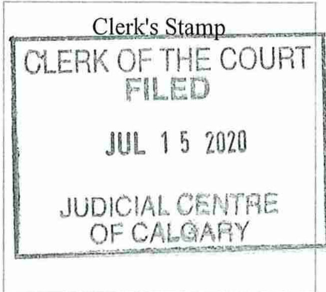
COURT FILE NUMBER	1801-10960	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
PLAINTIFF	PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity	
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE	
APPLICANTS (NOT A PARTY)	CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.	
DOCUMENT	**BRIEF OF CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**PARLEE MCLAWS LLP** Barristers & Solicitors Patent & Trademark Agents 3300 TD Canada Trust Tower 421 - 7 Avenue SW Calgary, Alberta T2P 4K9 Attention: **G. Scott Watson / Charles W. Ang** Telephone: (403) 294-7038 / 3457 Facsimile: (403) 767-8862 File No.: 22-921	



BRIEF OF THE APPLICANTS, CANADIAN NATURAL RESOURCES LIMITED, CENOVUS ENERGY INC., AND TORXEN ENERGY LTD.

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LIST OF AUTHORITIES

I. INTRODUCTION

1. Canadian Natural Resources Limited ("Canadian Natural"), Cenovus Energy Inc. ("Cenovus"), and Torxen Energy Ltd. ("Torxen", collectively with Canadian Natural and Cenovus, the "Applicants") all seek intervenor status in Court of Queen's Bench Action No. 1801-10960 (the "Action") with the right to participate in the *BIA* Application and the Application for Security for Costs, as herein defined, and all matters incidental thereto.

2. The Applicants should be granted intervenor status because they will be directly and significantly impacted by the outcome of the aforementioned matters, and will offer extensive expertise and unique perspectives to assist this Honourable Court.

II. FACTS

3. Terms not hereinafter defined shall have the same meaning as set out in the Statement of Claim filed in this Action.

Procedural History

4. The Applicants accept and endorse the Plaintiff's timeline of events as related to the impugned Transactions, and as described in the Affidavit of Paul Darby sworn and filed on August 2, 2018[1].

5. The following are key events that are relevant to the within Application for intervenor status:

a) On March 23, 2018, Sequoia made an assignment into bankruptcy and the Trustee was appointed;

b) On August 2, 2018, the Trustee filed the Statement of Claim resulting in the within Action being commenced and seeking to set aside the Transactions related to the Goodyear Assets on several grounds including, *inter alia*, that the Transactions constituted a transfer at undervalue in violation of Section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*") (the "*BIA* Claim");

[1] Affidavit of Paul J. Darby, filed August 2, 2018

c) In August 2019, several of the Trustee's claims were struck; however, the Court did not dismiss or strike the *BIA* Claim;

d) On February 25, 2020, the Defendants, Perpetual, POT, and PEOC (collectively, the "Perpetual Defendants") filed applications to strike or, alternatively, for summary judgment of the *BIA* Claim (the "*BIA* Application") and to seek an Order directing the Trustee to post security for costs (the "Application for Security for Costs"); and

e) As a result of the COVID-19 pandemic, the *BIA* Application and Application for Security for Costs, originally scheduled for June 22 to 24, 2020, were adjourned and have since been rescheduled to July 28 to 30, 2020. If granted, the *BIA* Application would be conclusive of this Action, subject to any appeals, and the Application for Security for Costs may similarly be conclusive of this Action in the event that the required security would prevent the Trustee from further litigating the *BIA* Claim, in effect allowing the Transactions to be maintained without review.

Backgrounds of the Applicants - Canadian Natural, Cenovus, and Torxen

6. Canadian Natural is a Canadian senior independent energy company engaged in the acquisition, exploration, development, production, marketing, and sale of crude oil, natural gas, and natural gas liquids[2]. Canadian Natural is also one of the largest independent producers of crude oil and natural gas in Canada with operations throughout Western Canada, and is a creditor in the bankruptcy proceedings of Sequoia[3].

