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July 16, 2021

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

Dear Commissioner Allan:

Re: Public Inquiry Into Anti-Alberta Energy Campaigns - Notice to Participant for Response

I am in receipt of your letters of June 18, 2021 to the West Coast Environmental Law Association, West Coast Environmental Law Research Foundation, and the West Coast Environmental Dispute Resolution Fund Society (West Coast Environmental Law or WCEL). In the letters you advised that you would potentially be making findings about the West Coast Environmental Law societies being allegedly involved in "anti-Alberta" campaigns and granted the societies standing as Participants for Response.[1]

I write in response to your invitation to review portions of the draft report (the Inquiry report) associated with the Public Inquiry into Anti-Alberta Energy Campaigns (the Inquiry), and specifically findings related to West Coast Environmental Law. I note at the outset that access to materials for our review was provided on a statutory holiday, July 1, 2021, only 11 business days before today's deadline for response. A full review of thousands of pages of documents relied upon by you in making your findings, and the full marshalling of evidence to address them was not possible on this time-frame. Although the Inquiry has been ongoing for two years we were provided with barely two weeks to respond. We respectfully request an extension of 60 days to complete our review and reserve the right to made additional submissions or provide additional evidence at that time.

Introduction

West Coast Environmental Law is proud of the work we do to develop legal solutions to protect the environment, to uphold Indigenous rights and ensure that communities have a voice in environmental decisions. As part of this work, we have a mandate, and responsibility, to engage in public dialogue about important issues and policies that affect the health of the environment and communities – including what constitutes "responsible" development of fossil fuels in the face of the climate crisis.

As you clearly state, West Coast Environmental Law has done nothing improper – the Inquiry report makes no findings of misconduct, and fails to identify any activities "that should be in any way impugned." We have always been transparent about our mandate, activities and sources of funding, and yet we and other organizations have been drawn into a secretive inquiry that implies wrongdoing and labels our lawful, respectable activities as "anti-Alberta."

The Inquiry defines "anti-Alberta energy campaigns" as attempts to "frustrate the timely, economic, efficient and responsible development of Alberta's oil and gas resources." We reject the notion that we have

[1] Each of the societies has been given 15 pages for a response submission for a possible total of 45 pages.

participated in such campaigns, because our work aims to ensure timely, economic and responsible decisions regarding oil and gas development, considering the impacts of that development on the environment, climate and public health.

Regardless of the findings, this ill-conceived Inquiry undermines free speech and democracy, and it is particularly distressing at a time when Canadians are suffering due to the impacts of the climate emergency that we are working to address, such as recent heat waves that have been fatal to hundreds of Canadians.

Our submissions are set out below.

No Misconduct

1. We welcome the Inquiry's conclusion that the activities of West Coast Environmental Law did not constitute misconduct, and should not be viewed as impugnable in any way.[2] Further, we note the Inquiry's acknowledgement that the land and marine conservation work of West Coast constitutes "an important pursuit,"[3] (land conservation) and a "valuable and important conservation initiative" (protecting the North Pacific Coast from the threat of oil spills).[4]

No Improper Motivation or Anti-Alberta Intent

2. West Coast Environmental Law is a non-profit group of lawyers dedicated to protecting the environment through law. We have an access to justice mandate and work to ensure that the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* are upheld in environmental decision-making. As set out in further detail below, the principal motivation driving our legal and campaign work is to achieve a more just and sustainable future for all, with a focus on British Columbia where we are based.
3. In our submission, the material cited in the draft Inquiry report fails to demonstrate any intention by West Coast to oppose responsible development of Alberta's oil and gas resources. While we may have a good faith disagreement with the Province on what levels of oil and gas development, or particular oil and gas projects, might be "timely, economic, efficient and responsible" at no time have we taken a position opposing all oil sands development in Alberta, nor have we attempted directly or indirectly to shut down existing oil sands projects.
4. The Inquiry's Terms of Reference, established by the Government of Alberta, required the Commission to inquire into the role of foreign funding in "anti-Alberta energy campaigns". The Terms of Reference define "anti-Alberta energy campaign" as:

> ***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; [Emphasis added].*

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[2] At para 365: "I again clarify that I do not find that participation in any anti-Alberta energy campaign constitutes misconduct on the part of any party that should be viewed as impugnable in any way."
[3] At para 86
[4] At para 228.

