Court of Queen's Bench of Alberta

Citation: Ecojustice Canada Society v Alberta, 2021 ABQB 397

Date:
Docket: 1901 16255
Registry: Calgary

Between:

Ecojustice Canada Society

Applicant

- and -

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*

Respondents

- and -

Indian Resource Council Inc., the Explorers and Producers Association of Canada, and W. Brett Wilson

Intervenors

Memorandum of Decision
of the
Honourable Madam Justice K.M. Horner

I. Introduction

[1] The Government of Alberta recommended a public inquiry into anti-Alberta energy campaigns supported by foreign organizations (the "Inquiry"). The Lieutenant Governor in

Council initiated the Inquiry by Order in Council 125/2019 dated July 4, 2019 (the "OIC"). In the OIC, Jackson Stephens Allan was appointed as the Commissioner pursuant to the *Public Inquiries Act*, RSA 2000, c P-39 to conduct the Inquiry in accordance with Terms of Reference ("T of R") appended to the OIC.

[2] Ecojustice Canada Society ("Ecojustice") brings this Application for Judicial Review ("Application") requesting that the Court find the Inquiry is unlawful, naming as respondents Her Majesty the Queen in Right of Alberta ("Alberta"), the Lieutenant Governor in Council ("LGIC"), the Minister of Justice and Solicitor General for Alberta (the "Minister"), and Mr. Allan (or Commissioner Allan)

II. Background

The Inquiry

[3] The Inquiry was established pursuant to section 2 of the *Public Inquiries Act*, which permits inquiries into matters within the provincial government's jurisdiction. Section 2 provides:

> 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
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> (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.

[4] The OIC that launched the Inquiry sets out its purpose in the Preamble, which affirms the Government of Alberta's commitment to the "timely, economic, efficient and responsible development" of the oil and gas industry in Alberta and, more broadly, Canada. The Preamble references 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". Further, the Preamble establishes the following premise:

> 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;

[5] In signing the OIC, the LGIC ordered the Inquiry, declaring this issue to be of public concern and appointing Mr. Allan as the Commissioner. The T of R appended to the OIC, as amended, establishes the Commissioner's mandate at section 2:

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:

(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.

(2) As part of the inquiry, the commissioner shall examine the work completed by other investigations in other jurisdictions into similar activities or alleged activities, including but not limited to the following:

(a) the 2017 report by the Office of the Director of National Intelligence of the United States of America, entitled *Background to 'Assessing Russian Activities and Intentions in Recent US Elections': The Analytic Process and Cyber Incident Attribution*;

(b) the 2018 United States House of Representatives Committee on Science, Space and Technology Majority Staff Report, entitled *Russian Attempts to Influence U.S. Domestic Energy Markets by Exploiting Social Media.*

(3) The commissioner shall make such findings and recommendations as the commissioner considers advisable, and may make findings and recommendations 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 if any anti-Alberta energy campaigns are 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 by recommending the interpretation of existing eligibility criteria or the creation of new eligibility criteria for attaining or maintaining charitable status.

[6] The Commissioner's mandate is expansive, as the "Alberta oil and gas industry" is broadly defined in section 1(a) of the T of R as:

> (i) any and all aspects of Alberta's petroleum and natural gas sectors, including the exploration, development, extraction, storage, processing, upgrading and refining of Alberta's oil and gas resources, and
>
> (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.

[7] While "anti-Alberta energy campaign" is defined in section 1(b) of the T of R as:

> means attempt 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 that resources to commercial market, by any means, which may include, by the dissemination of misleading or false information;

[8] The T of R have been amended by Orders In Council: 191/2020 dated June 25, 2020; 249/2020 dated August 5, 2020; 326/2020 dated October 28, 2020 and 039/2021 dated January 29, 2021. Although this last amendment was made after the briefs in this matter were filed I take judicial notice of it as permitted by section 12 of the *Judicature Act* RSA 2000, J-2. By the current T of R the Commissioner is to submit the final report no later than May 31, 2021 and the Minister of Energy is to publish the final report within 90 days of receiving it.

[9] Ecojustice filed this Application on November 19, 2019, and in December 2019 a Consent Order of this Court was obtained setting the hearing down for two days in April 2020 which hearing was then adjourned due to the Covid-19 crisis. In January 2020, each of the LGIC and the Commissioner filed a Certified Record in response to a Notice to Obtain Record of Proceedings served on each party by Ecojustice on November 19, 2019.

[10] In March 2020 the Indian Resource Council Inc, the Explorers and Producers Association of Canada and W. Brett Wilson ("the Intervenors") applied for leave to intervene on the Application which application was partially granted in a decision of this court on June 11, 2020. On July 17, 2020, Ecojustice applied for an Injunction staying the proceedings of the Inquiry until final disposition by the courts of the Application. This stay application was denied in a decision of this court on November 26, 2020. On September 15, 2020 the Commissioner posted to the Inquiry's website his Ruling on Interpretation of the T of R ("Ruling").

[11] After the hearing dates of February 11 and 12, 2021 had been scheduled Ecojustice filed a Notice of Constitutional Question ("Question") on January 15, 2021 to be heard at the same time as its Application. Essentially the issue framed in the Question, whether the OIC as amended is in pith and substance related to matters of exclusive federal jurisdiction and therefore *ultra vires* the jurisdiction of the LGIC to enact, overlaps with the relief sought in paragraph 1(b) of the Application. Ecojustice by filing and serving the Question seeks to perfect its notice and ensure the issue is properly before the court.

III. The Application

[12] Ecojustice seeks to halt the Inquiry into anti-Alberta energy campaigns, or given the current timing to restrict the publication of the report and other information. It has brought an Application alleging the following grounds:

(a) The Inquiry has been brought for an improper purpose and therefore is *ultra vires* the authority granted to the Lieutenant Governor in Council under section 2 of the *Public Inquiries Act*;

(b) Certain matters identified in the OIC and T of R are matters of exclusive federal jurisdiction and therefore are *ultra vires* the jurisdiction of the Lieutenant Governor in Council to so order; and,

(c) The OIC and T of R for the Inquiry, the political context of the Inquiry, and the Inquiry commissioner's political donations to the United Conservative Party and the now-Minister of Justice lead to a reasonable apprehension of bias.

[13] With respect to ground (a), Ecojustice asserts in its Application that the Inquiry has been called to justify the Government of Alberta's intent to harm the reputations, economic viability and freedom of expression of organizations who have opposed its position with respect to oil and gas development, as opposed to addressing a matter of pressing public interest. Further, Ecojustice argues that public comments made by government officials and incorporated in the OIC and T of R demonstrate that it was established for partisan political purposes, as opposed to independent fact-finding on a matter of public interest. Ecojustice submits this is outside the scope of section 2 of the *Public Inquiries Act (*the *"Act")*, RSA 2000, c P-39.

