environmental defence

July 16, 2021

BY EMAIL – info@albertainquiry.ca

J. Stephens Allan
Commissioner
Public Inquiry into Anti-Alberta Energy Campaigns
Edmonton, AB

Dear Commissioner Allan,

I am writing in response to correspondence received by Environmental Defence from you on July 1, 2021 in which you provided the draft of your proposed findings with regard to Environmental Defence that will be included in your final report to the Government of Alberta.

I would like to start by referring to your ruling of September 14, 2020 that your Terms of Reference – and in particular the definition of "anti-Alberta energy campaigns" - should be interpreted broadly. You stated that it is not your role to determine whether a particular oil project is "timely, economic, efficient and responsible". But rather you will proceed on the basis that "some level of oil and gas development" in Alberta is necessarily "economic, efficient and responsible", and therefore you would focus on opposition to development of Alberta's oil and gas resources "in a broad and general sense". In the same decision, you stated that you will likely not inquire into whether any particular statements by certain groups are "misleading or false".

We believe that you have exceeded your jurisdiction by interpreting your terms of reference in this way. As Commissioner of a Public Inquiry, your terms of reference are set by the Government of Alberta. You are not at liberty to selectively ignore or "read out" important terms like "economic, efficient, and responsible", which were included by the legislature to qualify the scope and demarcate the boundaries of your inquiry.[1] By doing so, you have deprived Environmental Defence and other affected groups from arguing that some aspects of oil and gas development in Alberta are not "economic, efficient and responsible". Similarly, by essentially defining *any* advocacy concerning the impact of oil and gas development on climate change as inherently "anti-Alberta", you have arbitrarily deprived Environmental Defence of the opportunity to argue that the information we are disseminating is not misleading or false, but reasonably accurate, grounded in science, and constructively contributes to legitimate debate on matters of public concern.

[1] Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 281; *Atco Ltd v Calgary Power Ltd*, [1982] 2 SCR 557 at 569; *Stevens v Canada (Attorney General),* 2004 FC 1746 at para. 36.

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For example, you have concluded that we have undertaken "Anti-Aberta Energy campaigns" in part by making repeated references to our work to seek government and industry redress to the issue of leaking oil sands tailings ponds, citing several of our reports (page 12, items 10, and 11 of your Report Part III assertions regarding Environmental Defence) and our application for investigation to the Commission for Environmental Cooperation (CEC)[2] (page 13, item 14 of same document). You make note of the publications and the CEC application, but offer no evidence, analysis or conclusion as to the veracity of the evidence of tailings pond leakage that we allege. You draw a conclusion that this is evidence of Anti-Alberta energy campaigning merely because of the fact that we raised these concerns at all.

Missing from your draft findings concerning the oil sands tailing leakage issue, however, are the results of our application to the CEC, which vindicated our concerns. In September 2020, the Commission for Environmental Cooperation (CEC) released a Factual Record (http://www.cec.org/wp-content/uploads/wpallimport/files/17-1-ffr_en.pdf) in response to our joint application, confirming overwhelming evidence that oil sands tailings ponds are leaking toxic pollutants into groundwater and tributaries of the Athabasca River in violation of the federal *Fisheries Act*, and that the Government of Canada has not brought any prosecutions pursuant to the pollution prevention provisions of the *Fisheries Act*, claiming it could not differentiate between naturally-occurring and anthropogenic sources of these toxic pollutants, despite evidence this distinction has been possible to make for a decade.

At the time the CEC Factual Record was released, the federal Minister of Environment and Climate Change expressed appropriately grave concern, saying, "The oil sands tailings issue is a problem that we are going to have to address going forward," adding that the findings of the Factual Record "certainly ... cannot be ignored." The Factual Record indeed reports an estimate of 785,000 cubic metres of OSPW have leaked from the Aurora Settling Basin alone, corresponding to an average of 39.25 million litres a year from a single tailings pond over its 20-year operation.

As you can see, through omission from your report of the results of the CEC application, you lead the reader to believe that our reports and applications that make assertions of ecological impacts of poor management of the oil sands and its wastes are spurious and without merit. You are therefore violating your commitment in your June 18, 2021 letter that you "will clearly declare that such a

[2] The **Commission for Environmental Cooperation** was established by Canada, Mexico, and the United States to implement the North American Agreement on Environmental Cooperation (NAAEC), the environmental side accord to the North American Free Trade Agreement. The CEC's mission is to facilitate cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

finding, if any, does not in any way suggest that the activities on which I might base a finding have been unlawful or dishonest, or that the conduct on which I might base a finding should in any way be impugned." Through these intentional omissions, your report does in fact impugn and allege misleading assertions by our organization, and therefore seeks to do us harm. You must, therefore, take the time and make the effort to assess and report on the accuracy of our reports and requests for investigation or remove mention of these reports and activities from your report.

I would also like to draw your attention to other information missing from your report that would result in findings contrary to those contained in your draft report. In November 2015, I joined, as a representative of Environmental Defence, Alberta Premier Rachel Notley and the CEOs of four large oil and gas companies (Suncor, Shell, Cenovus, and CNRL: https://www.thestar.com/news/canada/2015/11/22/alberta-premier-proposes-carbon-tax-emissions-cap-to-fight-climate-change.html) to publicly launch Alberta's Climate Leadership Plan. This plan contained commitments to carbon pricing, coal phase out, energy efficiency, new solar and wind and other measures to reduce dependence on fossil fuels. This Plan and its launch were clearly pro-Alberta energy industry, as demonstrated by the active participation and collective endorsement of the Plan by the oil and gas industry, environmental ENGOs, Indigenous representatives and the Premier of the province. No mention of this plan, or Environmental Defence's role in securing its adoption, is contained in your report.

