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The Alberta Inquiry and Freedom of Expression

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Matter Commented On: Alberta Inquiry into Anti-Alberta Energy Campaigns

Our colleagues Martin Olszynski and Shaun Fluker have posted concerns about the Alberta Inquiry into Anti-Alberta Energy Campaigns from the perspective of the rule of law and procedural fairness (see here and here). Amnesty International has also raised concerns about the Inquiry's "aggressive approach to defending the oil and gas industry from criticism" and the impact this approach will have on human rights defenders – especially those who are Indigenous, women, and/or environmental activists. Ecojustice flagged similar concerns about freedom of expression in its letter to Inquiry Commissioner Steve Allan.

To put these threats to expression in context, Ecojustice was warned to "watch its back" by Calgary businessman Brett Wilson on Twitter shortly after making its letter public. Alberta teachers have also come under fire for requiring students to critically reflect on the oil and gas industry. Former Wildrose leader Danielle Smith opined that "Schools are for education, not anti-energy indoctrination" and suggested that "we …need to get rid of teachers" who instill critical thinking about capitalism and the oil sands. More recently, a school dance was cancelled in Blackfalds after a grade four assignment asking students to compare industry and environmental perspectives led to threats against the teacher on a parents' Facebook forum. And in Airdrie, a father who was "irked" by an environment-focused presentation on the fossil fuel industry at his son's school received support from the government's new Canadian Energy Centre (aka the Energy War Room), which made a phone call to the local school board. The UCP has also admitted to blocking critical comments during Jason Kenney's Facebook livestream event on the Fair Deal Panel. At the same time, the government has insisted on maximizing freedom of expression in other settings. All Alberta universities must develop, obtain government approval for, and adhere to statements on freedom of expression that are consistent with the Chicago Principles (see e.g. the University of Calgary's new Statement on Freedom of Expression here and an article on the Chicago Principles here).

This post will explore what the *Charter* requires of governments when it comes to freedom of expression and how the Alberta Inquiry measures up against these requirements.

A Primer on Freedom of Expression Under the *Charter*

Section 2(b) of the *Charter* protects the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Freedom of expression is a "fundamental freedom" and its protection under the *Charter* is intended to promote several underlying values: seeking and attaining the truth; participation in social and political decision-

making; and diversity in individual self-fulfillment and human flourishing (*Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712; *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927). As with all *Charter*-protected freedoms, governments have a duty not to interfere with expression unless their actions can be justified as a reasonable limit under section 1 of the *Charter* (we expand on the principles related to interference and justification below).

The Supreme Court of Canada has interpreted the scope of section 2(b) broadly, such that it protects all activities that attempt to convey meaning except violence and threats of violence (see *Irwin Toy Ltd*; *R v Khawaja*, 2012 SCC 69 (CanLII)). Even expression that promotes hatred or is discriminatory is protected, although it is reasonable for governments to place some limits on those kinds of expression (see *R v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697; *R v Butler*, 1992 CanLII 124 (SCC), [1992] 1 SCR 452; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (CanLII)). Statements that are false, misleading or untrue are also protected under section 2(b), even if they are likely to cause injury or mischief to the public interest (see *R v Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731).

Just as there is constitutional protection of freedom of expression – or the freedom to express – the *Charter* also protects freedom from expression. Those with section 2(b) rights – both individuals and non-human entities such as corporations and NGOs – cannot be forced to articulate opinions that are not their own, unless there are justifiable reasons for doing so (see *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199).

Once the expression in question is found to fall within the protected scope of section 2(b), the next step is to determine whether the government has interfered with the expression. Government actions may interfere with freedom of expression in either their purpose or effect, and interference may consist of either placing limits on expression or forcing expression. Where a government interferes with expression because of its content – i.e. because of the meaning that the speaker is attempting to convey – this will automatically amount to a breach of section 2(b) and require justification under section 1 (*Irwin Toy*). For example, government limits on political speech, hate speech, discriminatory speech and false speech are all targeted at the content of the expression in question and therefore violate section 2(b) (*Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 (CanLII); *Keegstra*; *Whatcott*; *Zundel*). In other words, governments are required to remain neutral on the content of expression (*Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 (CanLII) at para 60).