5. The word "attempt" indicates an effort to reach a goal, placing the focus on the subjective intention of the organizations involved in the campaign. Merriam Webster dictionary defines attempt as: "the act or an instance of **trying to do or accomplish something**: an act or instance of attempting something" (emphasis added).
6. In September 2020, you issued an Interpretation of the meaning of "anti-Alberta energy campaign."[5] This interpretation does not explicitly consider the meaning of "attempts," but does implicitly recognize a subjective element, referring to "efforts to frustrate" as being a key focus of the inquiry and does note that parties may not be engaged in an "anti-Alberta energy campaign" when they oppose a particular project "on specific grounds … such as where a party's interests in land or traditional rights may be directly affected…"
7. Your interpretation dismisses consideration of whether particular projects or levels of oil and gas development may be "timely, economic, efficient and responsible," holding that the Commission does not have the capacity to "review the merits of individual projects" and because both the federal and provincial governments have regulatory processes aimed at assessing whether particular projects are in the public interest.
8. However, your reasons for declining to consider whether projects or oil sands development as a whole are "timely, economic, efficient and responsible" do not apply to understanding what the credible beliefs of parties are in relation to those factors, and whether or not they are motivated by other ulterior or illegitimate motivates. We submit that you did have the resources and powers necessary to examine that issue, and the determination of the federal or Alberta governments on those questions are irrelevant to the subjective intention of ENGOs.
9. Interpreting the Terms of Reference as focusing on the **motivations and intent** of those opposed to oil sands development is consistent with the Premier's stated reasons for the Inquiry. In defending the need for the Inquiry Premier Kenney claimed that the inquiry was necessary to "expose all of the interests involved" because in his view some of the campaigns against the oil sands were based on ulterior, commercial or other interests.[6] The Premier's statements suggested that the focus of the Inquiry was to be on whether ENGOs and particularly those with international funding were secretly advancing commercial or foreign financial interests.
10. Therefore, even taking as given the limited interpretation of the Terms of Reference reflected in your September 2020 ruling, in our submission, if a campaign is focused on *bona fide* and transparent motives to ensure that oil and gas resources are not developed in an untimely, uneconomic, inefficient or irresponsible way then it is not an "anti-Alberta energy campaign".
11. Similarly, if a campaign is focused on *bona fide* and transparent motives to conserve terrestrial or marine ecosystems or to uphold Indigenous rights in relation to those territories, which has an

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[5] https://albertainquiry.ca/sites/default/files/2021-01/Ruling-on-Interpretation-091420-TOR-2.pdf

[6] "The inquiry will "follow the money trail and expose all of the interests involved," uncover whether any laws have been broken and recommend policy actions where appropriate, Kenney said." - https://calgaryherald.com/news/politics/kenney-government-launches-inquiry-into-foreign-funded-meddling-in-albertas-energy-sector. See also: **https://www.cbc.ca/news/canada/calgary/alberta-war-room-public-inquiry-1.5200549; https://www.ctvnews.ca/business/alberta-to-hold-2-5-million-public-inquiry-into-funding-for-oil-and-gas-foes-1.4495264**.

incidental effect of constraining oil sands development (whether timely, economic, efficient or responsible or not), it is not an "anti-Alberta energy campaign" because there has been no "attempt" to constrain oil and gas development.

12. This interpretation of the Terms of Reference is consistent with the Charter's protection of Freedom of Expression. There is clearly a constitutional right to publicly and transparently express disagreement with the Alberta government on what is responsible development.
13. West Coast Environmental Law's motivations in all of the campaigns that you have identified in your draft Inquiry report (as in all of our work) have been transparent and good faith. Our predominant purpose for these campaigns is to protect communities, people and land within British Columbia from environmental harm, including harm from pipelines and other oil and gas infrastructure in the province. However, we also work to help Canada do its part to avoid dangerous climate change and to protect British Columbia communities from the impacts of climate change. To the extent that our work has an effect on the levels of oil and gas development in our neighbouring province, we seek to prevent untimely, uneconomic, inefficient and irresponsible development of the oil sands. Some of the factual basis which informed our views and motivations is briefly summarized below.
14. The Inquiry report's discussion of West Coast makes some general statements about our work, but none about our motivations in relation to protecting BC's lands, air and water or achieving timely, economic, efficient or responsible development of oil and gas resources. A finding at paragraph 7 that there is "evidence of opposition of Alberta's oil and gas resources" is not an evidentiary basis for holding that any particular campaign is an attempt to constrain development of Alberta's oil and gas industry to anything other than a responsible level.

15. The main discussion of the motives of what you refers to as the "anti-Alberta energy movement" begins at paragraph 525 of the main Inquiry report. With respect, each of the organizations discussed in the report have different motivations and each campaign has different objectives. Indeed, you implicitly recognized that fact in redacting the names of some organizations from the Inquiry report, concluding that their campaigns were not intended to constrain oil gas development. It is inappropriate and objectionable to suggest that West Coast Environmental Law or its campaigns, along with all the other organizations, shares the motives set out in the your discussion of a generalized movement, which is a caricature based on commentaries, and in some cases conspiracy theories, when we have set out our motives in these submissions and could have spoken to out motives at any time, had we been asked.

Climate Emergency and Responsible Development

16. The basic insight that the burning and production of fossil fuels are a major source of greenhouse gases and contribute to global increases in temperature is well understood. Governments beginning in the late 1980s charged the Intergovernmental Panel on Climate Change (IPCC), with scientists from around the world, to advise on the science of climate change. The conclusions of the IPCC are generally respected by the oil and gas industry and its most recent Assessment Report (AR5) warns that:

    Human influence on the climate system is clear, and recent anthropogenic emissions of green-house gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems. …

Observed changes in the climate system.
Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen.[7]

17. The governments of the world have committed since signing the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 that they would reduce greenhouse gas production. In 2015 at the Paris Conference, the world's governments pledged to keep average global temperature rise to "well below 2°C" and to work to keep it below 1.5°C. We note that West Coast Environmental Law has long engaged in this international process, including attending the Kyoto Convention in 1997 and the Paris Convention in 2015.
18. It is well recognized that achieving these targets will require global governments to **reduce** oil and gas production. One report recently estimated the need to decrease production by 6% per year,[8] while the International Energy Agency (IEA), the world's foremost body advising governments on climate, **recommends that no new oil and gas projects should begin development after this year (2021)** if we are to have a reasonable chance of staying below 1.5°C (emphasis added).[9]
19. This effect also occurs at the national level, although there is considerable debate about how rapidly Canada must reduce its greenhouse gas emissions in order to "do its part" to address climate change. In accordance with the UNFCCC agreement, Canada established targets to reduce its greenhouse gas emissions by 6% relative to 1990 levels by 2012, 17% relative to 2005 levels by 2020 and 30% below 2005 levels by 2030.[10] This last target has recently been enhanced to 40-45% reductions relative to 2005 levels by 2030 and net zero by 2050. Environmental organizations, including West Coast Environmental Law, believe that domestic emissions should be reduced by 60% relative to 2005 levels by 2030.
20. The production and burning of fossil fuels, including oil and gas, are a major and rising source of global greenhouse gases (GHGs) (notably carbon dioxide and methane), and one which is reflected in Alberta and Saskatchewan's rising GHG emissions, which the Supreme Court of Canada identified as the reason that Canada has failed to meet its climate commitments:

    As a result, Canada failed to honour its commitment under the Kyoto Protocol before withdrawing from that agreement in 2011, and it is not currently on track to honour its Copenhagen Accord commitment.[11]

21. Global greenhouse gas emissions, including those from Alberta's oil sands production, are harming British Columbians. A recent study found that the Summer 2021 heat wave that killed over 700 people was 150 times more likely, 2°C warmer, and virtually impossible without climate change.[12] Similarly, a

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7 https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf.

8 https://www.unep.org/news-and-stories/press-release/worlds-governments-must-wind-down-fossil-fuel-production-6-year.

9 https://www.iea.org/reports/net-zero-by-2050.

10 https://www.canadiangeographic.ca/article/brief-history-canadas-climate-change-agreements.

11 *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11, para. 184.

12 https://www.worldweatherattribution.org/western-north-american-extreme-heat-virtually-impossible-without-human-caused-climate-change/.

2018 study of the 2017 wildfires in BC found that they were 7-11 times larger than they would be without climate change.[13] While Alberta's government argued in the carbon pricing reference that its contribution to global climate change was not significant, this view was expressly rejected by the Supreme Court.

> *I reject the notion that because climate change is "an inherently global problem", each individual province's GHG emissions cause no "measurable harm" or do not have "tangible impacts on other provinces" … Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail. [para. 188]*

22. West Coast Environmental Law's view of the level of oil and gas development that would be considered "timely, economic, efficient and responsible" is informed by this climate science.
    a. "Timely" oil and gas development requires a recognition of the need to rapidly transition from the production of oil and gas for combustion, in line with the IEA's recommendations, or, alternatively, in line with achieving Canada's greenhouse reduction targets;
    b. "Economic" means both that the appropriate levels of production must balance the societal good of fossil fuel energy with its economic cost. The best approach for calculating social cost of carbon is controversial, because it tends to discount future impacts, but this social cost is not currently included in calculation of economic or efficient levels of oil and gas development in Alberta.
    c. "Efficient" to us includes the relative responsibility of the oil and gas industry compared to other sectors within Canadian society to reduce greenhouse gas emissions to achieve Canada's greenhouse gas targets. If the oil and gas industry produces a large share of the country's "carbon budget," then either the target will not be met or other sectors and provinces will need to do more.
    d. "Responsible" to us is tied to taking responsibility for the harm caused by each additional tonne of carbon dioxide and methane associated with the oil and gas industry. It is also tied to achieving climate targets that are consistent with a liveable world.
23. In your Interpretation of your Terms of Reference, you indicate that "some level" of oil and gas development will be "timely, economic, efficient and responsible." It is illogical to move from that vague finding to a conclusion that any attempts to constrain the oil sands will be contrary to "timely, economic, efficient and responsible development" of the industry. We agree that for decades to come there will likely be some level of oil and gas development, but in our view a truly timely, economic, efficient and responsible level will not involve **expanding** production and instead will involve a rapid shift away from the production of oil and gas for combustion. In this context, expanding pipelines and other oil and gas infrastructure is not timely, economic, efficient or responsible.
24. On the question of "economic" operations, we note that oil sands development is more costly than conventional oil and has a much lower EROEI.
    a. Oil sands mining yields **four to eight times** the energy used to mine it, and in-situ oil sands extraction – which accounts for the majority of production – returns only 3.2 to 5.4 times the

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13 https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EF001050.

energy investment. Those figures don't include transportation or final refining. By comparison, conventional oil brings a 10- to 20-fold return of the energy invested.

b. The oil sands industry has been walking a difficult balance between the high cost of production and its value on the open market. In 2014, the cost to produce oil sands crude was more than $60 per barrel (expressed in WTI terms), but improvements and efficiencies have brought costs down to **$46 to $53 per barrel**, according to one estimate. Nevertheless, the margins are thin in the best of times, and the industry incurred billions in debt in 2020 when a barrel of Canadian crude was worth less than $0.