7. Cenovus is a Canadian integrated oil and natural gas company headquartered in Calgary, with operations in oil sands projects in northern Alberta, conventional crude oil, natural gas and natural gas liquids assets in Alberta and British Columbia as well as a non-operated 50 percent

[2] Affidavit of Ron Laing, filed July 14, 2020, at para 4 [Laing Affidavit]
[3] *Ibid*, at paras 5 and 16

interest in two U.S. refineries and a wholly-owned crude-by-rail loading terminal at Bruderheim, Alberta and is a creditor in the bankruptcy proceedings of Sequoia[4].

8. Torxen is a Canadian exploration and production company focused on the development and optimization of conventional oil and gas assets in Southern Alberta with a commitment to high standards of safety, environmental responsibility and stakeholder relationships[5].

9. Orphaned oil and gas wells, pipelines, facilities, and associated sites are those wells, pipelines, facilities, and associated sites designated by the Orphan Well Association (the "OWA") as having no responsible and solvent owner to complete the necessary suspension, abandonment, remediation, and reclamation processes[6].

10. Once an oil and gas well, pipeline, facility, and/or associated site is designated as "orphaned", the OWA becomes responsible for the management of and the costs associated with suspending, abandoning, remediating, and reclaiming those locations.

11. In order to fund its abandonment and reclamation mandate and avoid closure costs from being borne by Albertans, the OWA issues an annual orphan levy to energy companies in Alberta proportionate to each energy company's share of the industry's estimated liability (the "Levy")[7].

12. The Applicants collectively hold approximately 30 to 35%[8] of all licenses issued by the Alberta Energy Regulator (the "AER") for wells located in the Province of Alberta, and accordingly, pay a proportionate annual Levy to the OWA, which Levies are used to protect the public and the environment by funding the abandonment and reclamation of wells, facilities, and pipelines that do not have a solvent and responsible owner.

13. As a result of the Transactions, the Goodyear Assets, currently owned by Sequoia, a bankrupt corporation, will be designated as orphans to be suspended, abandoned, remediated,

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[4] Affidavit of Antonio Jackson, filed July 14, 2020, at paras 5 and 6 [Jackson Affidavit]
[5] Affidavit of John K. Brannan, filed July 15, 2020, at para 5 [Brannan Affidavit]
[6] Affidavit of Lars De Pauw, filed June 30, 2020, at paras 6 and 7
[7] *Ibid*
[8] Laing Affidavit, at Exhibit "B"

and reclaimed by the OWA which efforts will be funded by industry members, including the Applicants through a significantly increased Levy.

14. If the Transactions are allowed to proceed, the Applicants will collectively be responsible for paying an increased Levy of approximately $54,500,000.00 based on the estimated cost to abandon and reclaim the Goodyear Assets[9].

III. ISSUE

15. The central issue in this Application is:

a) whether the Applicants should be granted intervenor status, and, if granted, what terms, conditions, rights, and privileges should apply to the Applicants' intervenor statuses.

IV. APPLICABLE LAW

16. The Court has the discretion to grant intervenor status under Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010, which states that "[o]n application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court"[10].

17. In *Ecojustice Canada Society v. Alberta*, 2020 ABQB 364 ("*Ecojustice*"), the Honourable Justice Horner noted that the test for granting intervenor status starts with a "two-step process set out by the Supreme Court of Canada: the court must first consider the subject matter of the proceeding, and then determine the proposed intervenor's interest in the subject matter"[11].

18. Justice Horner continued saying that, "in determining whether a proposed intervenor has an interest in proceeding, the court will consider: (a) whether the intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the intervenor has some expertise or fresh perspective to assist the court in resolving the matter"[12].

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[9] Laing Affidavit, at para 19; Jackson Affidavit, at para 20; Brannan Affidavit, at para 16
[10] *Alberta Rules of Court*, Alta Reg 124/2010, r 2.10 [*Rules*]
[11] *Ecojustice Canada Society v. Alberta*, 2020 ABQB 364, para 42 [*Ecojustice*]
[12] *Ibid*, at para 43

19. In *Ecojustice*, Justice Horner added that the following questions established by the Court of Appeal of Alberta in *Pedersen v. Alberta*, 2008 ABCA 192, are relevant in determining whether to grant intervenor status[13]:

a) Will the intervenor be directly affected by the outcome of the matter?

b) Is the presence of the intervenor necessary for the court to properly decide the matter?

c) Might the intervenor's interest in the proceedings not be fully protected by the parties?

d) Will the intervenor's submission be useful and different or bring particular expertise to the subject matter before the court?

e) Will the intervention delay the proceedings?

f) Will there possibly be prejudice to the parties if the intervention is granted?

g) Will intervention widen the *lis* between the parties?

h) Will the intervention transform the court into a political arena[14]?