[14] With respect to ground (b), Ecojustice argues that the Inquiry is essentially concerned with matters of federal jurisdiction that are *ultra vires* the jurisdiction of the LGIC. Specifically, the focus of the OIC and T of R relates to issues of exclusive federal jurisdiction, including:

(a) the transfer of funds from outside Canada to organizations within Canada;

(b) the funding of Canadian organizations by municipal, provincial and territorial governments outside of Alberta and the Government of Canada;

(c) the charitable status of Canadian organizations; and

(d) the opposition to the transportation of Alberta oil and gas resources by railways and pipelines under federal jurisdiction.

[15] Finally, with respect to ground (c), Ecojustice argues that the OIC and T of R predetermine certain matters before the Commissioner, which fetters his fact-finding and decision-making discretion. For example, Ecojustice says the OIC and T of R predetermine the existence of anti-Alberta energy campaigns and foreign funding of these campaigns, predetermine that Canadian organizations disseminated misleading or false information about the Alberta oil and gas industry, and pejoratively label certain positions as anti-Alberta.

[16] Ecojustice states that these and other predeterminations, as well as extensive public comments by the United Conservative Party ("UCP"), the Premier and the Minister, and political contributions made by the Commissioner to the UCP and to the leadership campaign of the then Minister all result in a cumulative impact that leads to a reasonable apprehension of bias.

[17] On its Application Ecojustice seeks an Order:

(a) declaring the OIC to be *ultra vires* the jurisdiction of the LGIC;

(b) in the alternative, declaring the OIC void or invalid;

(c) in the alternative, quashing the OIC;

(d) in the alternative, declaring the matters identified as within federal jurisdiction to be *ultra vires* the jurisdiction of the LGIC to order and contrary to section 2 of the *Public Inquiries Act*;

(e) in the alternative, for a remedy 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; and,

(f) for costs.

IV. Issues

[18] The issues are as follows:

A. What is or are the Decision(s) under review and what is the evidentiary Record for the purposes of determining the issues in this Application?

B. Is the OIC *ultra vires* the authority of the LGIC as granted by section 2 of the *Act* as having been brought for an improper purpose?

C. Is the OIC *ultra vires* the jurisdiction of the LGIC as it encroaches on matters of exclusive federal jurisdiction?

D. Is the OIC void or voidable as it, the T of R and the past conduct of Mr. Allan give rise to a reasonable apprehension of bias?

A. The Decision(s) for Review and the Record

[19] The decision for review before this court is that of the LGIC in enacting the OIC at the direction of Cabinet. The *Interpretation Act* RSA 2000, c-8, makes it clear at section 28(1)(dd) that the LGIC " means 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. The LGIC and the Commissioner submit that as none of the three issues outlined in the Application were properly put before the Commissioner for a decision there is no decision by the Commissioner for this court to review such that the LGIC's decision in enacting the OIC is the only decision for review.

[20] Ecojustice takes the position that its letter to the Commissioner of September 17, 2019 requesting amendments to the T of R based on its allegation of reasonable apprehension of bias and the grounds for relief in its Application filed on November 2019, also asserting a reasonable apprehension of bias, and the Commissioner's failure to respond or to make the requested amendments, constitute by omission or failure, a deemed decision by the Commissioner not to recuse himself.

[21] Ecojustice takes the position that both the decision of the LGIC in enacting the OIC and the deemed decision of the Commissioner are both decisions that are under review and encompassed by their Application.

[22] I agree, and find that the correspondence and Application were an implicit request for the Commissioner to recuse himself which by continuing the inquiry he refused to do. This additional decision is also encompassed by the Application

[23] When making a decision on an application for judicial review the court may consider the following evidence only:

a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
b) if questioning was permitted under rule 3.21, a transcript of that questioning;
c) anything permitted by any other rule or by an enactment;
d) any other evidence permitted by the court.

[24] The Commissioner submits that notwithstanding its agreement with the LGIC in a narrower reading of the Application, he submitted his Record and Supplemental Record ("Record") for a number of reasons. He points out that as a named Respondent in the Notice he was required to respond to the Notice to Obtain Record in Proceeding. That his Record would provide this court with fulsome evidentiary materials that would assist in putting the submissions of Ecojustice in a proper context. He submits he was concerned that if he did not provide his Record then Ecojustice could have requested that the court grant it the right to question the Commissioner under Rule 3.21 of the *Alberta Rules of Court* and enter any resulting transcript under Rule 3.22(b); or that Ecojustice could have requested that the court admit other evidence such as an Affidavit from Ecojustice setting out only the evidence that Ecojustice deemed relevant under Rule 3.22(d). Finally, the Commissioner submits that in cases where an allegation of bias has been made additional evidence may be admitted to fill gaps in the evidence: ***Bergman v Innisfree (Village)***, 2020 ABQB 661 at para 45. Thus in order to avoid delay, additional expense and to enhance the efficiency of the proceedings he chose to file his Record.

[25] The Record filed by the LGIC contains the documents that were before the provincial Cabinet at the time the decision to enact the OIC was made. The Record filed by the Commissioner contains details on the Inquiry from its website, correspondence between himself and Ecojustice between September and November 2019, details of Mr. Allan's political donations prior to the OIC and e-mails between Mr. Allan and others detailing his relationship with among others, then Justice Minister Doug Schweitzer.

[26] I accept that the Record from the Commissioner is necessary to fill gaps in the evidence and is helpful to the court in its consideration of the allegation of bias and I admit it as evidence under Rule 3.22(d) of the *Alberta Rules of Court.*

B. Improper Purpose

[27] Ecojustice and the Crown take diametrically opposing views on the applicable standard of review with respect to the first ground for this judicial review: namely, that the Inquiry has been brought for an improper purpose and is therefore *ultra vires* of the authority granted to the LGIC under section 2 of the *Act*.

[28] Ecojustice argues that the applicable standard of review is that of reasonableness, citing ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [***Vavilov***]. The Crown asserts that *Vavilov* is inapplicable in the present circumstances. It primarily relies on ***Katz Group Canada Inc v Ontario (Health and Long-Term Care)***, 2013 SCC 64 [***Katz Group***]

to argue that this Court should only consider the basic jurisdictional requirements and afford significant deference to the validity of the OIC and the Inquiry. In the alternative that ***Vavilov*** is found to apply, the Crown submits that this Court's reasonableness analysis should be informed by the legal principles arising out of ***Katz Group***.

[29] In my view, the Crown has mischaracterized Ecojustice's first ground for judicial review and is thereby relying on jurisprudence that is of little assistance to its position. Contrary to what the Crown is seemingly suggesting, Ecojustice does not challenge the *vires* of the *Act* or any provisions therein. To that end, ***Katz Group*** bears little relevance to the present case. In ***Katz Group***, the appellant pharmacies attacked the validity of certain regulations, on the basis that they were *ultra vires* their parent statutes. The high deference that attaches to the judicial review of regulations is engaged where a party challenges the validity of subordinate legislation, not where the challenge pertains to the interpretation of certain provisions within the subordinate legislation.