Even where the government does not directly or intentionally limit the content of expression, it may be found in breach of section 2(b) where restrictions on the form or place of expression have the effect of limiting access to content. A classic example is a law restricting leaflets or posters. Even if the government's intent was to prevent littering or junk mail or to protect aesthetics, the effect of the law might be to prevent the distribution of materials that engage the values underlying freedom of expression – truth-seeking, democratic debate, and personal self-fulfillment (*Ramsden v Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 SCR 1084; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 (CanLII)). Where government actions interfere with or force expression so as to undermine these values, they will be in violation of section 2(b).

Restrictions on expression that are targeted at or disproportionately affect disadvantaged groups – such as overzealous enforcement of pornography laws by customs officials against a bookstore selling materials to LGB communities – may violate the equality rights protection in section 15 of the *Charter* as well as section 2(b) (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 (CanLII)). Where restrictions on expression are targeted at or disproportionately affect women, section 28 of the *Charter* – which guarantees all *Charter* rights equally to men and women – may be engaged as well (see e.g. Kerri Froc's argument that Quebec's religious symbols ban violates women's equal right to religious expression under section 28). Moreover, as the Supreme Court noted in *Little Sisters*, it is "fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary" (at para 124).

Under section 1 of the *Charter*, government justifications of violations of freedom of expression must have a pressing and substantial objective and pass a proportionality test that reviews whether the action has a rational connection to the government's objective, is minimally impairing of expression, and properly balances the harms of curtailing expression against the benefits of doing so (*R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103). There is much case law under section 1 of the *Charter*, but a few key principles relevant to our analysis are these:

- Limits on *Charter* rights and freedoms must be prescribed by law, and where a law or policy is so vague that it does not provide an intelligible standard, no section 1 justification is possible (*R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606). The rationales for the doctrine of vagueness relate to the rule of law. First, citizens require fair notice when their conduct is subject to the law (at para 52; see also Shaun Fluker's post for analysis of why individuals and organizations targeted by the Alberta Inquiry have fair notice rights). Second, a law cannot be so devoid of precision that once the government decides to act, the subject will be automatically captured (at para 54).
- Where the expression in question lies far from or undermines the values underlying freedom of expression – as is the case for hate propaganda or discriminatory speech – it will be easier for the government to justify limitations on such expression (*Keegstra*).
- Not all government objectives will be seen as pressing and substantial. For example, a law that had the objective of compelling observance of a Christian day of rest was found to be unconstitutional in its very purpose and could not be justified under section 1 (*R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295).
- Where the government is restricting expression in order to protect vulnerable groups, this can amount to a pressing and substantial objective under section 1 and courts may provide governments with some deference in reviewing how they decided to limit the expression in question (see *Irwin Toy; Keegstra; Butler; Whatcott*).
- Budgetary considerations alone will not normally be a pressing and substantial basis for violating *Charter* rights (*Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 (CanLII) at para 109), but a financial emergency might provide government some leeway in taking measures to balance fiscal priorities (*Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 (CanLII) at para 72)).

- Courts will consider the chilling effect that restrictions on expression have on other speech, normally as part of the rational connection test (*Keegstra*).
- Absolute or total bans on expression will always be more difficult for governments to justify, as by definition they are not minimally impairing of section 2(b) freedoms (*Ramsden*). Vagueness is also relevant under the minimal impairment branch as it may result in a law or policy being overbroad (*Nova Scotia Pharmaceutical Society)*.

A Consideration of the Alberta Inquiry and Freedom of Expression

As noted on the website of the Public Inquiry into Anti-Alberta Energy Campaigns, the Commissioner's mandate is to "inquire into anti-Alberta energy campaigns that are supported, in whole or in part, by foreign organizations" including "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." There are serious problems with this government-created mandate from a freedom of expression perspective.