20. In *Ecojustice*, Justice Horner found that an industry consortium consisting of representative of different sides of Alberta's oil and gas industry had an interest, in part, "because they depend on the economic success of the oil and gas industry in Alberta"[15].

[13] *Ecojustice*, at para 44
[14] *Pedersen v. Alberta*, 2008 ABCA 192, at para 10
[15] *Ecojustice*, at para 49

V. ARGUMENT/APPLICATION OF THE LAW

A. The Applicants Will be Directly and Significantly Affected by the Outcome of these Matters

21. All third-party licensees in Alberta's oil and gas industry, including the Applicants, will be directly and significantly affected by the decision of the Court in the *BIA* Application and the Application for Security for Costs for the foreseeable future.

22. If the *BIA* Claim is struck or otherwise cannot proceed, the Transactions will endure and result in a direct financial impact on all OWA Levy contributors, which is estimated to be more than $200,000,000.00. The specific burden that will be borne by the Applicants is approximately:

a) $42,000,000.00 to Canadian Natural[16];

b) $6,000,000.00 to Cenovus[17]; and

c) $6,500,000.00 to Torxen[18].

23. In addition to the immediate financial impact to the Applicants and all third-party licensees that will result from a significantly increased OWA Levy, if the Transactions are permitted to endure without scrutiny under the *BIA*, the Applicants and all third-party licensees would be faced with the following issues:

a) industry members will be compelled to implement similar strategies incentivizing insolvency to avoid abandonment and reclamation obligations as well as municipal taxes; and

b) the authority of Alberta's regulatory regime and the purpose of the OWA would effectively be nullified, to the detriment of the environment, and to the cost of industry participants, including the Applicants, and all Albertans.

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[16] Laing Affidavit, at para 19
[17] Jackson Affidavit, at para 20
[18] Brannan Affidavit, at para 16

24. If the Transactions are upheld, and such transactions avoiding abandonment and reclamation obligations become an industry practice, then contributors to the Levy, like the Applicants, will be unfairly and disproportionately financially impacted potentially leading to a financial tipping point and operational instability. Given the current state of the industry that has been already significantly affected by declining markets and COVID-19 difficulties, further operational instability will exacerbate the problems already faced by operators and cause them to reach a financial tipping point sooner.

25. Canadian Natural and Cenovus are also creditors of Sequoia, in the amounts of $187,452.41 and $6,237,887.92, respectively, and the outcome of the *BIA* Application will directly affect their ability to recover their respective debts in the bankruptcy proceedings. Specifically, if judgment is ultimately awarded against the Defendants, then Sequoia would experience a corresponding increase in its assets or a corresponding decrease in its liabilities, depending on which relief is granted.

26. For the reasons set out above, the Applicants will be directly and significantly impacted by the decision of this Honourable Court in the *BIA* Application and the Application for Security for Costs as both Applications could preclude the continuance of the *BIA* Claim, which would result in the Transactions enduring and the aforementioned financial and operational hardships being immediately experienced by the Applicants and other industry members.

B. The Applicants Should be Granted Intervenor Status to Protect Interests Not Fully Protected by the Current Parties, to Provide Useful and Unique Expertise, and to Assist the Court with Properly Deciding the Matters

27. The Applicants' perspectives are necessary in order for the Court to properly consider the private industry interests of Alberta's oil and gas sector, as well as the associated public interest in ensuring industry members are guided by appropriate economic and environmental considerations.

28. Neither the existing parties to the Action nor the other potential intervenors are in a position to speak to or represent the private industry interests of Alberta's oil and gas sector or

the associated public interest before the Court; as such, the Applicants' interests will not be fully protected by the existing parties or the other potential intervenors to the Action.

29. As a diversified cohort of industry members, the Applicants are well situated to represent a sample of the oil and gas industry, each lending their unique perspective to assist the Court in recognizing the practical effects of the legal issues to be decided on energy production in Alberta, as well as the business and operational considerations of industry members.