[30] Based on my understanding of Ecojustice's submissions, Ecojustice challenges the provincial government's interpretation of the scope of authority granted by section 2 of the *Act.* Specifically, according to Ecojustice, an inquiry that is allegedly rooted in political motives cannot be considered "expedient" and "in the public interest" and cannot constitute a matter "connected with the good government of Alberta or the conduct of the public business of Alberta" or "of public concern." In other words, it is for an improper purpose.

[31] Considering the above, I agree with Ecojustice that ***Vavilov*** is the applicable case authority in the present case. Under the ***Vavilov*** regime, reasonableness is now the presumed applicable standard of review: at para 16. Briefly, the presumption of reasonableness can be rebutted (1) where the legislature has indicated that a different standard should apply and (2) where the rule of law requires that the standard of correctness be applied: ***Vavilov*** at para 17. The factual circumstances of the present case do not fall under either of the two exceptions outlined in ***Vavilov***, and as such, this Court's quest is to determine whether it was reasonable for the Cabinet to conclude, based on its interpretation of section 2 of the *Act*, that the Inquiry fell within the purview of the legislation.

[32] The law with respect to the court's role in reviewing subordinate legislation such as an OIC from the executive branch is outlined in three leading SCC decisions: ***Inuit Tapirisat of Canada v Attorney General of Canada*** (1980) 2 SCR 735; ***Thorne's Hardware Ltd v The Queen*** (1983) 1 SCR 106; and ***Katz Group***. These decisions make it clear that the exercise of legislative power given to the executive by statute must be within the boundary of the statute both as to empowerment and purpose but the executive is otherwise free to exercise its discretion as it sees fit except in an egregious case. My review for reasonableness of the LGIC's decision in enacting the OIC will be informed by these decisions.

[33] The case law directs that the court should only strike subordinate legislation if it: 1) is irrelevant, extraneous, or completely unrelated to the statutory purpose; or 2) fails to comply with a necessary statutory requirement; or 3) was enacted in egregious circumstances such as bad faith.

[34] These cases further confirm that the court is not empowered to review: the policy merits of the subordinate legislation; any underlying political, economic, social, or partisan considerations; the motives for enacting the subordinate legislation; whether it is necessary, wise

or effective; whether it will succeed in achieving its stated objectives; the sufficiency of the evidence before the decision maker(s); and the validity of the decision maker(s) beliefs.

[35] The decision before this court for review for reasonableness is whether the OIC is inconsistent with the statutory purpose of the *Act*, failed to comply with a legislative requirement or was enacted in the context of egregious circumstances.

[36] Ecojustice accepts that the discretion afforded to the LGIC under section 2 of the *Act* is broad and of limited review by the courts. It submits that although the statutory prerequisite appear to have been met, the real purpose of the Inquiry is unrelated to the statutory purpose of this Act. They submit additionally that the Cabinet's motive in enacting the OIC is egregious as it was done in bad faith.

[37] It is clear on its face that the OIC complies with the statutory requirements. It argues, using ***Roncarelli v Duplessis,*** (1959) SCR 121 at paras 121 and 140, as its foundation that good faith in this context means acting with a rational appreciation of intent and purpose and not to arbitrarily attempt to divest a party of its civil status.

[38] Although decisions by the LGIC in matters of public convenience and general policy are final and not reviewable in legal proceedings Ecojustice submits that the court can intervene in egregious cases to examine the motives of the LGIC and ensure that they are not unreasonable, whimsical, speculative or political.

[39] It grounds this position in the dated Alberta decision ***Alberta Teacher's Association v Alberta***, 2002 ABQB 240. With respect, I do not agree that this position can be supported by that decision. Justice Wachowich as he then was, determined that the wording of the statute under consideration required as a statutory condition precedent that the LGIC must form an opinion as to emergent circumstances and on the evidence before the court it had not. Therefore, the OIC under consideration failed for lack of a statutory requirement.

[40] Ecojustice submits that the purpose of the OIC in the present case is to target any person or group who opposes energy development and to "fight back" against those people or groups by investigating their funding sources. It states the government intent is clearly to harm these people or groups which is an improper purpose and outside the scope of the *Act* as it constitutes bad faith. It asks this court to have reference to material outside the Record of the LGIC in supporting this position, such as speeches of Premier Kenny and then Minister of Justice Douglas Schweitzer.

[41] The Intervenors and the Crown are of the view that the Inquiry was properly enacted. From a big picture perspective they collectively are of the view that good government requires good information. The subject matter may have a political component but that is all the more reason to appoint an independent third party to gather information and present its findings to cabinet. The stated purpose of the OIC is to gather information about foreign or otherwise funding of anti-Alberta energy campaigns that may 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. It is not to harm or damage people or groups opposed to the development of the province's energy resources but rather its function is information gathering and making recommendations only.

[42] I am of the view that the OIC meets the statutory requirements on its face. The language in the preamble states that the subject matter is in the public interest and a matter of public

concern. There is sufficient evidence on the Record of the Crown to find that cabinet made its own assessment of the subject matter and exercised its discretion to direct the Inquiry independently of the statements of members of the government outside the legislature.

[43] The Record of the Crown and the T of R as amended further support a finding that the subject matter of the Inquiry is information gathering only and not adversarial as posited by Ecojustice. The Commissioner "may" make findings and recommendations to the government that assists the government in its next actions, if any.

[44] The fact that the Inquiry may report on the funding of certain people or groups is not in and of itself bad faith or egregious circumstances such that court intervention may be warranted.

[45] The enactment of the OIC by the LGIC was a reasonable exercise of Cabinet discretion and accordingly Ecojustice's Application to quash or vacate the OIC on the ground of improper purpose is dismissed.

C. Constitutionality

[46] Ecojustice asserts that the OIC, based on its pith and substance, encroaches upon matters of exclusive federal jurisdiction and is thus *ultra vires* the jurisdiction of the LGIC for Alberta. In addition to its Application for Judicial Review, Ecojustice filed a Notice of Constitutional Question on January 15, 2021, wherein the following question was raised:

> Whether Order in Council 125/2019 of the Lieutenant Governor in Council for Alberta issued on July 4, 2019, as amended by Orders in Council 191/2020, 249/2020 and 326/2020, and the appended Terms of Reference, are in pith and substance related to matters of exclusive federal jurisdiction and therefore *ultra vires* the jurisdiction of the Lieutenant Governor in Council to so order.

[47] Ecojustice asks this Court to declare the OIC, as amended, void, invalid, or *ultra vires* the provincial legislature and the *Act*, or in the alternative, asks that this Court quash the OIC altogether. Further in the alternative, Ecojustice seeks an order 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.

