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Everything You Wish You Didn't Need to Know About the Alberta Inquiry into Anti-Alberta Energy Campaigns

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Matter Commented On: The [Alberta Inquiry](#), OC 125/2019

“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, [1959 CanLII 50 \(SCC\)](#) at 143 (per Rand J)

By now, most Albertans – and indeed most Canadians – have heard about the public inquiry “into the anti-Alberta energy campaigns that are supported by foreign organizations” (Alberta Inquiry or Inquiry), formally established by Order-in-Council 125/2019 pursuant to the *Public Inquiries Act*, [RSA 2000, c P-39](#). Back in July of this year, the government released the Inquiry’s [Terms of Reference](#) (ToR) and announced the appointment of Steven Allan as its Commissioner. This was followed in September by the launching of the Inquiry’s [website](#). For the most part, the Canadian pundit class’ reaction has ranged from [clear condemnation](#) (“anti-democratic” and “anti-Albertan” according to the *Globe and Mail*’s Jeff Jones) to [muted dismissal](#). The *Calgary Herald*’s own Don Braid [observed](#) that the “device of a full-blown public inquiry...has never been used before in such an overtly political way.” But there has been relatively little legal analysis of the Inquiry or its ToR with the exception of a [letter](#) to Commissioner Allan earlier this fall by Ecojustice (the environmental non-governmental organization (eNGO) that uses litigation to uphold Canada’s various environmental laws and a presumed target of the Inquiry), and a [letter](#) by Amnesty International (which generated this [response](#) from the Premier and a further [response](#) from Amnesty).

In this post, I spend some time unpacking the Inquiry’s ToR, which in my view are at best ambiguous and at worst self-defeating. In addition, because so much of the Inquiry is predicated on assumptions regarding the “timely, economic, efficient and responsible development of...Alberta’s oil and gas industry,” I also spend some time looking at the industry’s environmental performance, and the oil sands in particular. The post concludes with some lessons from another time, over 60 years ago, when the Premier of a different province sought to use the machinery of the state to suppress the views of a minority.

To be clear, it is perfectly legitimate in my view for a government to inquire into the extent to which foreign interests may be influencing domestic policies and debates, including Canadian

energy policy. As further set out below, however, it is increasingly doubtful that this particular inquiry is fit for that purpose. This suggests that it might have another purpose, including the delegitimization and stigmatization of groups and persons whose views do not align with those of our current government, signs of which already abound in Alberta’s political discourse.

The Alberta Inquiry’s Terms of Reference

Formally, the Alberta Inquiry’s mandate is set out in section 2 of the ToR. For my purposes, subsections 2(1) and 2(3) are the most relevant, along with the definition of “anti-Alberta energy campaigns” in section 1.

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.

(2) [Directs the Commissioner to consider other similar investigations, including into Russian interference]

(3) The commissioner shall make such findings and recommendations as the commissioner considers advisable to achieve the following:

- (a) make the Government of Alberta and Albertans generally aware of whether foreign funds are being provided in the manner described in subsection (1)(a);
- (b) enable the Government of Alberta to respond effectively to any anti-Alberta energy campaigns funded, in whole or in part, in the manner described in subsection (1)(a);
- (c) assist the Government of Alberta by recommending any additional eligibility criteria that should be considered when issuing government grants;
- (d) assist the Government of Alberta and other Canadian governments by recommending the interpretation of existing eligibility criteria or the creation of new eligibility criteria for attaining or maintaining charitable status.

“Anti-Alberta energy campaign” means 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...

On its face, this entire exercise is intended to verify – if not validate – claims long since made by others, including Vivian Krause, that Canadian opposition to oil and gas development, including pipelines, is not actually Canadian but rather foreign-grown and foreign-funded – if not wholly then at least in part. As acknowledged on the Inquiry’s own [FAQ page](#), the Inquiry “will be

examining and exploring a variety of sources to gather relevant information and evidence, and the prior work of Vivian Krause is one such potential source.”

