Public inquiry into anti-Alberta energy campaigns to proceed after court dismissal

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On May 14, 2021, the Court of Queen's Bench of Alberta dismissed the challenge by Ecojustice Canada Society (Ecojustice) to Alberta's public inquiry into "anti-Alberta energy campaigns" (the Public Inquiry). The decision in *Ecojustice Canada Society v Alberta*, 2021 ABQB 397 (*the Ecojustice Decision*) effectively greenlighted the Public Inquiry and allowed it to proceed.

The Public Inquiry, announced by Premier Jason Kenny in 2019, seeks to examine alleged anti-Alberta energy campaigns supported by foreign organizations. Ecojustice immediately opposed the Public Inquiry and brought an application for judicial review on the basis that the Public Inquiry was unlawful.

The *Ecojustice Decision* represents a small victory for the Government of Alberta in an ongoing series of energy-related constitutional legal battles that have taken place over the past few years. More broadly, however, the *Ecojustice Decision* reaffirms the high level of deference afforded to provincial public inquiries, which could signify that the province may rely on such powers more frequently in the future, especially as it relates to the province's energy sector.

Background

On July 4, 2019, Premier Kenny commissioned the Public Inquiry, seeking to investigate alleged foreign-funded efforts to undermine the province's oil and gas industry. The Lieutenant Governor in Council initiated the Public Inquiry by Order in Council 125/2019 (the OIC), and Jackson Stephens Allan was appointed as the Commissioner pursuant to the *Public Inquiries Act*, RSA 2000, c P-39 to conduct the Public Inquiry in accordance with Terms of Reference appended to the OIC.

The $3.5 million Public Inquiry received immediate backlash from certain environmental and activist groups, including Ecojustice. On November 19, 2019, Ecojustice filed an application for judicial review at the Court of Queen's Bench of Alberta, claiming that the Public Inquiry was unlawful, and arguing that:

1. The Public Inquiry was brought for an improper purpose and therefore *ultra vires* the authority granted to the Lieutenant Governor in Council under section 2 of the *Public Inquiries Act*;
2. Certain matters identified in the OIC and Terms of Reference were matters of exclusive federal jurisdiction and therefore *ultra vires* the jurisdiction of the Lieutenant Governor in Council; and
3. The OIC and Terms of Reference for the Public Inquiry, the political context of the Public Inquiry, and Commissioner Allan's political donations to the United Conservative Party (the UCP) and the Minister of Justice raised a reasonable apprehension of bias.

On July 17, 2020, Ecojustice applied for an injunction, seeking to stay the proceedings of the Public Inquiry until the Court completed its judicial review. In *Ecojustice Canada Society v Alberta*, 2020 ABQB 736, the Court denied Ecojustice's application, reasoning that Ecojustice's alleged irreparable harm to reputation was purely speculative at that juncture.

Decision

On May 14, 2021, the Court rendered its written decision regarding Ecojustice's application for judicial review, dismissing it in its entirety, and holding that:

1. The OIC enacting the Public Inquiry is not *ultra vires* the authority of the Lieutenant Governor in Council as having been brought for an improper purpose;
2. The OIC is not *ultra vires* the jurisdiction of the Lieutenant Governor in Council as encroaching on federal matters; and
3. The OIC, the Terms of Reference, and Commissioner Allan's prior conduct do not raise a reasonable apprehension of bias.

Improper purpose

Relying on speeches of Premier Kenny and then Minister of Justice Douglas Schweitzer, Ecojustice argued that the true purpose of the OIC was to target certain individuals and groups affiliated with environmental advocacy. The Court rejected Ecojustice's argument, stating that it can strike subordinate legislation only if such legislation is:

1. Irrelevant, extraneous, or completely unrelated to the statutory purpose;
2. Fails to comply with a necessary statutory requirement; or
3. Enacted in egregious circumstances such as bad faith.

After carefully canvassing the language in the preamble of the OIC and the evidence on the Record of the Crown, the Court concluded that the enactment of the OIC by the Lieutenant Governor in Council was a reasonable exercise of the Cabinet's discretion and did not constitute an improper purpose.