[48] The Crown is of the view that the OIC establishes a public inquiry into foreign funding of anti-Alberta energy campaigns in order to assemble information and recommendations that will assist the Government of Alberta's policy-making vis-à-vis the province's oil and gas industry. The Crown submits that this falls within the province's constitutional jurisdiction over regulation and development of natural resources, and as such, Ecojustice's application should be dismissed.

[49] As a preliminary issue, the Commissioner argues that this Court should not consider the constitutionality question, as Ecojustice did not first seek a determination from the Commissioner. The Commissioner contends that because he is imbued with the power to determine questions of law relating to a provision, it follows that he has the jurisdiction to determine the constitutional validity of the provision. Generally speaking, there are important rationales behind endowing an administrative decision maker with the authority to determine issues of constitutional validity. The scope of such authority was carefully canvassed by the Supreme Court of Canada in ***Nova Scotia (Workers' Compensation Board) v Martin***, 2003 SCC 54 at para 28 [***Martin***].

[50] However, following ***Martin***, the Alberta legislature introduced certain provisions to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, effectively limiting the application of ***Martin*** in the province. Section 11 of the *Administrative Procedures and Jurisdiction Act* states that "a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so." Schedule 1 to the *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006 contains an exhaustive list of decision makers on whom such jurisdiction is conferred.

[51] As noted by Ecojustice, the Commissioner is not a decision maker listed under Schedule 1 and thus has no jurisdiction to determine questions of constitutional law. Consequently, Ecojustice's failure to seek the Commissioner's decision in the first instance does not form a proper basis on which this Court should decline to consider the constitutionality issue.

[52] Given that Ecojustice has filed both an Application for Judicial Review and a Notice of Constitutional Question, it has proposed two possible approaches. If the constitutionality issue at hand is regarded as a judicial review of the Cabinet's interpretation of section 2 of *Act*, the standard of review is correctness: ***Vavilov*** at para 55. Alternatively, if the issue is viewed as one of constitutionality, the question of standard of review does not arise.

[53] In my view, because the Cabinet's interpretation as to the scope of *Act* is not readily apparent from the OIC alone, it would be inappropriate to determine the issue under the parameters of a judicial review. Accordingly, I will address the OIC and its constitutionality as a pure question of law, and to that end, the question of standard of review does not arise.

Analysis

[54] Federalism is one of the four fundamental guiding principles of Canada's constitutional order. The underlying structures of federalism, which run through Canada's political and legal systems, infuse and breathe life into the nation's Constitution: ***Reference re Secession of Quebec***, [1998] 2 SCR 217 at paras 32-50 [***Secession Reference***]. Significantly, in order to uphold the political and cultural diversity within a single nation, legislative powers were divided between two spheres: the national federal government and provincial legislatures. This division of powers, embedded in sections 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, is the "primary textual expression" of the federalism principle in Canada: ***Secession Reference*** at para 47. Under sections 91 and 92, each head of power is assigned to the level of government best placed to exercise the power: ***Canadian Western Bank v Alberta***, 2007 SCC 22 at para 22 [***CWB***].

[55] In response to the increasing complexity of modern society and the frequent blurring between the two spheres of legislative powers, courts have, in recent years, adopted a more flexible view of federalism. As the final arbiters of the division of powers, courts must be mindful of the "possibility of intergovernmental cooperation and overlap between valid exercises of provincial and federal authority": ***Reference re Genetic Non-Discrimination Act***, 2020 SCC 17 ("***Genetic Reference***") at para 22. However, the so-called cooperative federalism cannot override or modify the scope of the legislative authority conferred by the Constitution: ***Genetic Reference*** at para 25.

[56] Against this backdrop, I turn to Ecojustice's submission that the Government of Alberta has ignored the division of powers by authorizing an inquiry into matters outside its jurisdiction.

Specifically, Ecojustice argues that the OIC intrudes into matters of federal jurisdiction under section 91 of the *Constitution Act, 1967* as it deals with:

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.

[57] Ecojustice's position is that the OIC is *ultra vires* in two distinct ways. First, it directly violates the distribution of powers under the *Constitution Act, 1867*. Second, section 2 of the *Act*, the enabling legislation for the Inquiry, specifies that inquiries can only be held into matters within the jurisdiction of the provincial legislature. The Respondents take a diametrically opposing view, maintaining that provincial legislatures have the exclusive jurisdiction over non-renewable natural resources, property and civil rights, and matters of a merely local or private nature.

[58] In a case involving the constitutionality of a law in relation to the division of powers, a court must first identify the "pith and substance" of the impugned law. Based on such a characterization, the court must then classify the law by reference to the federal and provincial heads of power under sections 91 and 92 of the *Constitution Act, 1867*: ***Reference re Firearms Act (Canada)***, 2000 SCC 31 at para 15 [***Firearms Reference***].

Pith and substance

[59] The pith and substance of a law is, in essence, the law's "dominant purpose," "leading feature or true character," or "dominant or most important characteristics": ***Genetic Reference*** at para 29. It is now well-established that determining the pith and substance entails considering the law's purpose and effects. The court's characterization must precisely define the law's matter, with a particular focus on the law itself and its true nature: ***Genetic Reference*** at para 31. The Supreme Court of Canada has expressly rejected a formalistic or technical approach, opining instead that the identification of the true nature and character of the law is a holistic exercise: ***Starr v Houlden***, [1990] 1 SCR 1366 at 1405 [***Starr***].

Purpose of the OIC

[60] To assess the law's purpose, a court may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, as well as extrinsic evidence, such as Hansard or minutes of parliamentary debates. The ultimate objective is to ascertain the true purpose of the legislation, as opposed to its mere stated or apparent purpose: ***CWB*** at para 27; see also, ***Starr*** at 1389.

[61] Turning to the present case, the OIC commences with the following preamble:

> WHEREAS the Government of Alberta is committed to the timely, economic, efficient and responsible development of Canada's oil and gas industry, including Alberta's oil and gas industry;
>
> 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; and

> 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;
>
> THEREFORE, the Lieutenant Governor in Council orders that a Commission issue, pursuant to the Public Inquiries Act, declaring this issue to be a matter of public concern and appointing Jackson Stephens Allan as commissioner to inquire into and report on the matters set out in the Terms of Reference in the attached Appendix.

[62] The T of R to which the preamble refers provide useful insight into the precise definition of "anti-Alberta energy campaign" as well as the scope and mandate of the Commissioner. The relevant provisions are reproduced below for convenience:

> **Section 1** In these Terms of Reference,
>
> …
> (b) "anti-Alberta energy campaign" means 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;
>
> **Section 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:
>
> (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.
>
> **Section 2(3)** The commissioner shall make such findings and recommendations as the commissioner considers advisable, and may make findings and recommendations 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 if any anti-Alberta energy campaigns are 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 by recommending the interpretation of existing eligibility criteria or the creation of new eligibility criteria for attaining or maintaining charitable status.