If that is the case, however, then the ToR appear to be a fairly convoluted – if not outright self-defeating – way of getting there. Let’s start with the definition of “anti-Alberta energy campaign,” which refers to any and all attempts to delay or frustrate “the timely, economic, efficient and responsible development” of Alberta’s oil and gas resources. The obvious first question is: according to whom? Whether or not development has been timely, economic, efficient, and responsible has generally been the core of the controversy. And though it may be tempting to equate such an assessment with the views of Alberta’s democratically elected government, the next question would be which one? Premier Kenney’s views hardly seem relevant, bearing in mind that all of the relevant campaign activity began over a decade ago. How about the previous Notley government – the one that defined responsible development by virtue of a [Climate Leadership Plan](#) (since abandoned (at least partially) by the Kenney government)? What about the previous Redford or Stelmach governments, whose tenures included the commissioning of several independent reports raising concerns about the capacity of provincial regulators to adequately manage the pace of oil and gas development (see Table 1, below)? Simply put, every Alberta government over the past decade has either explicitly or implicitly acknowledged that oil sands development was outpacing its regulatory capacity, i.e. was not timely, efficient, or responsible.

In addition, and because Ecojustice is correct (in its letter) that the Inquiry is bound by the rules of procedural fairness (my colleague Shaun Fluker considers this question further in a forthcoming post), there appear to be legitimate issues regarding notice here. Notice is a fundamental procedural right and must convey the important issues and provide potentially affected groups sufficient information to be able to participate meaningfully in any relevant hearing. How is a potentially relevant group, or the “[many Albertans and Canadians who are anxious to participate in the process](#),” to know whether a campaign was “anti-Alberta” or “pro-Alberta” (e.g. for the responsible development of our oil and gas resources)? At the very least, it would seem incumbent on Commissioner Allan to explain what yardstick he will be applying with respect to “timely, economic, efficient, and responsible development.”

There are other issues with the ToR as well. The Commissioner is directed to consider “misleading or false information” in particular. Again, who determines what is false and misleading in such a complex regulatory space? Finally, and of relevance to the last part of this post in particular, it is clear from the ToR (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.

The Environmental Performance of the Oil Sands

We often hear that Alberta’s oil and gas industry is a leader in environmental performance, though the relevant memes and tweets are never accompanied by any supporting source or citation. While I can only speculate, I suspect a lot of it is based on a [Worley Parsons review](#) of several similar jurisdictions commissioned by the Canadian Association of Petroleum Producers (CAPP) back around 2014. While Alberta fared quite well in that comparison, it is critical for Albertans and

Canadians to understand that this was a *paper exercise* only, as explained in the executive summary:

The study was intended to examine and compare *environmental policies, laws and regulatory systems* as of December 2013; *and not intended to evaluate “performance” or “effectiveness” of the governments*. In particular, the survey was meant to evaluate the systems, processes and controls that exist within the evaluated jurisdictions and *not how effectively and efficiently the jurisdictions are operating* (Executive Summary, emphasis added).

Why does this matter? Because while “in all areas of law, there are gaps between the ‘law on the books’ and the ‘law in action,’... in environmental law the gap is sometimes a chasm” (Daniel Farber, “Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law,” (1999) [23 Harv Envtl L Rev 297](#) at 297). Fortunately, there are at least a half dozen credible, expert reports on the environmental performance of the oil sands and the effectiveness of Alberta’s and Canada’s regulatory regimes written in the last decade or so. These reports, portions of which I have excerpted below (Table 1, emphasis added), raise serious concerns with respect to air emissions, land disturbance and reclamation – including tailings ponds and end-pit lakes, cumulative effects, as well as chronic deficiencies in the monitoring regimes that are supposed to inform Albertans and Canadians about the environmental effects of oil sands development in the first place.

Table 1: Independent Expert Reports Re: Oil Sands Development and Environmental Performance

Report	Excerpts
<p>“Investing in our Future: Responding to the Rapid Growth of Oil Sands Development: Final Report” December 29, 2006 (Radke Report)</p>	<p><i>“Departments lack capacity to complete Environmental Impact Assessments (EIAs), to complete technical studies such as those involving instream flows, to focus on cumulative effects and to develop policy in a timely fashion. In addition, capacity to monitor and enforce environmental requirements is inadequate”</i> (at p 133).</p>
<p>The Royal Society of Canada, “Environmental and Health Impacts of Canada’s Oil Sands Industry” (2010)</p>	<p><i>“The environmental regulatory capacity of the Alberta and Canadian Governments does not appear to have kept pace with the rapid growth of the oil sands industry over the past decade. The EIA process relied upon by decision-makers to determine whether proposed oil sands projects are in the public interest has serious deficiencies in relation to international best practice. Environmental data access for cumulative impact assessment needs to improve”</i> (Executive Summary)</p>