30. As the largest independent producer of natural gas in Western Canada, the largest producer of heavy crude oil in Canada, the largest holder of AER licenses for wells in the Province of Alberta, and the largest contributor to the OWA Levy, Canadian Natural is ideally situated to lend its perspective to assist the Court in fully understanding the practical effects of the legal issues to be decided on energy production in Alberta, as well as the business and operational considerations of industry members.

31. As a developer of vast Canadian oil sands assets, with diversified ownership interests in Western Canada and in the United States, Cenovus is ideally situated to be an industry representative, lending its unique perspective to assist the Court in recognizing the immediate and long-term impacts of its decision. Cenovus is willing to share its expertise on the consequential effects of the Court's decision on all levels of Alberta's oil and gas industry, including the acquisition, exploration, development, production, marketing and sale of energy products, as well as the risk-benefit assessments utilized by industry members to conduct business, and make informed operational decisions.

32. Finally, as a private operator in Alberta's oil and gas industry, Torxen is able to provide insight into the consequential effects of the outcome of the Court's decision on smaller, mid-sized industry participants.

33. If granted intervenor status, the Applicants will be in a position to provide the Court with unique and useful submissions on the following issues:

a) the Transactions' significant and material departure from industry standards;

b) the apprehension of industry members in permitting the purposeful evasion of abandonment and reclamation obligations through multiple, sequential, transactions, concluded by insolvency;

c) private industry's understanding of the interplay between Section 96 of the *BIA* and the regulatory obligations of Alberta's regulatory regime, as well as the developed and evolving business practices in accordance with these interpretations; and

d) the direct and indirect consequences of the Transactions being allowed to persist through an Order by this Honourable Court to dismiss the *BIA* Claim, or to require the Trustee to post security for costs that will prevent the continuance of the *BIA* Claim, upon the OWA, the Levy, and Alberta's regulatory regime, as well as the consequential impacts to private industry and private industry members' management of their abandonment and reclamation obligations.

34. For the reasons set out above, the Applicants' presence as intervenors is necessary for the Court to properly decide the matter. In addition, the Applicants' interests in the matter will not be fully protected by the current parties to the Action or the potential intervenors to the Action, and the Applicants' submissions will be useful and bring a particular and unique expertise to the consideration of the *BIA* Application and the Application for Security for Costs.

C. The Intervention Will Not Unduly Delay the Proceedings, Cause Any Significant Prejudice to the Parties, Widen the *Lis* Between the Parties, or Turn the Court into a Political Arena

35. Granting the Applicants leave to intervene in the Action will not unduly delay the proceedings or cause prejudice to the parties as the expected timeline for proceeding with the intervention will not cause undue delay and the Court is empowered under Rule 2.10 of the *Alberta Rules of Court*[19] to control the scope of the intervention through any terms, conditions, rights and privileges it sees fit in order to ensure that proceedings are not unduly delayed and the parties are not prejudiced.

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[19] *Rules*, r 2.10

36. The Respondents will likely argue that the Applicants should not be granted intervenor status as it will cause prejudice and should have been sought by the Applicants immediately after this Action was commenced. However, the Applicants submit that the relevant time period to consider is not the commencement of the Action, but instead should be, at the earliest, the filing of the Respondents' *BIA* Application and the Application for Security for Costs (the "Respondents' Applications").

37. The Statement of Claim in the within Action pled numerous causes of action against the Respondents as well as the personal Defendant, Susan Riddell Rose, the majority of which were unique to the Trustee, such as its statutory right to commence an action under Section 96 of the *BIA.* It was not until the Applicants became aware of the Respondents' Applications that they understood the Respondents were seeking to summarily strike the *BIA* Claim or otherwise deprive the Trustee of its statutory right to review and challenge the Transactions under Section 96 of the *BIA* and litigate the *BIA* Claim in the normal course, which seriously concerned and alarmed the Applicants. The within Application for intervenor status was filed thereafter, with the intention of assisting the Court with the Applicants' unique expertise in advising of the grave consequences to the industry and Alberta as a whole that are expected should the Respondents' Applications be successful.