25. The liabilities of cleaning up tailings ponds and dealing with orphaned wells is estimated to be $260B. The question of how to pay for it must be addressed before further tar sands expansion could be considered "responsible.

    a. Internal estimates from the AER pegged the potential liability at $260 Billion. The AER has $1.6B security collected from companies, plus $1 billion in federal grant, representing 1% of total liabilities.[14]

26. The IEA and CER in their most recent forecasts have concluded that any new oil sands development is incompatible with Canada's emissions reductions commitments.

    a. In the CER's 'evolving scenario' even if emissions from all other sectors of the economy were reduced to zero, emissions from oil and gas production would cause the country to miss an 80 per cent by 2050 reduction target by 32 per cent (assuming emissions per barrel in the oil sands could be reduced by 30 per cent). In the CER's Reference Energy System Scenario (reference scenario), which assumes no new policies are adopted to reduce emissions, oil and gas production on its own would result in Canada missing this target by 94 per cent (analysis by David Hughes in report cited in note 16 below).

    b. The IEA stated in their recent report: "Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required. Unabated coal demand declines by 90% to just 1% of total energy use in 2050. Gas demand declines by 55% to 1,750 billion cubic metres and oil declines by 75% to 24 million barrels per day (mb/d), from around 90 mb/d in 2020."[15]

27. In spite of record production levels of oil and gas in Canada, royalty revenues are down 45% since 2000; tax revenues declined from 14% in 2009 to less than 4% in 2018. In Alberta, non-renewable resource revenue is down 61% from 2000 levels in 2019, and 72% on a revenue per barrel of oil equivalent basis.[16]

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[14] See: **https://www.nationalobserver.com/2018/11/01/news/alberta-regulator-privately-estimates-oilpatchs-financial-liabilities-are-hundreds** (AER slide deck at bottom, also here: **https://www.scribd.com/document/392110284/Inactive-wells-are-growing-under-a-system-that-gives-some-companies-centuries-to-clean-up#fullscreen&from_embed**).

[15] International Energy Agency, May, 2021, Net Zero by 2050: A Roadmap for the Global Energy Sector, **https://www.iea.org/reports/net-zero-by-2050**

[16] **https://www.policyalternatives.ca/publications/reports/canada%E2%80%99s-energy-sector.**

28. Recent growth in Canada's emissions is the highest of any G7 country. Of the two G7 countries that have increased emissions since the Paris Agreement was signed in 2016, Canada, at 3.3 per cent, was the worst, followed by the US at 0.6 per cent.[17]
29. Given the foregoing, and since you have found that there is no evidence of illegal or impugnable actions, nor suggested that we acted in a manner inconsistent with our organizational purposes, presumably you accept that we are acting on *bona fide* and transparent beliefs, rather than the ulterior motives alluded to by the Premier in relation to the establishment of the Inquiry. If so, **then we submit you must find that West Coast has not engaged in an "anti-Alberta energy campaign" and should be excluded from your report.**
30. In the alternative, **if you do not agree that the above interpretation of the Terms of Reference is consistent with your September 2020 ruling, then we submit that you have defined those Terms of Reference in a manner that exceeds your jurisdiction** and which deprives us of the opportunity to properly counter your characterization of our activities.
31. As mentioned above, you found that it is not your role to determine whether a particular oil project is "timely, economic, efficient and responsible". Instead, you held you would proceed on the basis that "some level of oil and gas development" in Alberta is necessarily "economic, efficient and responsible", and therefore would focus on <u>any</u> opposition to development of Alberta's oil and gas resources "in a broad and general sense". In the same decision, you found you would likely not inquire into whether any particular statements by certain groups are "misleading or false".
32. Terms of reference are subordinate legislation and must be interpreted in the same manner as a statute.[18] As Commissioner, you are not free to interpret the Terms of Reference in any way you deem fit, but must do so in accordance with principles of statutory interpretation. Your interpretation effectively reads out the words "economic, efficient and responsible" from the Inquiry's Terms of Reference. As the Supreme Court of Canada says, "The general cannon of interpretation of course requires a court to ascribe some meaning to each word used by the legislature."[19]
33. The Government could have chosen to draft the Terms of Reference to include any activities that limit the development of oil and gas development, but did not. By ignoring the terms "economic, efficient and responsible" and giving them no meaning, you have exceeded the jurisdiction given to you by Cabinet.[20]
34. The impact of this misinterpretation is clear. If it were to stand you would have deprived WCEL and other groups from the opportunity of showing that their advocacy was never opposed to the "economic, efficient and responsible" development of oil and gas in Alberta. Furthermore, you suggest in your ruling on interpretation and your draft report that federal or Alberta Government determinations of whether a project is in the public interest is determinative of whether a particular project is "timely, economic, efficient and responsible"; however, you have not excluded advocacy around such a project from your purview. Your approach is accordingly inconsistent and unfair.

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[17] Source: United Nations, National Inventory Submissions 2021, **https://unfccc.int/ghg-inventories-annex-i-parties/2021**

[18] Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice (Toronto: Irwin Law, 2009) at 281.

[19] *Atco Ltd. v. Calgary Power Ltd*., [1982] 2 SCR 557 at 569.

[20] *Stevens v. Canada (Attorney General),* 2004 FC 1746 at para 36.

