

Procedural Fairness and the Alberta Inquiry into Anti-Alberta Energy Campaigns

By: Shaun Fluker

Order Commented On: Order in Council, [O.C. 125/2019](#) (July 4, 2019)

In early July the Lieutenant Governor in Council commissioned an [inquiry](#) under power granted by section 2 of the *Public Inquiries Act*, [RSA 2000, c P-39](#) (the ‘Inquiry’) to investigate and report on any anti-Alberta energy campaigns that are supported, in whole or in part, by foreign organizations. This comment focuses on the threshold question of whether the doctrine of procedural fairness applies to this Inquiry, and examines the potential legal sources of a fairness obligation. I am not digging into the specific allegations of unfairness already directed at the Inquiry (see [here](#) and [here](#)), but rather my question is more generally whether those persons who are investigated by the Inquiry have a legal right to know and meet the case being compiled against them. This question arises because, on the one hand, an inquiry such as this could be seen as merely a fact-finding mission with no mandate to decide anything or impose liability on anyone, and historically the common law neither imposed fairness obligations on such investigations nor provided remedies in these cases. On the other hand, the Terms of Reference for the Inquiry attached to Order in Council, [O.C. 125/2019](#) suggest a somewhat close relationship between this investigation and decisions with potential adverse consequences for certain groups. As well, the overtly partisan basis for the Inquiry means it is likely that any findings or recommendations made by the commissioner have the potential to damage the reputation of persons named in his report, even if no further actions are taken by the Minister of Energy or the Lieutenant Governor in Council.

The Inquiry and its Mandate

A good starting point here is to look at the mandate of the Inquiry. My colleague Martin Olszynski examined the mandate in [Everything You Wish You Didn’t Need to Know About the Alberta Inquiry into Anti-Alberta Energy Campaigns](#), and again for ease of reference, here are sections 2(1) and (3) in the Terms of Reference:

- 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(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.

If nothing else, this mandate confirms that the Inquiry is targeted at a specific group of entities and strongly suggests its findings may lead to adverse consequences for that group. As Professor Olszynski explained in his post, there are also troubling references in this mandate to phrases such as “misleading or false information about the Alberta oil and gas industry”. These references suggest certain results from this investigation may have been pre-determined by the Lieutenant Governor in Council. Because it is clear that this Inquiry is directed at Canadian environmental NGOs and related groups which have intervened in energy project hearings or have otherwise raised concerns with those projects, the targeted nature of this process makes it very likely that some or all of the proceedings will be subject to procedural fairness obligations (see *Homex Realty v Wyoming*, [1980] 2 SCR 1011, [1980 CanLII 55 \(SCC\)](#)).

The mandate, however, is only one consideration here. I always tell my Administrative Law students that the application of procedural fairness is a contextual matter. Some government decisions are subject to the fairness doctrine, others are not. And what constitutes fairness in one decision-making process may not be so in another. One also needs to remember that the doctrine of fairness only applies to the exercise of authority which is of a ‘public character’. This point of law was recently affirmed by the Supreme Court of Canada in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, [2018] 1 SCR 750, [2018 SCC 26 \(CanLII\)](#). See [here](#) for my ABlawg commentary on this decision. Thus in any assessment of whether and

how procedural fairness applies, one must identify the decision in question, who the decision-maker is, and what legislative framework governs the matter.

We are told on the [Inquiry](#) website that the proceedings will be undertaken in phases. The first phase is described as the investigative phase, and it is apparently already underway. Section 3 of the Terms of Reference state that phase one will conclude with the commissioner providing the Minister with an interim report on his investigative findings and policy recommendations no later than January 31, 2020. We are told that phase two may include a public hearing, and that this second phase will conclude with the commissioner's submission of his final report to the Minister no later than July 2, 2020. An obvious point of concern here is the suggestion that the commissioner will be making interim findings and recommendations during phase one without conducting a public hearing. Does the fact that the initial phase of the investigation only leads to an 'interim report' make the proceedings sufficiently preliminary that fairness obligations – in the form of a public hearing – do not arise during phase one? I suggest below that the common law may require a public hearing during phase one, but this depends largely on the content of that interim report. This may be difficult to decipher because we may never know what is included in the interim report: Section 3 of the Terms of Reference states that only the final report will be made public and the [Inquiry](#) website asserts that the proceedings are not subject to the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#). This shroud of secrecy over an investigation we are told is of significant public interest, strikes me as very odd.