[63] Ecojustice contends that the OIC and the appended T of R are clear evidence of the fact that the OIC is principally concerned with the transfer of funds from outside Canada to organizations within Canada, who in turn use those funds for public campaigns contrary to the interests of Alberta's oil and gas industry.

[64] Based on the preamble, Ecojustice argues that the true purpose of the OIC 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." It further asserts that such a purpose is confirmed by the T of R. In particular, section 2(1) states that the mandate of the Commissioner is to "inquire into the role of foreign funding, if any, in anti-Alberta energy campaigns" and lists specific matters of inquiry, all of which 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.

[65] In my view, Ecojustice's characterization of the true purpose of the OIC is unduly attenuated. Placing a narrow focus on certain provisions and phrases within the OIC and the T of R may, at first blush, suggest that the OIC seeks to regulate the transfer of funds between foreign organizations and the so-called anti-Alberta campaigns. However, such an impoverished characterization does not accurately reflect the true purpose of the OIC viewed as a whole.

[66] The preamble of the OIC unequivocally establishes that the underlying concern behind the Inquiry is the development of Alberta's oil and gas industry. According to the preamble, the relevant context behind the OIC is the existence of allegations that foreign individuals or organizations are indirectly interfering with Alberta's oil and gas industry. More specifically, these foreign entities are purportedly providing financial resources to Canadian organizations in order to assist them in opposing Alberta's oil and gas industry, including by disseminating misleading or false information. The OIC primarily seeks to understand the relevant facts about such alleged foreign funding so that Alberta's oil and gas industry is not hindered in its reasonable opportunity to compete in international oil and gas markets.

[67] The OIC's overarching concern vis-à-vis Alberta's energy sector is further evinced by the T of R. The mandate of the Commissioner is to "inquire," make "findings," and give "recommendations" with respect to the alleged foreign funding of the so-called anti-Alberta energy campaigns. Considering the definition of "anti-Alberta energy campaign," the fundamental rationale behind the Commissioner's authority lies within the timely, economic, efficient, and responsible development of the oil and gas industry, and not the regulation of foreign funds.

[68] The OIC and the mandate of the Commissioner necessarily touch on foreign funding, as it is allegedly a source of harm to the province's economic interests. However, to state that the

OIC is principally concerned with the international and interprovincial transfer of funds would be an inaccurate extrapolation of but a portion of the OIC. In my view, the true purpose of the OIC is to find facts about attempts to 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.

[69] In a court's quest to identify a law's pith and substance, both the legal and practical effects of the law are relevant: ***Genetic Reference*** at para 51. Legal effects refer to how the law as a whole affects the rights and liabilities of those subject to its terms, and are determined from the terms of the law itself: ***R v Morgentaler***, [1993] 3 SCR 463 at 482 [***Morgentaler***]. For practical effects, the court considers the predicted practical effects of the law in operation, flowing from the application of the law: ***Morgentaler*** at 483. Determining the effects of the law "involves considering how the law will operate and how it will affect Canadians," and in some instances, the effects may reveal that the law has an ulterior purpose: ***Firearms Reference*** at para 18.

[70] As Ecojustice points out, the legal effects of the OIC are manifold. First, under section 5 of *Act*, the Commissioner is afforded, in the course of the Inquiry, the "power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench." In other words, the OIC and the Inquiry may subject organizations like Ecojustice, to give evidence and produce documents relating to their sources of funding.

[71] Second, the OIC facilitates the Commissioner to make findings with respect to foreign-funded organizations that oppose the province's oil and gas industry and based on such findings, make non-binding, policy-related recommendations to the Government of Alberta. These recommendations may include recommendations on additional eligibility criteria for grants and for attaining or maintaining charitable status in the province.

[72] One natural practical effect flowing from the legal effects of the OIC is the dissemination of information. The Inquiry and its conclusions may touch on the specific sources of foreign funding, the specific organizations in Canada who receive such funding, and specific ways in which foreign entities are harming the province's energy sector. Certain organizations, including environmental advocacy groups, may be named publicly in the final report. Moreover, the OIC and the findings of the Inquiry may ultimately impact the Government of Alberta's policy development. Depending on the details of the findings, the Government of Alberta may respond with policies that address foreign influences on the province's economic interests and promote the province's oil and gas resources in the international arena without undue hindrance.

[73] The primary point of contention arises out of the fact that the OIC allows the Commissioner to make recommendations on (1) the interpretation of the existing eligibility criteria or (2) the creation of additional eligibility criteria for attaining or maintaining charitable status in the province. Ecojustice asserts that the practical effect of this is the imposition of unjust and targeted eligibility criteria for charitable status in Alberta, which would indirectly strip certain organizations of their charitable status. In my view, this claim is specious.

[74] There is an important distinction between *providing recommendations* on additional eligibility criteria for attaining and maintaining charitable status and *implementing* additional eligibility criteria for attaining and maintaining charitable status. The OIC contemplates the

former, which, in its practical effect, allows the Commissioner to put before the Government of Alberta a list of recommendations that he deems appropriate. Ecojustice's concern lies within the latter, which extrapolates the OIC by a significant margin.

[75] The Court cannot simply conjecture and make findings without evidence on what the Commissioner's ultimate recommendations might be. To assume at this juncture that (1) the Commissioner's recommendations will contain eligibility criteria targeted at organizations like Ecojustice and (2) the Government of Alberta will accept such recommendations and effectively strip certain organizations of their charitable status is too far-fetched to be described as a practical effect of the OIC.

[76] Given the discussion above regarding the purpose and effects of the OIC, I agree with the Crown that the pith and substance of the OIC is to discover and report on the existence of a perceived threat to Alberta's energy industry and explore ways of addressing that threat if considered necessary.

Heads of power

[77] Ecojustice and the Crown fundamentally disagree on under which heads of power the OIC falls. Ecojustice argues that the OIC encroaches upon the federal regulation of trade and commerce and registration of charities for tax purposes under sections 91(2) and 91(3) of the *Constitution Act, 1867,* respectively. Further, Ecojustice is of the view that the OIC is concerned with interprovincial railways and pipelines, contrary to the exception provided under the provincial head of power in section 92(10). In stark contrast, the Crown's position is that the OIC falls squarely within the province's jurisdiction: namely, the OIC relates to the management of non-renewable natural resources, provincial property, and management of charities pursuant to sections 92A, 92(13), and 92(7), respectively.

[78] In my view, given that the pith and substance of the OIC concerns the existence of a perceived threat to Alberta's energy industry and ways of addressing said threat, the appropriate head of power under which to classify the OIC is section 92(13): "Property and Civil Rights in the Province." Further, the OIC concerns the Government of Alberta's legislative and proprietary powers over natural resources pursuant to sections 92A and 109 respectively.