38. The Applicants emphasize that they are not seeking to intervene in the Action as a whole, but are only seeking to intervene in the *BIA* Application and the Application for Security for Costs, as well as all matters incidental thereto. The Respondents' Applications were not filed until February 2020, and, due to the impacts of COVID-19, were then adjourned and rescheduled in or around the end of June 2020 to be heard on July 28 to 30, 2020. Accordingly, the within Application was brought in a timely manner and should not result in undue prejudice to the Respondents. Further, these Applicants are fully willing and able to adhere by any expedited timelines that the Court may order as a condition of being granted intervenor status.

39. Granting the Applicants leave to intervene in the Action will also not widen the *lis* between the parties, as all of the Applicants' proposed submissions relate to issues that are already before the Court in this Action and are limited to issues that are specific to the

Applicants. Further, the Court is empowered under Rule 2.10 of the *Alberta Rules of Court*[20] to control the scope of the intervention as it sees fit in order to ensure the *lis* between the parties is not widened.

40. Finally, granting the Applicants leave to intervene will not turn the Court into a political arena, as the Applicants intend to focus only on the legal issues involved in this Action and the potential business consequences to the oil and gas industry in Alberta that could stem from a decision of the Court.

VI. CONCLUSION

41. For the reasons set out above, the Applicants respectfully ask the Court to grant them leave to intervene in this Action on terms that the Court considers just.

VII. RELIEF SOUGHT

42. Canadian Natural, Cenovus, and Torxen request the following relief:

a) an Order, pursuant to Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010, granting Canadian Natural, Cenovus, and Torxen leave to intervene in the Action with the right to participate in the *BIA* Application and the Application for Security for Costs and all matters incidental thereto on such terms as this Honourable Court deems just;

b) an Order, pursuant to Rule 2.10 of the *Alberta Rules of Court*, Alta Reg 124/2010, prohibiting costs, either in favour of, or against the Applicants, with respect to any other party or intervenor in the *BIA* Application or the Application for Security for Costs;

c) as necessary, should this Honourable Court grant the Applicants leave to intervene on July 24, 2020, or thereabouts, a further Order adjourning the *BIA* Application and/or the Application for Security for Costs currently scheduled for July 28, 2020 to July 30, 2020; and

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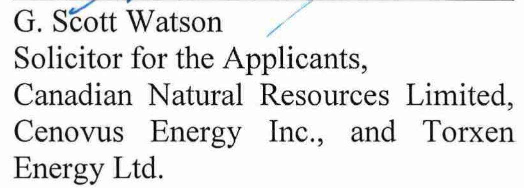
[20] *Rules*, r 2.10

d) such further or other relief as this Honourable Court may deem just or necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2020.

PARLEE MCLAWS LLP



PER: ______________________________
G. Scott Watson
Solicitor for the Applicants,
Canadian Natural Resources Limited, Cenovus Energy Inc., and Torxen Energy Ltd.

LIST OF AUTHORITIES

1) *Alberta Rules of Court*, Alta Reg 124/2010
2) *Ecojustice Canada Society v. Alberta*, 2020 ABQB 364
3) *Pedersen v. Alberta*, 2008 ABCA 192

TAB 1

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

TAB 2

2020 ABQB 364
Alberta Court of Queen's Bench

Ecojustice Canada Society v. Alberta

2020 CarswellAlta 1107, 2020 ABQB 364, [2020] A.W.L.D. 2142

Ecojustice Canada Society (Respondent / Applicant on Originating Application) 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 on Originating Application) and Indian Resource Council Inc., the Explorers and Producers Association of Canada, and W. Brett Wilson (Applicants)

K.M. Horner J.

Heard:
Judgment: June 11, 2020
Docket: Calgary 1901-16255

Counsel: Maureen Killoran, Q.C., Sean Sutherland, Justin Lafferty Osler, for Applicants, Indian Resource Council Inc., Explorers and Producers Association of Canada, and W. Brett Wilson
Barry Robinson, for Respondent / Applicant on Originating Application Ecojustice Canada Society
Doreen Mueller, Q.C., Peter Bujis, for Attorney General of Alberta
David Wachowich, Q.C., for J. Stephens Allen

