, Tab 48, p 574].**

210 Further, it is impossible to have a fair hearing or to have procedural fairness if the hearing is tainted by a reasonable apprehension of bias. 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* or must be quashed.

Newfoundland Telephone, at paras 40-41 [ABA, Vol 2, Tab 36, pp 428-429]; _Chrétien_, at para 76 [ABA, Vol 1, Tab 18, p 201]; _Slawsky_, at paras 112-113 [ABA, Vol 3, Tab 53, p 651]

211 Similar to the remedy for an improper purpose, if the subject of the Inquiry is found to be *ultra vires* the provincial legislature, the Inquiry is invalid and must be quashed.

Starr, at para 40 [ABA, Vol 3, Tab 55, p 689]; _Stromberg_, at para 127 [ABA, Vol 3, Tab 56, p 704].

212 Therefore, if this Honourable Court finds that certain matters are *ultra vires* the Inquiry or that the Inquiry is tainted by a reasonable apprehension of bias, the Applicant seeks an Order:

(a) declaring Order in Council 125/2019 void;

(b) in the alternative, declaring Order in Council 125/2019 invalid;

(c) in the alternative, quashing Order in Council 125/2019;

(d) in the alternative, declaring the Inquiry to be *ultra vires* the jurisdiction of the Legislature of Alberta and contrary to section 2 of the *Public Inquiries Act*;

(e) in the alternative, in the nature of *certiorari*, prohibiting the Commissioner from continuing with the conduct of the Inquiry, publicly releasing any evidence or submissions put before the Inquiry, or publishing any report related to the Inquiry;

(f) granting the Applicant costs of this proceeding; and

(g) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2021.

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Barry Robinson
Solicitor for the Applicant Ecojustice Canada Society