	<p><i>“The environmental footprint of bitumen production activities is considerable, with major air, water, and land dimensions.... Air emissions are large both absolutely and in comparison to those associated with conventional crude oil production in the province and other industrial activities in Canada. The management of water used in and generated by bitumen extraction processes also gives rise to environmental concerns, notably the storage and ultimate disposition of tailings... There are enormous land disturbance and reclamation issues that encompass dealing with the scarred landscape left by surface mines and the forest clearing that is characteristic of <i>in situ</i> production” (at p 29).</i></p>
<p><u>“A World Class Environmental Monitoring, Evaluation and Reporting System for Alberta: The Report of the Alberta Environmental Monitoring Panel”</u> (June 2011)</p>	<p>“While not all monitoring organizations and activities are deficient in the same areas, shortcomings generally focus on the following themes:</p> <ul style="list-style-type: none"> • <i>Monitoring programs are not properly designed.</i> Monitoring requirements have evolved over time and <i>program design has, in many cases, not kept pace.</i> • <i>Monitoring organizations suffer from inadequate funding, weak scientific direction, and a general lack of resources</i> to take on the enormous challenge of monitoring. • <i>Monitoring results are not communicated or made available in transparent, useful formats.</i> • Multiple independent organizations managed by stakeholder boards are not well organized to achieve either holistic scientific objectives or operational excellence. <p><i>Consequently, the overall “state of the environment” is not well understood.</i> Of particular concern is a lack of scientific oversight of monitoring, evaluation and reporting activities, resulting in an inability to:</p> <ul style="list-style-type: none"> • Identify critical knowledge gaps that prevent meaningful long-term monitoring and effective adaptive management; • Provide sufficient feedback to develop standard environmental monitoring methods, which are

	<p>presently lacking, particularly in the Lower Athabasca region; and</p> <ul style="list-style-type: none"> • <i>Establish meaningful environmental baselines and reference conditions essential for cumulative effects monitoring; most reference stations in the oil sands area have been lost as development expanded.</i> <p>(at p 25)</p>
<p>2011 October Report of the Commissioner of the Environment and Sustainable Development, Chapter 2—Assessing Cumulative Environmental Effects of Oil Sands Projects</p>	<p><i>“Incomplete environmental baselines and environmental data monitoring systems needed to understand changing environmental conditions in northern Alberta have hindered the ability of Fisheries and Oceans Canada and Environment Canada to consider in a thorough and systematic manner the cumulative environmental effects of oil sands projects in that region.”</i></p> <p>“Fisheries and Oceans Canada, Environment Canada, and the Canadian Environmental Assessment Agency did not adapt the terms of reference for subsequent environmental assessments as a means of reducing gaps in the information needed to fully consider changing environmental conditions.”</p>
<p>Report of the Auditor General of Alberta (July 2015), Environment and Parks and the Alberta Energy Regulatory – Systems to Ensure Sufficient Financial Security for Land Disturbances from Mining</p>	<p>“Since the time of our last follow-up audit, the Department of Environment and Parks developed and implemented the Mine Financial Security Program (MFSP). The focus of our current audit was on this program, and whether it constitutes an approach that provides for sufficient financial security...</p> <p><i>As of December 31, 2014, \$1.57 billion of security is currently being held in comparison to estimated reclamation liabilities of \$20.8 billion...</i></p> <p>Overall conclusion Implementing the MFSP was an important step towards a system that obtains sufficient financial security for mining related land disturbances.</p>

	<p>However, for the design and operation of the MFSP to fully reflect the intended objectives of the program, <i>improvements are needed to both how security is calculated and how security amounts are monitored.</i></p> <p>What we found <i>There is a significant risk that asset values calculated by the department are overstated within the MFSP asset calculation, which could result in security amounts inconsistent with the MFSP objectives. The MFSP asset calculations do not incorporate a discount factor to reflect risk, use a forward price factor that underestimates the impact of future price declines, and treat proven and probable reserves as equally valuable.</i></p> <p>Why this is important to Albertans In the event that a mine operator cannot fulfill its reclamation obligations, and no other private operator assumes the liability, <i>the province may have to pay a potentially substantial cost for this work to be completed.</i> Thus, a robust and responsive system to calculate and collect security from mine operators is essential.”</p>
<p>Council of Canadian Academies, 2015. Technological Prospects for Reducing the Environmental Footprint of Canadian Oil Sands. The Expert Panel on the Potential for New and Emerging Technologies to Reduce the Environmental Impacts of Oil Sands Development, Council of Canadian Academies.</p>	<p>“Today, there are dozens of initiatives under way to improve process efficiency and environmental performance in the oil sands. There is also an environmental monitoring system operating in the region that is currently undergoing major enhancements. Billions of dollars in R&D and commercialization are being spent every year.</p> <p><i>As impressive as these efforts are, they are not enough.</i> This assessment of the evidence finds that most of the required challenges and solutions are multidisciplinary and have wide-ranging implications in highly integrated industrial and ecological ecosystems. The financial risks of implementing costly new technologies at the scale required are also immense. <i>Moreover, despite a half-century of development, many seemingly intractable problems remain: what to do with tailings, how to treat and discharge water safely, how to reduce the amount of GHGs, and how to reduce the footprint on the land and wildlife caused by mining and in situ</i></p>