[79] Except under rare circumstances, the development and management of natural resources are exclusively within the purview of the provincial legislature. In fact, sections 92A and 109 of the *Constitution Act, 1867* act as safeguards for each province's proprietary rights with respect to its natural resources: ***Reference re Greenhouse Gas Pollution Pricing Act***, 2020 ABCA 74 at paras 270-273 [***Greenhouse Reference***]. Relatedly, under the plenary power provided by section 92(13), each province has the constitutional authority to regulate its energy industry: ***Greenhouse Reference*** at para 274; ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 at para 30.

[80] The OIC seeks to make findings about attempts to 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. It ultimately permits the Commissioner to make recommendations based on the factual findings so that the Government of Alberta can respond with appropriate policies that strive to preserve the province's interests and promote the province's oil and gas resources in the international arena without undue hindrance. Therefore, the underlying matter of the OIC is the province's natural resources.

[81] Ecojustice suggests that because the Commissioner may inquire into foreign funding, the OIC, in actuality, deals with property *outside* the province. This is an overly restrictive view. Provinces' power to authorize a judicial inquiry is an important safeguard of the public interest and "should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise": ***Consortium Developments (Clearwater) Ltd v Sarnia (City)***, [1998] 3 SCR 3 at para 26.

[82] Considering that the purpose of the OIC is to assemble facts on foreign funding and its influence on Alberta's energy sector, it follows that foreign funding is necessarily implicated in the Inquiry. However, the focus lies in finding facts regarding the province's natural resources. To place the focus on the fact that foreign funding originates, by its nature, from foreign jurisdictions and to conclude on that basis that the OIC cannot fall under section 92(13) would run contrary to the Supreme Court of Canada's direction.

[83] Section 91(2) clearly lays out that the regulation of trade and commerce is a matter exclusive to federal jurisdiction. In the seminal decision ***Citizens Insurance Co of Canada v Parsons*** (1881), 7 App Cas 96 (PC) at 113 [***Parsons***], the Judicial Committee of the Privy Council established the twin branches of the section 91(2) power: (1) interprovincial and international trade and commerce; and (2) general regulation of trade affecting the whole dominion. The Supreme Court of Canada has, on numerous occasions, confirmed and reiterated the legal propositions arising out of ***Parsons***: see, for example, ***Reference re Securities Act***, 2011 SCC 66 at para 75 [***Securities Reference***].

[84] Ecojustice's main argument rests on the first branch. According to Ecojustice, the fact that (1) the OIC concerns the transfer of funds from outside Canada to organizations within Canada and (2) under the T of R, the Commissioner may inquire into whether foreign entities have provided financial assistance to Canadian organizations, and not simply Albertan organizations located within the province, demonstrate that the OIC falls under the regulation of interprovincial and international trade and commerce.

[85] Moreover, Ecojustice asserts that provincial public inquiries cannot inquire into matters of federal jurisdiction. It argues that because the Inquiry purports to make findings regarding foreign funding, it touches on federal powers enshrined under section 91 and is thus *ultra vires*. In support of its position, Ecojustice relies on the following quote from ***Attorney General of Quebec and Keable v Attorney General of Canada***, [1979] 1 SCR 218 at 241-242 [***Quebec***]:

> Great stress was laid by the appellants as well as by intervenants on Dickson J.'s 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. <u>This does not mean that</u>

> 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]

[86] In my view, the Supreme Court of Canada's comment must be interpreted in a more nuanced fashion. Brushing upon matters of federal jurisdiction does not automatically render a provincial commission of inquiry *ultra vires*. What the Supreme Court of Canada in ***Quebec*** cautions against is gathering information for the precise purpose of delineating and proposing changes in federal law. In that regard, ***Quebec*** is of little assistance to Ecojustice. As established already, the primary purpose behind the OIC and the Inquiry is making findings about injurious effects that foreign entities may be causing on Alberta's oil and gas industry and creating appropriate recommendations to safeguard the province's interests. That the OIC touches on foreign funding, on its own, does not render the OIC unconstitutional.

[87] Relatedly, based on the pith and substance of the OIC, it would be amiss to characterize the OIC as an attempt at regulating the transfer of monies across international boundaries. Instead of seeking to *regulate* international and interprovincial trade and commerce, the OIC permits the Commissioner to make findings with respect to whether foreign organizations have provided financial assistance in an attempt to frustrate the development of Alberta's oil and gas resources. As such, I am not persuaded that the OIC should fall under section 91(2).

[88] Given the factual matrix at hand, the Supreme Court of Canada's caution in ***Desgagnés Transport Inc v Wärtsilä Canada Inc***, 2019 SCC 58 at para 57 [***Desgagnés***] seems particularly apt: "An overly broad interpretation of the federal power over 'trade and commerce' could entirely subsume – and potentially displace through paramountcy – the provinces' legislative authority over property and civil rights and over matters of a purely local nature…. The balance between federal and provincial powers would inevitably be upset." In the circumstances of the present case, to adopt Ecojustice's position would, in effect, allow section 91(2) to subsume section 92(13).

[89] Although generally, local works and undertakings fall within provincial jurisdiction, section 92(10)(a) lists some important exceptions: "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." By virtue of the fact that the T of R mention "railways and pipelines falling under... federal jurisdiction," Ecojustice argues that the OIC is *ultra vires*.

[90] It is true that the approval and regulation of interprovincial railways and pipelines fall exclusively within federal jurisdiction: ***Canadian National Railway Co v Courtois***, [1988] 1 SCR 868; ***Reference re Environmental Management Act***, 2019 BCCA 181 at paras 103-104 [***Pipeline Reference***], aff'd 2020 SCC 1. In ***Pipeline Reference***, for instance, the Government of British Columbia sought to *regulate* the planned Trans Mountain pipeline expansion through legislative amendments. The Court held that the pith and substance of the impugned amendments related to the *regulation* of interprovincial or federal undertaking, as opposed to environmental interests.

[91] In stark contrast, however, the notion of regulation is conspicuously absent in the present case. While railways and pipelines appear in the T of R, a closer examination reveals the shortcomings in Ecojustice's argument. Section 1(b) of the T of R defines "Alberta oil and gas industry" as "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."

[92] Viewed in the full context of the OIC, two elements become clear: first, the OIC references transportation by railways and pipelines only under section 1(b). In other words, as a whole, the OIC does not seek to regulate federal railways or pipelines, or otherwise interfere with the federal government's power endued by section 92(10)(a). Second, federal railways and pipelines are not the crux of the definition under section 1(b); rather, the reference to federal railways and pipelines is purely ancillary and modifies "marketing and delivery of Alberta's oil and gas resources." The primary intention behind the reference is to capture all oil and gas resources emanating from Alberta, regardless of the mode of transportation. In fact, doing so makes practical sense from the province's point of view. If "Alberta oil and gas industry" is confined to oil and gas resources being transported intraprovincially, solely through provincial railways and pipelines, the scope of the Inquiry would be unduly limited and its purpose frustrated.