Subject: Civil Practice and Procedure; Public

Headnote

Civil practice and procedure --- Parties — Intervenors — General principles

Government of Alberta initiated public inquiry into anti-Alberta energy campaigns supported by foreign organizations — Applicant applied for judicial review requesting that court find inquiry was unlawful — Industry consortium consisted of parties representing perspective of First Nation resource owners and industry partners, perspective of junior, mid-sized and independent oil and gas producers in Alberta, and perspective of industry investor — Industry consortium applied for leave to intervene on application for judicial review on two issues, whether inquiry into foreign funding of anti-Alberta energy campaigns was ordered in public interest within s. 2 of Public Inquiries Act such that inquiry was ordered for proper purpose; and whether inquiry fell within constitutional jurisdiction of Province of Alberta — Application granted in part — Industry consortium was comprised of representatives of different facets of Alberta oil and gas industry who wanted inquiry to proceed, and theirs was part of public interest that inquiry stated it sought to protect — If inquiry was halted, perspective of industry consortium would not be considered, and industry consortium were directly affected by outcome of application for judicial review — Industry consortium had expertise as participants in Alberta's oil and gas industry, which was perspective that was not presently before court — It was unlikely that industry consortium could raise constitutional jurisdiction arguments that would not be raised by respondents, they did not have particular expertise, and their participation as intervenor was not necessary for court to properly decide that issue — On issue of whether inquiry was brought for improper purpose, one of considerations would be whether public interest was served by inquiry, and industry perspective represented by industry consortium was necessary for court to properly consider public interest aspect of that issue — Industry consortium's submissions on public interest aspect of inquiry would be useful and different from submissions of respondents, and it was not clear that perspective would otherwise be presented — Intervention would not delay proceedings or create unfair time pressures for applicant, applicant would not be prejudiced if industry consortium was granted leave to intervene, allowing industry consortium to intervene would not wide lis between parties, and it was unlikely to transform court into political arena — Industry consortium would be directly and

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significantly affected by outcome of judicial review application, and would provide expertise and fresh perspective on issue of whether inquiry had been brought for improper purpose — Industry consortium was granted leave to intervene on issue of whether inquiry had been brought for improper purpose and was ultra vires authority granted to Lieutenant Governor in Council under s. 2 of Act.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Consortium Developments (Clearwater) Ltd. v. Sarnia (City) (1998), 1998 CarswellOnt 3948, 40 O.R. (3d) 158 (headnote only), 230 N.R. 343, 48 M.P.L.R. (2d) 1, 165 D.L.R. (4th) 25, 114 O.A.C. 92, [1998] 3 S.C.R. 3, 8 Admin. L.R. (3d) 165, 1998 CarswellOnt 3949, 40 O.R. (3d) 158 (note), 40 O.R. (3d) 158 (S.C.C.) — referred to

Edmonton (City) v. Urban Development Institute (2014), 2014 ABCA 340, 2014 CarswellAlta 1875, 61 C.P.C. (7th) 309, 584 A.R. 255, 623 W.A.C. 255, 7 Alta. L.R. (6th) 338 (Alta. C.A.) — considered

Gitxaala Nation v. R. (2015), 2015 FCA 73, 2015 CarswellNat 522, 2015 CAF 73, 2015 CarswellNat 4831 (F.C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2016), 2016 ABCA 238, 2016 CarswellAlta 1466, 89 C.P.C. (7th) 14, 39 C.B.R. (6th) 1, 40 Alta. L.R. (6th) 11 (Alta. C.A.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — considered

Pedersen v. Van Thournout (2008), 2008 ABCA 192, 2008 CarswellAlta 648, (sub nom. *Pedersen v. Thournout)* 432 A.R. 219, (sub nom. *Pedersen v. Thournout)* 424 W.A.C. 219 (Alta. C.A.) — considered

Reference re Environmental Management Act (2020), 2020 SCC 1, 2020 CSC 1, 2020 CarswellBC 115, 2020 CarswellBC 116, 29 C.E.L.R. (4th) 181, 30 B.C.L.R. (6th) 1, [2020] 2 W.W.R. 1, 441 D.L.R. (4th) 589 (S.C.C.) — considered

Reference re Greenhouse Gas Pollution Pricing Act (2019), 2019 ABCA 349, 2019 CarswellAlta 1975, 97 Alta. L.R. (6th) 232, 43 C.P.C. (8th) 167 (Alta. C.A.) — considered

Reference re Greenhouse Gas Pollution Pricing Act (2020), 2020 ABCA 74, 2020 CarswellAlta 328, 3 Alta. L.R. (7th) 1 (Alta. C.A.) — referred to