Harm is Caused by Terminology in Terms of Reference Regardless of Definition

35. WCEL also takes great issue with the characterization of our organizations and our activities as "anti-Alberta energy campaigns". The Terms of Reference clearly convey some degree of wrongdoing or impropriety with that phrase, which is defined as one who "frustrates" such development "by any means, which may include, by the dissemination of misleading or false information". As a matter of statutory interpretation, examples provided in a non-exhaustive list are meant to illustrate the kinds of things that are covered by the term.[21] In this case, the illustrative example used is "dissemination of misleading or false information". This implies that the entire term is meant to refer to activities or means that are somehow dishonest, improper or underhanded. The amplifier "anti" contributes to this interpretation. Furthermore, section 2(2) of the Terms of Reference, which elaborates on the mandate of the Commissioner makes references to Russian cyber and social media activities, referring to these as activities "similar or allegedly similar" to "anti-Alberta energy campaigns".
36. In this context, WCEL's position is that you have exceeded your jurisdiction by essentially defining any sort of advocacy concerning the impact of oil and gas development on climate change (and indeed any conservation activities that may incidentally have some affect on Alberta oil and gas development) – regardless of the legitimacy, scientific merit or good faith of those activities – as being inherently "anti-Alberta".
37. Again, it is wrong and unfair if you interpret your Terms of References so as to deprive WCEL of the opportunity to demonstrate that all of our advocacy has been done in good faith and based on solid and widely accepted science. Moreover, it is disingenuous of you to suggest that labelling WCEL and other groups as "anti-Alberta" does not necessarily connote anything negative.
38. Any common-sense interpretation of the term would suggest otherwise. Worse yet, the wording of the Terms of Reference allows a damaging inference to be drawn that groups who are found to be engaging in "anti-Alberta energy campaigns", which you define in an impermissibly broad way, are engaging in activities "similar" to Russian cyber interference. This is manifestly not the case.
39. In light of the foregoing, we would ask that you reconsider your interpretation of the Inquiry's Terms of Reference. According to any proper interpretation, WCEL should not be included in your report.

Standard of Admissible Evidence

40. WCEL is deeply concerned that you have applied an unreasonably and unlawfully loose standard of admissibility for the evidence you rely on. While it is recognized that public inquiries are not subject to the same strict rules of evidence as a court,[22] that does not mean that "anything goes".[23] The BC Court of Appeal's decision in *Cambie Hotel* is often cited for the proposition that hearsay evidence is admissible in administrative hearings if it is relevant and can be "fairly regarded as reliable".[24] The BC

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[21] Ruth Sullivan, *Sullivan On the Construction of Statutes*, Sixth Edition (Toronto: LexisNexis, 2014) at ¶4.38 to ¶4.42

[22] B&E 10:5200; also see *Addy v Canada (Somalia Inquiry)*, [1997] 3 FC 784.

[23] *Fraser Health Authority (Re)*, 2006 BCIPCD No. 26, cited in, e.g., *British Columbia Lottery Corporation v Skelton*, 2013 BCSC 12.

[24] *Cambie Hotel (Nanaimo) Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* 2006 BCCA 119 ("Cambie Hotel").

Court of Appeal explored the meaning of "fairly regarded as reliable" further in *BC (Securities Commission) v Alexander*:[25]

> *[64] While a tribunal is not subject to the rules of evidence that apply in a court of law, the principles underlying the authentication of documentary evidence and the presumptive inadmissibility of hearsay evidence provide some insight in discerning what evidence in this context may "fairly be regarded as reliable."*
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> *[65] Under the rules of evidence, documents (real evidence) must be authenticated, that is the documents must be proved to be what they purport to be before they may be admitted into evidence. To establish threshold authenticity, the author or creator of a document is typically called as a witness to attest that he or she made the document and what the document was intended to be. […]*
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> *[67] Once authenticity is established, where a document that contains hearsay evidence is being offered for the truth of its content, the reliability of the content of the document may present another hurdle to admissibility under the rules of evidence. Hearsay evidence is presumptively inadmissible because of the inherent dangers associated with the reliability of such evidence in the absence of a contemporaneous opportunity to cross-examine the author of the statement. However, exceptions to the presumptive rule have been developed where there are "circumstantial guarantees of reliability" to overcome the inherent dangers of such evidence and/or extrinsic evidence that may corroborate the trustworthiness of its content.*

41. A review of the *Public Inquiries Act* confirms that the Alberta legislature expected some degree of formality and guarantees of reliability with respect to the admission of evidence in a public inquiry. In that regard, several of the statutory provisions refer to sworn evidence and the admissibility of documents.[26]
42. Based on WCEL's review of your draft report, it is apparent there are several examples where you have simply relied on newspaper stories, which are inherently hearsay, as well as other documents from various sources on internet – some of which are inherently unreliable. Relying on the web pages of our group and others is one thing, but you have apparently obtained documents from questionable websites in the U.S. (e.g., freebeacon.com, Capital Research Center, etc.), and have framed your report around them as though they were authentic. For example, you have relied on documents that are purportedly from the Rockefeller Brothers, Corporate Ethics International and the RCMP. It was open to you to seek confirmation of the authenticity of those documents, but it appears that was not done.
43. At one point, you even expressly state in reference to reports by the Capital Research Center that "I have not sought to verify" amounts coming from those groups. With respect, if you cannot verify the information, you should not be referring to it.
44. Your report also frequently refers to interviews you have conducted, but you rarely mention who is the interviewee. It is unknown whether any of these interviewees provided statements under oath,[27] and if they did, why those statements have not been provided. This is a serious denial of procedural fairness and natural justice to rely on evidence that is not provided to an affected party. Further, we

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[25] *British Columbia (Securities Commission) v Alexander,* 2013 BCCA 111.
[26] *Public Inquiries Act,* RSA 2000, c P-39 sections 4, 5, and 8-10.
[27] *Public Inquiries Act,* RSA 2000, c P-39 sections 4 and 10.

could not ask you for the opportunity to cross examine any of those statements, as contemplated by your *Rules of Practice and Procedure*, because we simply do not know who those interviewees are. But more seriously, we question how you can even rely on this evidence according to any standard of admissibility.

45. In our submission, you should review your report in detail, and remove any references to information that cannot "fairly be regarded as reliable". Your final report should also explain how you found other evidence to be admissible, in accordance with the legal standards described above.