To the extent the mandate relates to Canadian organizations that have "disseminated misleading or false information about the Alberta oil and gas industry", it appears that the government has already characterized the expressive activities of environmental organizations, or at least some of them, as false or misleading. Even if that were the case – which is debatable – false and misleading expression is protected under section 2(b) of the *Charter*. Alternatively, as argued by Ecojustice, Commissioner Allan's mandate requires him to inquire into whether Canadian organizations have exercised their freedom of expression in a way that is false or misleading toward the Alberta oil and gas industry. In either case, the Inquiry is not looking at false and misleading statements generally, just those deemed or found to be anti-energy/Albertan. It is therefore assessing the relevant expression based on its content. Put another way, the purpose of the Inquiry appears to be to limit the things Canadian organizations can say about the Alberta oil and gas industry without suffering some kind of consequences (presumably including a possible loss of government funding). If that is not the government's very purpose, then the effects of the Inquiry will be to limit access to content, i.e. to critical commentary about the industry. This content-based interference with expression violates section 2(b).

It would be no answer for the government to claim that its real focus is foreign organizations – to paraphrase *Little Sisters*, expression that is free within Canada cannot become the subject of government stigmatization and harassment simply because the organization receives funding from a foreign source. Moreover, the Inquiry does not target foreign funding generally – foreign funding to the Alberta oil and gas industry is outside its scope, supporting the argument that the Inquiry's mandate is tied to content.

An unconstitutional purpose is sufficient to find a violation of section 2(b), but it is also useful in this case to consider the effects of the government's actions. Amnesty International and Ecojustice have expressed concerns about the chilling impact of the Inquiry on human rights defenders and environmental activists. Brett Wilson's and Danielle Smith's comments and the Blackfalds and Airdrie incidents are examples of how targeting the expression of specific groups can embolden others to make similar threats to expressive activities and indeed can normalize such threats. The underlying values of freedom of expression are inevitably harmed when the

government targets the content of expression without regard for the effects of doing so, especially when specific groups are targeted. The attack on organizations expressing concerns about the oil and gas industry – and the silencing of individuals challenging the Fair Deal Panel – coupled with the "hyperpartisan" Energy War Room and the government's insistence on protecting freedom of expression of almost every kind on university campuses, show that the government is breaching its duty to be neutral on the content of expression it restricts, promotes or demands.

Amnesty's argument that the government's attempts to silence human rights and environmental defenders will have an adverse impact on women and Indigenous people also engages sections 15 and 28 of the *Charter*. This argument is supported by a Special Rapporteur's report on the Situation of women human rights defenders which was released by the UN General Assembly earlier this year. The report recognizes that while women human rights defenders and environmental activists "often face the same risks that defenders who are men face" to their fundamental freedoms, they also "face additional and different risks and obstacles that are gendered, intersectional and shaped by entrenched gender stereotypes and deeply held ideas and norms about who women are and how women should be" (at para 6). Indigenous women "fighting for land and environmental rights" are one group of women facing these additional risks (at paras 3, 63), and additional UN reports document the risks faced by Indigenous human rights and environmental activists more broadly (see the Human Rights Council's 2019 resolution Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development and the 2018 Report of the Special Rapporteur on the rights of indigenous peoples).

Could these violations be justified by the government under section 1 of the *Charter*? The onus would be on the government to justify the Alberta Inquiry's impact on freedom of expression, so our analysis here is necessarily speculative.

Before even getting to the application of the *Oakes* test, a reviewing court may decide that the limit on *Charter* rights is unconstitutionally vague and cannot be justified. The Inquiry's mandate defines "anti-Alberta energy campaign" to mean "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." There are some elements of this definition that could lead to serious difficulty in interpretation, such as "attempts to directly or indirectly delay or frustrate." Would objecting to potentially harmful aspects of a project during an environmental assessment fulfill this requirement? What if legal counsel for the objector worked for an organization that was partially funded by international sources? The phrases "timely, economic, efficient and responsible development of … Alberta's oil and gas industry" and "misleading or false information" are also ambiguous and subject to controversy, as Martin Olszynski argued in his post.