On the topic of decisions to be made, there will be many during this Inquiry. Some decisions relate to matters which are primarily substantive in character, like the decision made by the Lieutenant Governor in Council in July to commission the Inquiry under the *Public Inquiries Act*, and the decisions which will be made by the Lieutenant Governor in Council or individual ministers on the basis of the recommendations provided by the Inquiry in the final report. In addition, there will be countless procedural decisions made by the commissioner along the way, such as decisions on who is entitled to participate in the Inquiry, on evidentiary points and disclosure of information during the investigation, and on whether someone is entitled to funding to cover the costs of their participation in the Inquiry.

Sources of Procedural Fairness Obligations

Where do we look for sources of an entitlement to procedural fairness, or conversely an obligation to be fair? The first place to examine is the governing legislative framework for the Inquiry. In this regard, we should look at the *Public Inquiries Act* and the Terms of Reference. Several provisions in the *Public Inquiries Act* make it clear that some procedural entitlements must be afforded by the commissioner to persons who participate in the Inquiry or who may be adversely affected by the findings of the Inquiry. Sections 11 through 13, in particular, set out as follows:

Right to counsel

11 Any person appearing before a commissioner or commissioners may be represented by counsel.

Right to call witnesses

12 Any witness who believes his or her interests may be adversely affected and any person who satisfies a commissioner or commissioners that any evidence given before a commissioner or commissioners may adversely affect the person's interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the discretion of a commissioner or commissioners, to call and examine or cross-examine witnesses personally or by that person's counsel in respect of the matter.

Notice of allegation of misconduct

13 No report of a commissioner or commissioners that alleges misconduct by any person shall be made until reasonable notice of the allegation has been given to that person and the person has had an opportunity to give evidence and, at the discretion of the commissioner or commissioners, to call and examine witnesses personally or by that person's counsel in respect of the matter, notwithstanding that the person may have already given evidence or may have already called and examined witnesses personally or by that person's counsel.

These sections set out entitlements that we would associate with a person's right to know and meet the case against them. However, these sections actually raise more questions than they answer. For instance, sections 12 and 13 incorporate a considerable amount of discretion exercisable by the commissioner into whether or not someone will be able to give evidence or question the evidence given by others at the Inquiry. Similarly, the [Inquiry](#) website states the commissioner "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." To what extent will these sources be subjected to cross-examination at the Inquiry? And what constitutes 'reasonable' notice (in terms of content in the notice, manner of dissemination, and timing) under section 13? Does the reference to 'report of a commissioner' in section 13 include the interim report in these proceedings, such that a 'public hearing' is needed during phase one of the investigation? One must look to other sources of procedural fairness for answers to these questions.

One additional source would be rules of procedure for the Inquiry. It is disappointing to observe that while we are already 4 months into this process the commissioner has yet to publish anything in this regard. The Terms of Reference set by the Lieutenant Governor in Council are also surprisingly brief. Section 5 sets out a slight variation on the Alberta-familiar 'directly affected' test for obtaining standing. The test to be met by a person seeking to participate in the Inquiry is to satisfy the commissioner that they may be 'directly or substantially affected' by the subject-matter of the Inquiry (See [here](#) for my discussion in the Alberta Law Review on how the 'directly affected' or 'directly and adversely affected' test for standing has been administered in Alberta by other statutory regimes). Section 5 states "the commissioner may grant standing to participate in the Inquiry only if, in the opinion of the commissioner, (a) the applicant is or may be directly or substantially affected by the subject-matter of the inquiry, or (b) the applicant has a clearly ascertainable interest or perspective that ought to be separately represented at the inquiry in order to assist the inquiry to fulfill its mandate." Query whether this test for standing is consistent with the 'adversely affected' test set out in section 12 of the *Public Inquiries Act*, not only in relation to the difference in the words used but also in that the Terms of Reference

suggest discretion in the commissioner to decide standing issues whereas the legislation provides for a legal right to standing to give evidence. Presumably the Act will govern in this instance, but this does raise the question of why the Lieutenant Governor in Council chose what appears to be a narrower test for standing in the Terms of Reference for persons who may be adversely impacted by the Inquiry.

Section 6 of the Terms of Reference provides for the possibility of costs recovery for expenses incurred to participate in the Inquiry. At this stage the costs policy remains to be determined, but we do know from the text of section 6 that the recovery of expenses will be subject to the discretion of the commissioner. For an illustration of how costs may be handled by the commissioner, it could be instructive to look at the practice of the Alberta Energy Regulator. See [here](#) for a quantitative study on costs awards by tribunals published by Eric Dalke and I in the Alberta Law Review last year. Meaningful participation in the Inquiry will not be cheap, and it will be interesting to observe how much of the \$2.5 million budget is allocated to cost awards given to participants of the Inquiry. Section 7 of the Terms of Reference states that the commissioner is supposed to have already provided the Minister with a proposed budget allocation. Given how concerned the Alberta government is about finances and its mandate to reduce government spending, I'm surprised the allocation of this budget has not been published on the [Inquiry](#) website.