[93] As a result, in my view, the mere fact that the T of R mention federal railways and pipelines does not violate the important federal power enshrined under section 92(10)(a).

[94] Ecojustice acknowledges that section 92(7) provides the following authority to provincial legislatures: "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals." However, it asserts that the OIC in question deals with the registration and deregistration of charities, which, according to Ecojustice, is more appropriately classified under a federal head of power.

[95] Relying on ***International Pentecostal Ministry Fellowship of Toronto (IPM) v Canada (Minister of National Revenue)***, 2010 FCA 51 at paras 7-9 [***IPM***], Ecojustice contends that the determination of charitable status is *ultra vires* provincial jurisdiction. In its view, the registration and deregistration of charities relate to the exclusive taxation powers of the federal government pursuant to section 91(3) of the *Constitution Act, 1867* instead of section 92(7).

[96] Upon reviewing ***IPM***, I find Ecojustice's position untenable. ***IPM*** centred around the appellant, who was registered as a charitable organization under the *Income Tax Act.* The respondent undertook an audit of the appellant and ultimately determined that the appellant stood in contravention of a number of obligations under the *Income Tax Act.* As such, the appellant's charitable registration was revoked. The primary issue was whether certain provisions within the *Income Tax Act*, which allowed the federal government to revoke charitable registrations for tax purposes, were *intra vires* Parliament's power of taxation pursuant to section 91(3). The Court answered in the affirmative precisely because the underlying purpose behind the impugned provisions was taxation, and not maintenance and management of charities pursuant to the provincial head of power under section 92(7). At para 8, the Federal Court of Appeal opined:

> We have not been persuaded that there is any merit to the Appellant's argument that the provisions of the ITA dealing with the registration and deregistration of charities are an unconstitutional infringement on provincial legislative authority. In our view, these provisions relate, in their pith and substance, to federal taxation, and accordingly they are *intra vires* the Parliament of Canada under subsection 91 (3) of the *Constitution Act, 1867*. Both the advantages of registration and the drawbacks of revocation relate solely to the tax treatment of

> charities and their donors. They do not impermissibly affect the affairs of charities in any other way, nor do they impede provinces from otherwise regulating charities.

[97] ***IPM*** does not stand for the proposition that the determination of charitable status itself falls exclusively under section 91(3) of the *Constitution Act, 1867*. Rather, what the Court held was that the impugned provisions of the *Income Tax Act*, though they allowed the federal government to revoke charitable registrations, were designed as an extension of the federal taxation power and were therefore within the federal government's jurisdiction. There is a crucial difference between the Court's reasoning and conclusion in ***IPM*** and Ecojustice's interpretation.

[98] As discussed in the pith and substance analysis, the OIC facilitates the Commissioner to make non-binding recommendations, the precise content of which is unknown at this juncture. Therefore, even if ***IPM*** were read to mean that the deregistration of charities falls squarely within federal powers, the claim that the Inquiry will, in fact, lead to the revocation of charitable status of certain entities is too speculative at this juncture for the OIC to be classified under section 91(3).

The double aspect doctrine

[99] Despite my conclusion regarding the classification of the OIC under section 92, I will address the double aspect doctrine for the sake of completeness.

[100] Some matters may have both provincial and federal aspects, and *ipso facto* cannot be accurately categorized under a single head of power: ***CWB*** at para 30. The double aspect doctrine ensures that the policies of the elected legislators of both levels of government are respected and "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power." A valid provincial enactment will be allowed to have incidental effects on a federal head of power unless either interjurisdictional immunity or federal paramountcy are found to apply: ***Desgagnés*** at paras 84-85; ***Securities Reference*** at para 66.

[101] During oral argument, Ecojustice took the position that the double aspect doctrine does not apply in the present case because the OIC is classified exclusively under section 91 of the *Constitution Act, 1867*. The Crown, on the other hand, submits that to the extent that the OIC intrudes into matters of federal jurisdiction, if any, they are incidental effects, saved by the double aspect doctrine. In the event that the OIC is found to present a double aspect – namely, it also falls under a federal head of power – I agree with the Crown's position.

[102] Particularly germane to the present case is the fact that the Supreme Court of Canada "has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers": ***Starr*** at 1390-1391.

[103] Although ***Starr*** was decided in the context of a provincial public inquiry and the federal criminal law, the quote above is nonetheless helpful in the present case. To the extent that the OIC touches upon the federal authority to regulate international and interprovincial trade and commerce as well as railways and pipelines, they are merely incidental. While Ecojustice has not specified which federal legislation is encroached upon by the OIC, I conclude that there is no repugnancy or express contradiction between the OIC and federal legislation governing trade and

commerce or railways and pipelines, generally. In the absence of such a conflict, the double aspect doctrine applies, and the OIC must stand valid and operable.

[104] In light of my analysis above, I find that the OIC is *intra vires* provincial jurisdiction. Accordingly, Ecojustice's Application to quash or vacate the OIC on constitutional grounds is dismissed.

D. Reasonable Apprehension of Bias

[105] Finally, Ecojustice puts forward that a combination of the implicit bias in the OIC, the Inquiry's T of R and Commissioner Allan's history of political donations and associations with members of the current provincial government ground their allegations of a reasonable apprehension of bias.

[106] Specifically, Ecojustice alleges that the OIC and the T of R predetermine: the existence of anti-Alberta energy campaigns; that those campaigns negatively impact the efficient and responsible development of Alberta's oil and gas resources; that there has been foreign funding of the campaigns; that the intent is to harm or injure the Alberta oil and gas industry; and that there has been the dissemination of misleading or false information about the Alberta oil and gas industry and labels certain public positions as anti-Alberta.

[107] As a result of these predeterminations, Ecojustice argues that the Commissioner's fact finding ability has been unnecessarily fettered giving rise to a reasonable apprehension of bias that will lead to procedure unfairness and no proper independent analysis of the evidence gathered by the Inquiry.

[108] Ecojustice points to partisan political statements made by various politicians including the Premier prior to or at the time of the enacting of the OIC that are they say reflected in the OIC and the T of R. Ecojustice alleges that Commissioner Allan's past political donations and relationships with some members of the current provincial cabinet contribute to this reasonable apprehension of bias and that this Court should strike the Inquiry before the final report is issued as a consequence.

[109] Commissioner Allan and the LGIC take the position that this portion of the Application is premature and that there are no exceptional circumstances here that provide a basis for Ecojustice's Application on this point to be considered. It is not contested that that the law with respect to judicial review requires that, absent exceptional circumstances, the parties exhaust all adequate remedial recourses in the administrative process before having recourse to the courts. This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the costs and delays associated with premature forays to court and avoids the waste associated with a court hearing when the applicant may very well be successful at the end of the administrative process.