Freedom of Expression

46. This Inquiry is fundamentally about one of the most crucial and fundamental freedoms protected by the *Canadian Charter of Rights and Freedoms*. Your inquiry is explicitly targeted at the expressive activities of organizations challenging oil and gas development that contributes to climate change, an "existential threat to human life in Canada and around the world" (paragraph 171). The political responses to this existential threat are matters of legitimate concern to all Canadians, and in a free and democratic society all Canadians have the right to be heard on these issues.

47. The Supreme Court of Canada has highlighted the importance of freedom of expression to the political process:

> *The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.*[28]

48. It is also understood by the Courts that funding for expressive activities must also be protected as a derivative aspect of that freedom. The Supreme Court of Canada in *Harper* referred to funding restrictions tied to speech as improperly interfering with the right to "effective communication":

> *It is clear that the right here at issue is of vital importance to Canadian democracy. In the democracy of ancient Athens, all citizens were able to meet and discuss the issues of the day in person. In our modern democracy, we cannot speak personally with each of our fellow citizens. We can convey our message only through methods of mass communication. Advertising through mail-outs and the media is one of the most effective means of communication on a large scale. We need only look at the reliance of political parties on advertising to realize how important it is to actually reaching citizens — in a word, to effective participation. The ability to speak in one's own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens. Pell J.'s observation could not be more apt: "[s]peech without effective communication is not speech but an idle monologue in the wilderness"; see United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), at p. 415.*[29]

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[28] *R. v. Keegstra*, [1990] 2 SCR 697 at para 89.

[29] *Harper v. Canada (Attorney General)* [2004] 1 SCR 827 at paras 16 and 20, 20 for quote.

49. More recently, the courts have held that registered charities should not have their right to freedom of expression unduly restricted by burdens or limits on funding or spending on public policy engagement, as this interferes with the right to "effective communication". As the court held, 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."[30]

50. With respect, your draft report does not appear sensitive to the constitutional dimensions of your mandate. Your Terms of Reference have tasked you with inquiring into the expressive activities related to a vitally important political issue – how to address climate change. You have interpreted your Terms of Reference in a way that characterizes campaigns which have an impact on the level of oil and gas production mandated by the Government of Alberta as automatically engaged in an "anti-Alberta energy campaign", regardless of their motivations and without regard to the impact on expression. Indeed, the vary existence of your inquiry hinders our work and casts a chilling effect on the expressive activities related thereto.

51. In the submission of the WCEL, your report should say that a) you did not find any evidence that any group was disseminating misleading or false information, and b) we were engaging in constitutionally protected activities that are fundamental to democracy. It is essential that any recommendations you may make avoid suggesting limits or restrictions on funding or expression. We note, as the court does in *Canada Without Poverty* at para 44 that "[a]ny burden, including a cost burden, imposed by government on the exercise of a fundamental freedom such as religion or expression can qualify as an infringement of that right or freedom if it is not 'trivial or insubstantial'."

Indigenous Rights

52. The draft Inquiry report section (h), under the heading "First Nations" contains a lengthy narrative, which you refer to as an "important story" that "I, as Commissioner feel is important to be shared with Albertans." This may be a "story" you want to tell, but that does not make the content the proper subject of the report of a Commission of Inquiry. This section:

    a) Consists almost entirely of quotes excerpted second hand from newspaper articles and op eds. As noted above, newspaper articles are inherently hearsay and the Inquiry report offers no analysis that would support the accuracy and reliability of this material. [31]

    b) Reflects a marked and misleading imbalance in the reporting cited. Even a cursory review of our media tracking over the time period referenced by the Commission turns up hundreds of articles quoting representatives of Indigenous peoples expressing concern about the risks of irresponsible oil sands development, oil pipelines or oil tankers.

    c) Reflects a fundamental misunderstanding of the nature of inherent Indigenous title, rights and law as recognized in international human rights law, and aboriginal title and rights recognized by section 35 of the Canadian Constitution.

53. It is also noteworthy that you did not avail yourself of extensive sworn evidence that is available regarding potential impacts on aboriginal title and rights from oil sands infrastructure projects, for

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[30] *Canada Without Poverty v AG Canada*, 2018 ONSC 4147 at para 37.

[31] *British Columbia (Securities Commission) v Alexander,* **2013 BCCA 111.** One exception to this are quotes from affidavit sworn by the CEO of an advocacy organization for First Nations with "oil and gas interests".

example in proceedings before the National Energy Board (as it then was) or the federal courts in relation to the Enbridge Northern Gateway project, but rather chose to rely on second hand reports from newspaper articles.

54. Furthermore, while we applaud the Inquiry for not targeting Indigenous peoples who may have received philanthropic support for their efforts to safeguard their territories from the risks of irresponsible oil sands development, there is no excuse for failing to provide these nations, and other Indigenous nations referenced in the Inquiry report as withholding their consent from oil sands related projects,[32] with a formal opportunity to respond to the "findings" of the Inquiry set out in section (h).
55. In our submission, given the inherent unreliability of news articles as a source of evidence, the virtual absence of other evidence to support the "story" you tell, and the other legal shortcomings noted, we submit that that section (h) should be omitted in its entirety.
56. As lawyers, we are bound by our professional and ethical obligations to serve the interests of our clients. We take instructions directly from the Indigenous nations who are our clients and who are free to end the retainer at any time. To the extent that the assertions made in section (h) suggest otherwise this is a serious and unfounded allegation against other legal professionals that you should consider very carefully before making.
57. We also make the following general comments about the tone and content of section (h).
58. The draft report is correct when it states:

    285. First Nations are seen by many Canadians as speaking with one voice. They are in fact, similar to any other community or group in that they have a diversity of views on many issues. Most often, like every community, their views and the positions taken by them on various issues are dictated by their geographical location and opportunities or challenges that arise therefrom.
59. Unfortunately, the section that follows repeats this pattern by selectively quoting primarily resource-development oriented Indigenous spokespeople to create the impression of a monolithic Indigenous perspective. Ironically, this biased and one-sided view mirrors the dynamic of so-called 'eco-colonialism' of only capitalizing on Indigenous people who share their agenda and recruiting token members to front their causes, in this case, the pro-oil, climate denying agenda.
60. The Inquiry report also fails to recognize the economic duress faced by many of these Nations resulting from the dispossession of land and presumption of Crown title. This includes the forced displacement of Indigenous peoples from their lands to reserves, 150+ years of colonial rule which includes residential schools, day schools, the 60s scoop, and the epidemic of missing and murdered women and girls. Current reflections of this colonial dynamic include the disproportionate rates of children in foster care and incarceration in the criminal justice system, in addition to the chronic underfunding of Indigenous education and health. These are not new issues, but ongoing legacies of colonization as set out in multiple public inquiries with full participation of Indigenous peoples, from the **Report of the Royal Commission on Aboriginal Peoples** in 1996, to **The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls** in 2019.

[32] E.g., The Coastal First Nations who banned heavy oil tankers from their territories referenced at paragraph 222.

61. Ultimately, most of the legal uncertainty faced by resource companies who violate Indigenous rights can be resolved by obtaining the free, prior and informed consent of impacted Nations, as stated clearly by the Supreme Court of Canada in ***Tsilhqot'in***. The **Truth and Reconciliation Commission's 94 calls to action** includes a focus on the corporate sector:

    92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.

62. Constitutionally protected rights like Aboriginal title and rights exist to protect against the tyranny of the majority – that means for a linear project like a pipeline, transmission line or railway, consent must be obtained from all communities along the route – it is not a referendum.

63. Indigenous self-determination involves more than economic participation in oil and gas projects, it includes the right to decide, return of land, and reparations.

64. WCEL supports and is guided by the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and the 94 calls to action identified by the Truth and Reconciliation Commission. We recognize that this is an ongoing journey of learning and unlearning as we continue to decolonize our practices.

65. In our experience, Indigenous peoples are at the forefront of the climate crisis and a textbook example of environmental racism. Indigenous peoples disproportionately experience the greatest impacts of climate change, while having contributed the least to the problem, with fewer opportunities to mitigate or adapt to the climate crisis and its impact on lands, water and air.

66. WCEL's motives have always been about the stewardship of ecosystems and a more sustainable and just society, with a focus on British Columbia where we are based. This fundamentally includes working in support of Indigenous self-determination, which both brings the causes of the climate crisis into focus, and presents solutions for how to transition from a hydrocarbon-based economy.

Funding

67. As noted since the Inquiry has not demonstrated that West Coast Environmental Law engaged in an "anti-Alberta energy campaign" the sources of our funding are irrelevant to the Inquiry and all references to West Coast should be removed or redacted, and any amounts associated with West Coast removed from the totals. We also make the following submissions related to this funding section of the Inquiry report.

68. You correctly note at paragraph 434 that "determining with precision, the total quantum of foreign funding, is not the mandate of the Inquiry. Rather, it is to determine the 'role of foreign funding, if any, in anti-Alberta energy campaigns'."

69. In our submission, it follows that the tables included at paragraphs 429 and 437 and related commentary should be excluded from the final Inquiry report as irrelevant. This information serves little purpose other than to encourage readers to incorrectly conflate overall international funding with the actual focus of the Inquiry on a very limited subset of funding, that to so-called "anti-Alberta energy campaigns."

70. If any figure at all related to international funding is included in your report for West Coast Environmental Law, which we submit should not be the case, at most it should be limited to $1,028,171; the total of the international grants listed in Part III. However, for the reasons set out

below and elsewhere in our submissions we submit that even these funds were never used for an "anti-Alberta energy campaigns."

71. I also note that there are a number of inaccuracies in the Deloitte report; for example "major" international funders are listed that have never made grants to the noted society. Also contrary to the text of paragraph 426 the West Coast Environmental Law Association is not a registered charity.

72. The amount of government funding specified as received by our organizations is greater than, and not in accordance with our audited financial statements.

Additional comments on Part III – West Coast Environmental Law

Background

73. I note the following with respect to the three West Coast Societies as it relates to this inquiry:

74. The West Coast Environmental Law Research Foundation is a registered charity, who has a majority of independent board members with no legal relationship to the other West Coast societies, retaining at all times direction and control over its charitable resources. The Inquiry report should take care to clarify that any reference to "affiliation" between the West Coast societies is not intended to suggest otherwise.

75. The West Coast Environmental Dispute Resolution Fund Society exists solely to house the Environmental Dispute Resolution Fund (EDRF), which is administered by the West Coast Environmental Law Association. The EDRF is funded in full by a single Canadian entity, the Law Foundation of British Columbia and has never received international funding from any source. As such, reference to any activities funded by the EDRF should be excised from the Inquiry report.