Other statutory sources of procedural rights can sometimes be found in bills of rights or omnibus legislation pertaining to administrative process. In Alberta, these statutes would be the *Alberta Bill of Rights*, [RSA 2000, c A-14](#) and the *Administrative Procedures and Jurisdiction Act*, [RSA 2000, c A-3](#). The *Administrative Procedures and Jurisdiction Act* does not apply to the Inquiry because the Inquiry is not listed as a prescribed authority under the legislation. However, section 1(a) of the *Bill of Rights* sets out the right of an individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law. Similarly, section 7 of the *Canadian Charter of Rights and Freedoms* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” It remains to be seen whether or not the Inquiry will deprive anyone of these quasi-constitutional and constitutional rights, thereby triggering procedural entitlements under these enactments.

To what extent will the common law doctrine of procedural fairness address the uncertainties left lingering by the legislative framework governing this Inquiry? Historically, the common law only imposed fairness obligations on decision-makers performing a ‘judicial’ or ‘quasi-judicial’ function and, as noted above, the common law was not concerned with proceedings that were ‘preliminary’ or otherwise did not make determinations on legal rights and obligations. On these historical terms, it is unlikely that the common law doctrine of procedural fairness would say anything in relation to the Inquiry because the explicit terms of its mandate are limited to fact-finding and giving recommendations.

However in a series of decisions during the late 1970s and into the 1980s, the Supreme Court of Canada expanded the application of procedural fairness to non-judicial proceedings at the administrative level which affected the rights, interests, or privileges of a person (see e.g. *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, [1978](#)

[CanLII 24 \(SCC\)](#), *Martineau v Matsqui Institution*, [1980] 1 SCR 602, [1979 CanLII 184 \(SCC\)](#) and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, [1985 CanLII 23 \(SCC\)](#)). These decisions expanded the reach of the common law procedural fairness doctrine to matters other than those of a ‘judicial’ character, however decisions which are of a general legislative character were still left outside the scope of the doctrine. What exactly amounts to ‘legislative character’ is a matter of interpretation, however where the decision-maker is a legislature or cabinet there is a strong likelihood the proceedings will be viewed as being of a legislative character outside the reach of the common law procedural fairness doctrine (see *Att. Gen. of Can. v Inuit Tapirisat et al.*, [1980] 2 SCR 735, [1980 CanLII 21 \(SCC\)](#), *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, [1990 CanLII 138 \(SCC\)](#), *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, [1991 CanLII 74 \(SCC\)](#) and more recently *Canadian Doctors for Refugee Care v Canada (Attorney General)*, [2014 FC 651 \(CanLII\)](#)).

The decision to commission the Inquiry under the *Public Inquiries Act* was made by the Lieutenant Governor in Council, and thus this decision would almost certainly be characterized by the common law as a legislative decision. However as noted at the outset of this comment, where a legislative decision is, in substance, targeted at a specific person or group it may be that the decision is subject to procedural fairness obligations in the common law (see *Homex Realty v Wyoming*, [1980] 2 SCR 1011, [1980 CanLII 55 \(SCC\)](#)). And it is clear that this Inquiry is targeted at Canadian environmental NGOs. A successful judicial review application on this issue – such as the allegations of bias made by Ecojustice [here](#) - would likely result in the quashing of Order in Council, [O.C. 125/2019](#).

It is certain that the conduct of the Inquiry itself is within the scope of the common law procedural fairness doctrine. More specifically, in *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, [1997 CanLII 323 \(SCC\)](#), the Supreme Court of Canada confirmed that non-dispositive proceedings such as public inquiries are subject to the doctrine of procedural fairness. The Court observed that while public inquiries do not make findings on legal liability, the conclusions and recommendations of an inquiry may have an adverse impact on persons implicated in the investigation and that accordingly procedural fairness is essential to the legitimacy of the proceedings (at para 55). As well, the extent of fairness obligations will depend on the degree of proximity between the investigative proceedings and subsequent decisions which have adverse impacts.

We can expect that the common law will answer procedural questions left unanswered by the legislative framework. The common law will require that the commissioner act fairly in the exercise his discretionary powers on procedural entitlements during the Inquiry. This means that his decisions on matters such as standing, evidence, disclosure, and funding, must ensure that all persons whose rights or interests may be adversely affected by the Inquiry are given a reasonable opportunity to meet the case being compiled against them. To the extent that the commissioner’s interim report to the Minister is part of that adverse case, I would say the commissioner has a legal obligation to conduct a public hearing before he submits that interim report. This would also enhance the transparency of the Inquiry, which would be a very welcome development.

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