Constitutionality

Ecojustice argued that the "pith and substance" – also known as a law's "true purpose" – of the OIC had the effect of encroaching on matters of exclusive federal jurisdiction

because it impinged on matters related to trade and commerce, interprovincial railways and pipeline, and registration and deregistration of charities. As such, Ecojustice contended that the OIC was *ultra vires* the jurisdiction of Alberta.

Looking at both the intrinsic and extrinsic evidence, the Court determined that the true purpose of the OIC was 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.

As for legal and practical effects of the OIC, Ecojustice submitted that the OIC would effectively strip certain organizations of their charitable status, solely based on their involvement in environmental advocacy. In support of its argument, Ecojustice pointed to Commissioner Allan's authority to make recommendations on eligibility criteria for provincial charitable status, based on his findings. The Court noted that there was an important distinction between providing recommendations on eligibility criteria for provincial charitable status and actually implementing additional, and possibly more onerous, eligibility criteria for provincial charitable status.

The OIC contemplates the former, which in its practical effect, allows Commissioner Allan to put before the Government of Alberta a list of recommendations that he deems appropriate. The Court reasoned that to accept Ecojustice's argument was to presume and accept as a fact 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.

Overall, the Court characterized the pith and substance of the OIC as an attempt to discover and report on the existence of a perceived threat to Alberta's energy industry and exploring ways of addressing that threat.

Based on such characterization, the Court held that the appropriate head of power under which to classify the OIC was section 92(13), respecting "Property and Civil Rights in the Province." It is worth nothing the Court's comment with respect to interprovincial railways and pipelines. The Terms of Reference define "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."

By virtue of the fact that the Terms of Reference mention "railways and pipelines falling under... federal jurisdiction," Ecojustice argued that the OIC was *ultra vires* provincial authority. As confirmed in *Reference re Environmental Management Act*, 2019 BCCA 18; aff'd 2020 SCC 1, the approval and regulation of interprovincial railways and pipelines fall exclusively within federal jurisdiction. However, the notion of regulation was absent in the Terms of Reference. In the Court's view, the OIC did not encroach upon federal jurisdiction because the OIC did not seek to regulate federal railways or pipelines, but rather mentioned federal railways or pipelines in a descriptive sense, in order to define the scope of the delivery of Alberta's oil and gas resources.

The Court reasoned that "[b]rushing upon matters of federal jurisdiction does not automatically render a provincial commission of inquiry *ultra vires*." The Court ultimately held that the Public Inquiry was an information-gathering tool, rather than a regulatory scheme.

Reasonable apprehension of bias

Ecojustice's argument regarding reasonable apprehension of bias was similarly dismissed. Looking at the aggregate evidence, such as Commissioner Allan's donations to political parties other than the UCP, the Court opined that Commissioner Allan was capable of managing the Public Inquiry while adhering to the highest standards of impartiality and integrity both personally and in overseeing the infrastructure of the process.

Implications

The *Ecojustice Decision* joins a rapidly growing body of recent jurisprudence respecting constitutional division of powers disputes in the context of federal and provincial energy regulation in Western Canada.

The *Ecojustice Decision* represents a small victory for the Government of Alberta, following the Federal Court of Appeal's recent decision in *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84. Specifically, the decision confirms Alberta's constitutional authority to conduct public inquiries into broad matters relating to its energy industry and places an important distinction between merely touching upon matters of federal jurisdiction and actual encroachment into such matters. The former does not automatically render a provincial public inquiry *ultra vires.* The *Ecojustice Decision* also reaffirms the high level of deference afforded to provincial public inquiries, which could signal the province's increased reliance on legislation like the *Public Inquiries Act*, especially as it relates to oil and gas issues.

Alberta's next legal battle in the context of its energy sector is its constitutional challenge to the federal *Impact Assessment Act*, which grants Canada powers to review resource projects on the basis of a number of broad and discretionary factors, including a project's greenhouse gas emissions. The Court of Appeal of Alberta heard this matter in February 2021 and is expected to render a written decision in the coming months.

By

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