76. The Inquiry Report discusses our involvement in several cases which are funded through the EDRF. Your conclusion that we are engaged in an "anti-Alberta energy campaign" and should be a target of the Inquiry is in part based on the fact that we have provided funding through our EDRF to groups working on divestment and children's lawsuits.

77. For greater clarity, the EDRF is an access to justice fund, which is funded entirely through Canadian sources. The funds in question are awarded so that the BC individuals and groups that apply to the fund can further their specific environmental goals. The motivation of West Coast in providing these funds is unrelated to constraining oil or gas development in Alberta, but rather to ensuring that community groups and individuals have the legal support they need to resolve environmental disputes in British Columbia.

78. Past incorrect assumptions by prominent officials that grant recipients are following our instructions and/or have received international funding through us has resulted in at least one grant recipient receiving death threats, and we would encourage you not to mischaracterise the role of the EDRF or EDRF grant-recipients.

79. The actions of the EDRF are entirely irrelevant to the Commission's Inquiry and reference to any activities funded by the EDRF should be excised from the report.

Litigation and Legal Representation

80. At para. 262, you begin a discussion of litigation strategies.
81. Unless you are alleging what is legally known as abuse of process (and you have said that you are not impugning any of the parties), it is difficult to see that a demand that government or industry comply with legal requirements can be termed an attempt to frustrate responsible development. Compliance with the law is generally considered a basic requirement of responsible corporate and government behaviour.
82. The first section "Legal Challenges in the Regulatory Context", to the extent that it relates to regulatory decisions related to Alberta oil and gas development or associated projects, might meet the geographic component of the Inquiry. We note, however, that the actual discussion in that section is related to letter writing to influence statutory decision-makers, and does not actually relate to legal challenges at all.
83. The other two types of litigation discussed, however, do not generally relate to Alberta, and with a few exceptions should not be taken as falling within the "geographic boundary" identified by you in terms of your mandate.

Public Trust and Failure to Warn Lawsuits

84. Under "'Public Trust' Lawsuits," starting at para. 269, you discuss a series of cases filed on the basis of the legal theory that the federal government owes a duty of care to youth or other vulnerable groups, on public trust, constitutional or other grounds. These lawsuits have been filed all around the world, and generally focus on a duty of each government to carry out actions to address climate change within its borders. These lawsuits collectively in no way target Alberta.

[In order not to further potential harm to them, details of specific named EDRF clients and files has been omitted]

91. To our knowledge, the Petitioners in these cases have received no notice of the fact that their cases are going to be named as "anti-Alberta energy campaigns", or provided with any opportunity to respond. It is inappropriate for them to be named and identified as "anti-Alberta energy campaigns" without such notice.
92. We have had no involvement in "failure to warn" cases, and to our knowledge none have been filed in Canada, but we find it absurd that cases which are clearly international in scope are deemed to fit within the geographic limits of the Inquiry by virtue of a mention of the Alberta Oil Sands as one of the assets owned by Exxon. The fact that you feel comfortable naming elected officials from other countries as engaged in "anti-Alberta energy campaigns" is shocking.

Divestment

93. At para. 165 you discuss Divestment Campaigns. Divestment is a tool generally have an international focus, and the fact that they may mention the Alberta Oil Sands or related infrastructure should not be determinative of whether they are focused on Alberta. The fact that you have identified a small number of examples of Alberta-focused divestment campaigns does not make all use of this tool an Anti-Alberta Energy Campaign.

[In order not to further potential harm to them, details of specific named EDRF clients and files has been omitted]

97. As noted above, we take the position that reference to this file and all EDRF cases should be excised from the Inquiry report.

Funding Applications and Grant Descriptions

98. As noted above, you have found that efforts to oppose a particular project "on specific grounds … such as where a party's interests in land or traditional rights may be directly affected…" does not constitute an "anti-Alberta energy campaign".

99. Based on my review of lawyer time records, all but a fraction of the international grant funds noted in draft Part III of the report were devoted to representation of specific First Nations clients in efforts to defend their title, rights and legal interests potentially affected by specific pipeline and tanker projects, and related to regulatory and court proceedings about these specific projects.

100. With respect, a small number of general statements on our website or the descriptions provided by philanthropic organizations cannot be relied on to evaluate what grant funds were actually used for, namely legal representation that does not fall within your definition of "anti-Alberta energy campaigns."

101. Further, as you have indicated that you consider the outcomes of federal and provincial review and environmental assessment processes determinative as to whether a particular project is "timely, economic, efficient and responsible", any projects which has been rejected by either level of government cannot be considered the subject of an "anti-Alberta energy campaign."

102. The majority of our legal time funded by the international grants noted was devoted to representation of clients in relation to the Enbridge Northern Gateway pipelines and tankers project, which as you know was rejected by the federal government in 2016. As such this work and related funding does not fall within your interpretation of the definition of contributing to an "anti-Alberta energy campaign".

103. Based on all of the above, West Coast Environmental Law submits that you have erred in determining that WCEL has participated in an "anti-Alberta energy campaign" as defined in the Terms of Reference. We further request that any reference to West Coast Environmental Law participating in an "anti-Alberta energy campaign" be removed from the Inquiry report along with the other amendments requested throughout these submissions.

All of which is respectfully submitted:

[original submission signed]

Jessica Clogg,
Executive Director & Senior Counsel
for
West Coast Environmental Law Association
West Coast Environmental Law Research Foundation
West Coast Environmental Dispute Resolution Fund Society

*This submission has been edited from the original to correct typographical errors and to omit information about specific EDRF clients.