Another question to ask at the outset of section 1 analysis is how much deference the court would owe the government in attempting to justify its violation of section 2(b). Here it is important to note that even if the information being shared by Canadian organizations about the Alberta oil and gas industry was found to be false or misleading – which again, is debatable – that kind of expression can serve a useful social purpose. The Supreme Court recognized in

Zundel that false, misleading or exaggerated information "arguably has intrinsic value in fostering political participation and individual self-fulfilment" (at para 29). So this is not the kind of "low value" expression that warrants deference to the government under section 1.

The next question would be whether the Alberta Inquiry has a pressing and substantial reason for restricting the freedom of expression of Canadian organizations disseminating information about the Alberta oil and gas industry. Governments have a fair bit of leeway in articulating what their objectives are, but it is important for courts not to accept objectives that are too broadly defined, as that will skew the entire section 1 analysis.

The government would probably argue that its objective in forming the Inquiry was to identify and prevent misinformation that may have a negative impact on the Alberta oil and gas industry. However, as noted elsewhere, the way to prevent misinformation in a free and democratic society is to counter it with better information, not restrict its availability – which raises rational connection problems with this objective. Further, if it could be shown that the real objective of the Inquiry was to silence environmental activists and human rights defenders, or – to borrow Professor Olszynski's words, delegitimize and stigmatize them – that would be an unconstitutional purpose and the government's justification would fail.

Although governments can rely on the protection of vulnerable groups from the harms of certain kinds of expression, that argument would be difficult to put forward here. In spite of the economic downturn that has decreased profits and led to layoffs, it is difficult to see the oil and gas industry as a vulnerable group analogous to the victims of hate speech (*Keegstra* and *Whatcott*) or the victims of pornography (*Butler*). And while the Supreme Court has said that financial emergencies can amount to a pressing and substantial basis for restricting *Charter* rights in some circumstances, the only case where they have accepted this objective involved denying a financial benefit to one group (pay equity adjustments for women workers) so the cost savings could be spent elsewhere (e.g. hospital beds) (*N.A.P.E.* at para 75). This sort of "rights versus dollars" approach has the potential to seriously undermine *Charter* protections and must be approached with caution (see here). In the case of the Inquiry, restricting expression in order to deal with the budgetary problems presented by falling oil and gas revenues is a questionable objective at best, and also presents rational connection problems.

Another objective the government might put forward is that the Inquiry is aimed at reducing the level of foreign control over messaging about the oil and gas industry. However, even if that objective was legitimate, it would also have rational connection problems in light of the research showing that foreign influence is minimal in this context (see Martin Olszynski's post for more on that point).

We have already raised the chilling effects on expression that the Alberta Inquiry may cause, and this point would be relevant under the rational connection and minimal impairment stages of analysis as well. If government action has the effect of chilling legitimate speech, then any objective the government can raise for restricting problematic speech arguably goes too far and loses a rational connection to its aims. This sort of overbreadth also raises minimal impairment concerns, as do the vagueness problems we noted earlier. Although the Alberta Inquiry is not imposing a total ban on the expression of environmental activists and human rights defenders,

the chilling effects of the Inquiry and the uncertainty its vague mandate creates around what can and cannot be said without adverse consequences are not minimally impairing of expression.

The final stage of section 1 analysis asks whether the beneficial effects of the restrictions on expression outweigh the harmful effects. The beneficial effects of the Inquiry are hypothetical, especially considering that the situation faced by Alberta's oil and gas industry has not been shown to be connected to any misinformation that Canadian organizations are allegedly sharing. And the Inquiry's harmful effects on expression have already begun to occur, considering again the normalization of backlash exemplified by the incidents we discuss in the introduction and the chill on expression that will likely result. Combined with the adverse impact the Inquiry is likely to have on women and Indigenous human rights defenders and environmental activists, the Inquiry's harmful effects arguably outweigh any beneficial impact.

At the end of the day, we believe there are strong arguments that the Alberta Inquiry unjustifiably violates the freedom of expression of the Canadian organizations it is aimed at as well as those associated with such organizations, including their members and supporters.

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