Reference re Impact Assessment Act (2020), 2020 ABCA 94, 2020 CarswellAlta 385 (Alta. C.A.) — considered

Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care) (2013), 2013 SCC 64, 2013 CarswellOnt 15719, 2013 CarswellOnt 15720, 58 Admin. L.R. (5th) 173, 366 D.L.R. (4th) 62, 451 N.R. 80, 312 O.A.C. 169, [2013] 3 S.C.R. 810, 130 O.R. (3d) 240 (note) (S.C.C.) — referred to

Starr v. Ontario (Commissioner of Inquiry) (1990), [1990] 1 S.C.R. 1366, (sub nom. *Starr v. Houlden)* 68 D.L.R. (4th) 641, (sub nom. *Starr v. Houlden)* 110 N.R. 81, (sub nom. *Starr v. Houlden)* 41 O.A.C. 161, (sub nom. *Starr v. Houlden)* 55 C.C.C. (3d) 472, (sub nom. *Starr v. Houlden)* 72 O.R. (2d) 701 (note), 1990 CarswellOnt 998, 1990 CarswellOnt 1299 (S.C.C.) — referred to

Wilcox v. Her Majesty the Queen in right of Alberta (2019), 2019 ABCA 385, 2019 CarswellAlta 2635 (Alta. C.A.) — referred to

Statutes considered:

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 ¶ 10 — considered

s. 92 ¶ 13 — considered

s. 92 ¶ 16 — considered

s. 92A ¶ 1 [en. (U.K.), 1982, c. 11, Sched. B, s. 50, reprinted R.S.C. 1985, App. II, No. 44] — considered

s. 109 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

ss. 50-51 — referred to

Public Inquiries Act, R.S.A. 2000, c. P-39

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Generally — referred to

s. 2 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 2.10 — considered

APPLICATION by industry consortium for leave to intervene on application for judicial review of public inquiry into anti-Alberta energy campaigns supported by foreign organizations.

***K.M. Horner J.*:**

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 appended to the OIC.

2 Ecojustice Canada Society ("Ecojustice") brought an Application for Judicial Review 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, the Minister of Justice and Solicitor General for Alberta (the "Minister"), and Mr. Allan. The Application for Judicial Review has not yet been heard.

3 The Indian Resource Council Inc. ("IRC"), the Explorers and Producers Association of Canada ("EPAC") and W. Brett Wilson each apply for leave to intervene on the Application for Judicial Review (the "Intervenor Application"). While each applicant is a separate entity and has filed an individual affidavit in support of the Intervenor Application, they filed one written argument and refer to themselves collectively as the "Industry Consortium". They seek leave to intervene jointly as representatives of diverse interests in Alberta's oil and gas industry. Ecojustice opposes the Intervenor Application on the basis that the Industry Consortium is not directly affected by the Application, and provides no expertise or fresh perspective that would be of assistance to the Court. Ecojustice also argues that there may be prejudice and politicization of the matter if intervenor status is granted.

4 The parties to this Application have agreed that it can proceed as an application in writing, based on written argument. Mr. Allan has filed no materials and is taking no position on the Intervenor Application. Similarly, no materials have been filed by Alberta, the Lieutenant Governor in Council, or the Minister.

5 For the reasons set out below, I allow this Application in part.

II. Background

A. The Inquiry

6 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
>
> (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,

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the Lieutenant Governor in Council may by commission appoint one or more commissioners to make the inquiry and to report on it.

7 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;

8 In signing the OIC, the Lieutenant Governor in Council ordered the Inquiry, declaring this issue to be of public concern and appointing Mr. Allan as the Commissioner. The Terms of Reference appended to the OIC establishes the Commissioner's mandate at section 2:

2(1) The commissioner shall inquire into anti-Alberta energy campaigns that are supported, in whole or in part, by foreign organizations, 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 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 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 to any anti-Alberta energy campaigns 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;

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(d) assist the Government of Alberta and other Canadian governments by recommending the interpretation of existing eligibility criteria or the creation of new eligibility criteria for attaining or maintaining charitable status.

9 The Commissioner's mandate is expansive, as the "Alberta oil and gas industry" is broadly defined in section 1(a) of the Terms of Reference 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.