Finally, your draft report includes (page 17, item 25) a table showing municipal, provincial and federal funding received by Environmental Defence from 2003 to 2019 totalling $3,367,647. It implies that all of these funds were used to conduct "Anti Alberta Energy campaigns". But your report cites no supporting evidence of this use. Our records indicate that only $37,953 (scarcely greater than 1%) of the government funds received by Environmental Defence during this period were used to facilitate our participation in environmental review processes associated with oil pipelines approvals. The balance of the funds were used for programs entirely unrelated to pipeline approvals or energy policy and practice in Alberta.

For example, more than 25% of the amount cited in your report was funding from all three levels of government for Blue Flag Canada, a program to support water quality, environmental management, education, and safety services on Canadian public beaches. Nearly 15% of the amount cited in your report was funding for an Ontario program aimed at improving home energy efficiency (smart thermostats, E.V. purchase etc). And another 10% of the amount cited in your report was funding for projects related to toxic chemicals in household products. Other government funding received by Environmental Defence during this period included funding specifically related to the Greenbelt, a protected area in Southern Ontario. Clearly, the figures included in your report lack any context and present a grossly distorted and misleading picture of the government funding received by Environmental Defence, wrongly implying that these funds were used in what your Inquiry would call "Anti-Alberta Energy campaigns", when in fact the vast majority of these funds were allocated to projects to help clean beaches, reduce harmful

ingredients in consumer products, and protect greenspace in a region more than 3,000kms away from Alberta's oil sands.

These specific comments and responses to information on which you rely are illustrative of Environmental Defence's broader concerns with the conduct and findings of your inquiry. First, while a public inquiry is not a court of law, this does not give you license to make highly speculative findings without concrete, or even fairly reliable evidence. The provisions of the *Public Inquiries Act* make clear that a public inquiry involves the attendance of witnesses (section 4), evidence given on oath either orally or in writing (sections 5 and 10), authenticated documentary evidence (sections 8-9), and the right to call witnesses or conduct cross-examination to test evidence that may adversely affect a person's interests (section 12). Your inquiry has done none of these things, and your choice to dispense with any reasonable standards of evidence has, perhaps unsurprisingly, resulted in factual errors and omissions, lack of context, and misleading findings such as those noted above.

Compounding this problem is the short time you have afforded us to respond to your draft findings. As you know, we did not receive access to your report and the Inquiry "dataroom" until July 1, 2021 (the Canada Day holiday). So, while your inquiry has been under way for two years, you have given us barely 10 working days to review all the materials and findings in your draft report, review our own records, assess our position, and prepare submissions in response -- all at the height of summer, when nearly half our team are on holidays and we are still struggling to deal with the administrative and logistical complications related to the COVID-19 pandemic. In short, the time you have provided Environmental Defence and other groups to respond to your Inquiry's extensive report and voluminous "dataroom" is unreasonable and a breach our right to know and meaningfully respond to your information and findings. In our view, this is a breach of both common law procedural fairness and natural justice, as well as the provisions of the *Public Inquiries Act* (sections 12 and 13). We have attempted, above, to respond to the information and findings of your Inquiry but have by no means been able to provide a thorough and comprehensive response by the deadline you have imposed. Had you provided us with more time, we would have made further and more detailed submissions on more of the specific comments, findings and speculative statements in your draft report. With that in mind, we hereby formally request a three-week extension so that we can provide a more fulsome and detailed response to the information and findings in your draft report.

In summary, your draft report makes arbitrary, unwarranted and irregular changes to the terms of reference given to you by the Alberta government, makes broad assertions and innuendo of wrongdoing with inaccurate, incomplete and selective use of information, implies malice in our organization's intent concerning engagement in energy policy issues and suggests that these activities were richly supported by governments at multiple levels without any proof. Based on this flawed and myopic review of publicly available information you conclude that our work is Anti-Alberta and propose to characterize our work in that manner in your public report. Moreover, it is disingenuous to suggest that labelling our activities as

"anti-Alberta" does not impugn Environmental Defence and prejudice its reputation. It is our view that your draft report is intended to harm our organization based on false and misleading statements, and our view is that it must be either changed to address these issues or not submitted to the Alberta government at all. We ask that you reconsider your interpretation of the Inquiry's Terms of Reference, reassess your findings in light of the information provided above, and exclude Environmental Defence from your report entirely given that we are not engaged in "anti-Alberta" activities, however defined.

As a final point, Environmental Defence anticipates that your Final Report may include recommendations relating to the regulation of charities. However, you should be mindful that any such limitations or restrictions would likely interfere with freedom of expression as protected under the *Canadian Charter of Rights and Freedoms*. Before making any such recommendation, we encourage you to carefully review *Canada Without Poverty v AG Canada*. In that case, a court struck down restrictions on charities' spending on political activities related to their mission, holding that every charitable organization has "a right to effective freedom of expression – i.e. the ability to engage in unimpaired public policy advocacy toward its charitable purpose."[3] The advocacy work of groups like Environmental Defence is constitutionally protected and fundamental to democracy, and your Inquiry should make no findings or recommendations that may infringe or constrain the lawful exercise of those rights.

Sincerely,

Tim Gray
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[3] *Canada Without Poverty v AG Canada*, 2018 ONSC 4147 at para. 47