	<p><i>production. There are few simple solutions remaining to implement and no off-the-shelf technology...</i></p> <p><i>Improvements in GHG production intensity on a per barrel of bitumen basis have stagnated recently due to higher levels of in situ production. These intensities are projected to increase again in the absence of new technology and anticipated declines in reservoir quality.</i></p> <p><i>...While fluid tailings production intensity (the volume of fluid tailings per barrel of bitumen) is expected to decrease with the use of new technologies to meet provincial regulatory requirements (i.e., the Alberta Government’s Tailings Management Framework for the Mineable Athabasca Oil Sands), total volumes are expected to increase over the next several years and then decrease well below Directive 074 levels. <i>The resulting environmental footprint from tailings is multifaceted and includes the large areas of land disturbed; seepage of process-affected water into groundwater; the quantity, quality, and fate of process-affected water in the tailings pores; off-gassing of various chemical substances of concern (e.g., polycyclic aromatic compounds (PAHs), volatile organic compounds (VOCs) including benzene and methane); windblown fugitive dust from tailings sand beaches that contain chemicals of concern; risk of an accidental dam breach; and long-term reclamation of tailings ponds, which remains a significant technological, economic, and environmental challenge.</i>” (at xiii – xv).</i></p>
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The foregoing casts serious, legitimate, and entirely Canadian-based doubt on claims that oil sands development has *ever* been timely, efficient or responsible, let alone world leading. It also further undermines the government’s approach to this Inquiry, as the current government must know – or ought to know – the contents of these reports (having commissioned several of them).

Echoes of a Quebec Premier Over 60 Years Ago

Sixty years ago, the Supreme Court of Canada issued one of its most iconic “rule of law” decisions, *Roncarelli v Duplessis*, excerpted at the outset of this post. Briefly, Mr. Roncarelli was a Montreal-based restaurateur who, at the direction of Quebec’s then Premier Maurice Duplessis, had his liquor license permanently revoked. The reason? Mr. Roncarelli had the temerity to provide

financial support, in the form of bail surety, for Jehovah's Witnesses arrested for disseminating pamphlets expressing their beliefs, which "produced a violent reaction" (at 131) in Quebec's then overwhelmingly Catholic society. Having had his license revoked, Mr. Roncarelli brought an action against the Premier and was awarded \$33,123.53 in damages.

In the course of his reasons, Justice Rand penned some of the most revered passages in Canadian administrative law, which in addition to the excerpt above includes the following:

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... (at 140, emphasis added).

The authority for the Alberta Inquiry is found in section 2 of the *Public Inquiries Act*, which reads as follows:

When the Lieutenant Governor in Council considers it expedient and in the public interest to cause an inquiry to be made into and concerning a matter within the jurisdiction of the Legislature and

- (a) connected with the good government of Alberta or the conduct of the public business of Alberta, or
- (b) that the Lieutenant Governor in Council declares by commission to be a matter of public concern,

the Lieutenant Governor in Council may by commission appoint one or more commissioners to make the inquiry and to report on it.

Considering all of the facts, including the unprecedented use of the *Public Inquiries Act* in "such an overtly political way" (to borrow Don Braid's words), the ambiguity of the ToR, the Kafkaesque nature of the Inquiry's website (which has also been exempted from freedom of information legislation), and the numerous legitimate and well-documented concerns regarding previous governments' management of the oil sands, an arguable case could be made that this particular Inquiry is not a valid exercise of the *Public Inquiries Act*. It also doesn't help the government that the National Observer's Sandy Garossino appears to have [already carried out the kind of analysis](#) we might expect from Commissioner Allan, without requiring the significant machinery of a public inquiry. Time will tell.

In the interests of full disclosure, the author has never received funding from any Canadian eNGO. Like thousands of other Canadians, however, he has supported several such groups, including Ecojustice, whether financially or through volunteering, since 2002.

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