[110] The LGIC submits that an allegation of bias raises the issue of procedural fairness and where founded results in a loss of jurisdiction. ***Slawsky v Edmonton (City)*** 2019 ABQB 77 at para 62. Here Ecojustice has failed to identify to whom a duty of fairness is owed and who has breached the duty of fairness, if one exists. Commissioner Allan submits that in any event no hearings had been held by him prior to this hearing and as such standards of procedural fairness, as far as his role is concerned, are outside the scope of this Application.

[111] With respect to the timing of this Application the Respondents submit that Ecojustice must await the outcome of the Inquiry and the Commissioner's final report and then bring this

motion if they then see fit. As a result the Respondents say the Application must fail as unfocused and premature.

[112] I am satisfied that this application is premature for the reasons outlined by the Respondents and that there are no exceptional circumstances present that would allow for the hearing to proceed despite this flaw.

[113] Despite this finding which requires that I dismiss the Application I go on to consider whether Ecojustice has made the case that the Inquiry must be vacated as a result of the T of R and the prior conduct of Commissioner Allan raising a reasonable apprehension of bias.

[114] It is well established that the standard of review analysis in the case of judicial review for bias has no application. They are always reviewed as a question of law and therefore the applicable standard with which to review the decision of Commissioner Allan not to recuse himself is one of correctness. No deference is owed to the decision maker. ***Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*** 2008 FC 802 (CanLII).

[115] The test for a finding of a reasonable apprehension of bias is set out by Justice de Grandpre in ***Committee for Justice and Liberty v National Energy Board***, (1978) 1 SCR 369 at para 394 as ".....the test is what would an informed person, viewing the matter realistically and practically-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".

[116] The parties agree that the test for bias in an administrative setting is a flexible standard that varies depending on the nature and function of the particular commission. The test is highly fact specific and the facts must be interpreted in light of the entire context of the matter. The test is based on a consideration of all relevant factors or events rather than any single fact. The allegation of bias must be supported by material evidence that is not merely suspicion or impression.

[117] Here, where the nature of the Inquiry is investigative, the test is not as rigorously applied as it might be were it performing an adjudicative or quasi adjudicative function. ***Newfoundland Telephone Co v Newfoundland (Public Utilities Board)***, (1992) 1 SCR 623 at 638.

[118] This means that the test becomes one of whether there is a reasonable apprehension that the Commissioner would reach a conclusion on a basis other than the evidence.

[119] It is not contested that the appearance of impartiality is important in some matters of public decision making and that the public have confidence in those matters in both the impartiality of the decision maker as well as the system within which the decision maker is operating. In other words, that the Inquiry under discussion in this application and the Commissioner both be and appear to be independent and impartial.

[120] The Commissioner issued his Ruling on September 15, 2020. In that Ruling he made it clear that the Inquiry would not undertake a determination as to whether any information disseminated as a means of opposing the development of the Alberta's oil and gas resources was misleading or false. The Commissioner made the observation that to attempt to do so would require resources and time that the Inquiry did not have.

[121] Ecojustice urges this court to have no reference to the Ruling in considering the implicit bias in the T of R as it was issued after their Application was filed. Ecojustice did not amend their Application to provide for review of the Ruling therefore it is final. The Ruling is a quasi judicial interpretation of the enactment that governs the Inquiry. To ignore it in considering the T of R for implicit bias is non sensical. It is this Ruling that will guide the Commissioner in both the investigative phase and the hearing phase (if there is one) and in rendering his final report. The T of R are central to the mandate of the Inquiry as is the Ruling as a result.

[122] I am persuaded that any predeterminations in the T of R that may have existed are almost totally mitigated by the terms of the Ruling. It is clear even in the uninterpreted T of R that the Commissioner could make any finding he considered advisable. As such any implicit predeterminations in the T of R were never prejudgments by the Commissioner and his discretion was always broad enough to overcome any such implicit bias.

[123] The parties agree that decision makers such as the Commissioner are presumed to act with integrity and impartiality absent evidence to the contrary. It is incumbent on Ecojustice to demonstrate a reasonable apprehension of bias with respect to the Commissioner Allan.

[124] Ecojustice points to Commissioner Allan's prior political donations to the leadership campaign of UCP member and the Minister of Justice at the time of the OIC, Douglas Schweitzer, as well as other members of the UCP party.

[125] While Ecojustice accepts that it is a reasonable expectation that some persons in such appointments would support the political party who appointed them and that such conduct is too remote to support a finding of bias, it then falls back on the T of R and political statements made by members of the provincial government to say that this Inquiry is a highly political one with partisan loyalties, including those of Commissioner Allan at play.

[126] In examining the nature of Commissioner Allans' political donations as set out in his Record, this is simply not supportable. In the years prior to his appointment starting in 2015 Commissioner Allan made donations to several provincial and federal political parties including the UCP and several Calgary mayoralty candidates as well. The e-mails with Schweitzer and others indicate nothing more than the real concerns of an engaged citizen on the economic development of his city, homelessness and initiatives to curb it, and most important given the timing, flood mitigation for the future.

[127] The material in the Record filed by the LGIC illustrates Commissioner Allan's exceptional qualifications for the role of Commissioner in this Inquiry both professionally and as an engaged citizen. His varied volunteer associations ranging from Past President of the Institute of Chartered Accountants to President of the Rotary Club of Calgary to Board Vice-Chair of the Neyaskweyahk Trust of the Ermineskin Cree Nation demonstrate the breadth of his experience and reach.

[128] It cannot be doubted that Commissioner Allan has the ability to manage a public inquiry of this nature while adhering to the highest standards of impartiality and integrity both personally and in overseeing the infrastructure of the process.

[129] Even if I am wrong in finding that the bringing of this Application is premature and should be dismissed on that basis, I would make a finding that there is no reasonable apprehension of bias raised by either the T of R or Commissioner Allan's prior political conduct and dismiss Ecojustice's Application.

Conclusion

[130] Having found that the OIC enacting the Inquiry is not *ultra vires* the authority of the LGIC as having been brought for an improper purpose, that the OIC is not *ultra vires* the jurisdiction of the LGIC as encroaching on federal matters and that the OIC, the T of R and Commissioner Allan's prior conduct do not raise a reasonable apprehension of bias, I dismiss the entirety of Ecojustice's Application with costs in favour of the Attorney General and Commissioner Allan but not the Intervenors as they do not seek their costs in this matter.

Heard on the 11th and 12th days of February, 2021
Dated at the City of Calgary, Alberta this 14th day of May, 2021.

K.M. Horner
J.C.Q.B.A.

Appearances:

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