October 13, 2020

Commissioner Steve Allan
Public Inquiry into Anti-Alberta Energy Campaigns

Re: Section 25 Application regarding the Commissioner's Ruling on Interpretation

The letter sets out the factual and legal basis for a section 25 application pursuant to the Rules of Procedure requesting that the Commissioner either (i) reconsider his September 14, 2020 interpretation[1] of the Inquiry's Terms of Reference; or (ii) request Cabinet to further amend the Terms of Reference as necessary. As further set out below, the Commissioner's interpretation is both substantively unreasonable and amounts to a breach of procedural fairness.

A. The Issue: Timely, Economic, Efficient and Responsible Development

The Terms of Reference define "anti-Alberta energy campaign" as follows (underlining added):

> 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.[2]

The Commissioner's ruling, however, attempts to excise the underlined portions of this definition, and replace it simply with "some level of oil and gas development":

> [7] ...I do not interpret it to be my role to determine whether a particular project is "economic, efficient and responsible". Alberta and Canada have regulatory frameworks set up to make these determinations, which I do not interpret as my mandate to duplicate. Moreover, the Commission does not have the resources or time necessary to review the merits of individual projects at the regulatory level. Accordingly, I will proceed from the basis that some level of oil and gas development in Alberta is "economic, efficient and responsible" and focus on opposition to development Alberta's oil and gas resources in a broad and general sense.

This interpretation is unreasonable in light of the plain wording of the Terms of Reference as well as the evidentiary record. It also amounts to a breach of procedural fairness in that it deprives potentially named groups of a potentially important defence to any adverse findings or findings of misconduct, namely that they were not opposed to timely, economic, efficient, and responsible development but rather to uneconomic, inefficient, and irresponsible development.

B. The Commissioner's Interpretation is Unreasonable

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[3] the Supreme Court of Canada clarified that "an administrative decision maker's interpretation of a statutory provision must be

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[1] See https://albertainquiry.ca/sites/default/files/2020-09/Ruling-on-Interpretation-091420-TOR.pdf
[2] Order in Council 125/2019.
[3] 2019 SCC 65 [*Vavilov*].

consistent with the text, context and purpose of the provision... Where, for example, the words used are 'precise and unequivocal,' their ordinary meaning will usually play a more significant role in the interpretive exercise…Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements."[4]

In light of this guidance, it is untenable for the Commissioner to conflate "the timely, economic, efficient and responsible development of Alberta's oil and gas resources" with "some level of oil and gas development in Alberta." Rather, this is an attempt to do what only the Lieutenant Governor-in-Council may do – *and in fact has already twice done* – under the *Public Inquiries Act*[5]: amend the Terms of Reference.

Nor is this clear departure from the plain wording and context of the Terms of Reference saved by the Commissioner's reasoning. First, the Terms of Reference do not refer to individual projects, but to timely, economic, efficient and responsible development in a general sense. Thus, while reassessing individual energy projects might indeed have been a massive undertaking, the Commissioner has not been asked to do so.[6] Rather, on a plain reading, the Terms of Reference require the Commissioner to determine whether a given campaign attempted to delay or frustrate the timely, economic, efficient and responsible development of Alberta's oil and gas resources.

More concretely, this definition would appear to exclude campaigns opposed to development in Alberta that was *not* economic, efficient, or responsible, evidence of which was submitted to the Commissioner during Phase 1 of the Inquiry.[7] Thus, apart from the plain wording of the Terms of Reference, the Commissioner's interpretation is also unreasonable in light of the record before him (regardless of whether such record is private or public pursuant to section 9 of the Rules of Procedure). As noted by the Supreme Court of Canada in *Vavilov*:

> [126] …a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it…[8]

The Inquiry's record includes six independent reviews of all, or parts of, Alberta's and Canada's regulatory systems spanning a nearly ten-year period between 2006 and 2015:

- "Investing in our Future: Responding to the Rapid Growth of Oil Sands Development: Final Report" December 29, 2006 (Radke Report)

[4] Ibid at para 120.
[5] RSA 1980, c P-29.
[6] Even if this were the task before the Commissioner, it is doubtful that he could refuse one so clearly assigned to him on the basis that in his view it would require too many resources.
[7] Submission by Martin Olszynski to the Alberta Inquiry (submissions@albertainquiry.ca), dated Tuesday, December 17, 2019 at 2:33 pm (email and confirmation of receipt on record with the applicant).
[8] *Vavilov supra* note 3 at para 126 [emphasis added].

- The Royal Society of Canada, "Environmental and Health Impacts of Canada's Oil Sands Industry" (2010)
- "A World Class Environmental Monitoring, Evaluation and Reporting System for Alberta: The Report of the Alberta Environmental Monitoring Panel" (June 2011)
- 2011 October Report of the Commissioner of the Environment and Sustainable Development, Chapter 2—Assessing Cumulative Environmental Effects of Oil Sands Projects
- 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
- 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.

Nowhere in his ruling on interpretation does the Commissioner discuss these reports and how they might assist him in carrying out his mandate or, if he is of the view that they do not, why that is the case. His ruling does not meet the standard of justification set out by the Supreme Court of Canada in *Vavilov*.[9]

C. **The Commissioner's Interpretation Breaches Procedural Fairness**

In addition to being unreasonable, the Commissioner's interpretation would appear to deprive groups of the ability to introduce evidence supporting a potentially important defence to any adverse findings or allegations of misconduct, namely that they did not oppose *any and all* oil and gas development, or some other fictitious level of development, but rather development that they considered to be inefficient, uneconomic, and/or irresponsible.[10] As noted by leading administrative law scholars, "discretionary decisions over the admissibility of evidence must not remove the entitlement of affected persons to have a reasonable opportunity to make their case."[11] By attempting to excise the above noted portions of the definition of "anti-Alberta energy campaigns," the Commissioner appears to have done just that.

D. Relief Sought

The Commissioner should reconsider his interpretation, taking into account the issues set out above. Alternatively, the Commissioner may wish to request Cabinet to further amend the Terms of Reference with a view towards remedying these defects. Bearing in mind the considerable delay that has already plagued this Inquiry, **I respectfully request a response within three (3) weeks**. If no corrective action is forthcoming by that time, an application for judicial review may be commenced.

I look forward to hearing from you.

Martin Olszynski

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[9] Ibid at para 2.
[10] See e.g. *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471.
[11] Gus Van Harten et al, *Administrative Law: Cases, Texts, and Materials*, 7th ed. (Emond: Toronto, 2015) at 412.