10 The Terms of Reference also set out the requirement to produce interim and final reports by specified deadlines, the budget and administrative support to be provided, and policies on standing and financial assistance to participants in the Inquiry process.

B. The Application for Judicial Review

11 Ecojustice seeks to halt the Inquiry into anti-Alberta energy campaigns that are supported by foreign organizations, or to restrict the publication of the report and other information. It has brought an Application for Judicial Review 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 Terms of Reference 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 Terms of Reference 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.

12 With respect to ground (a), Ecojustice asserts in its Notice of 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 set out in the OIC and Terms of Reference demonstrate that it was established for partisan political purposes, as opposed to independent fact-finding on a matter of public interest. This, Ecojustice submits, is outside the scope of section 2 of the *Public Inquiries Act*.

13 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 Lieutenant Governor in Council. Specifically, the focus of the OIC and Terms of Reference 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.

14 Finally, with respect to ground (c), Ecojustice argues that the OIC and Terms of Reference predetermine certain matters before the Commissioner, which fetters his fact-finding and decision-making discretion. For example, Ecojustice says the OIC

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and Terms of Reference 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.

15 Ecojustice states that these and other predeterminations, as well as extensive public comments by the United Conservative Party, the Premier and the Minister, and political contributions made by the Commissioner to the United Conservative Party and to the leadership campaign of the now-Minister all result in a cumulative impact that leads to a reasonable apprehension of bias.

16 On its Application for Judicial Review, Ecojustice seeks an Order:

(a) declaring the OIC to be *ultra vires* the jurisdiction of the Lieutenant Governor in Council;

(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 Lieutenant Governor in Council 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.

17 The Application for Judicial Review was originally scheduled to be heard on April 23, 2020. As a result of the COVID-19 pandemic, it was adjourned *sine die* and will be rescheduled when the Court begins hearing non-urgent matters, currently slated to begin with matters already scheduled for June 29, 2020 and following.

C. The Intervenor Application

18 The Industry Consortium is comprised of the IRC (for the perspective of First Nation resource owners and industry partners), EPAC (for the perspective of junior, mid-sized and independent oil and gas producers in Alberta) and Mr. Wilson (for the perspective of an industry investor). They apply for leave to intervene in the Application for Judicial review. Collectively, the Industry Consortium asks to:

(a) file a 15-page written brief of argument; and

(b) present oral argument at the hearing of the Application for Judicial Review.

19 The Industry Consortium makes no specific request for leave to file evidence on the Application for Judicial Review.

20 On this Intervenor Application, the Industry Consortium relies on three affidavits setting out the perspectives of the IRC (Affidavit of Stephen Buffalo, sworn March 11, 2020 (the "Buffalo Affidavit")), EPAC (Affidavit of Tristan Goodman, sworn March 3, 2020 (the "Goodman Affidavit")), and Mr. Wilson (Affidavit sworn March 5, 2020 (the "Wilson Affidavit")).

IRC

21 Mr. Buffalo is the president and CEO of the IRC. In the Buffalo Affidavit, he describes the IRC as an advocacy organization acting on behalf of First Nations across Canada with oil and gas rights on their reserves and traditional lands. Its membership is comprised of 130 First Nations in nine provinces, including 38 IRC members in Alberta. The IRC's mandate is to ensure that its members' interests are represented when natural resource development is discussed, and that they benefit from this development.

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22 In general, the IRC promotes the responsible and sustainable development of pipelines and energy infrastructure, while also protecting Aboriginal rights. In addition, Mr. Buffalo explains that the IRC aims to dispel simplistic myths in the media and other groups that create a false dichotomy between the development of natural resources and the protection of the environment and Indigenous rights. The IRC engages in a broad range of activities in support of its mandate, including advocacy; legislative developments; facilitating meetings between First Nations, government and industry; facilitating First Nations control over the Indian Oil and Gas Canada Co-Management Board created by what is now Indigenous Services Canada; training and publishing information materials; and organizing conferences.

EPAC

23 Mr. Goodman is the President of EPAC, a not-for-profit organization founded in 1986 that promotes the Canadian oil and gas industry on behalf of junior and midsized companies. EPAC has a membership of over 170 junior and midsized oil and gas companies that produce over 50% of all natural gas and approximately 25% of all oil in Alberta, and 35% of Canada's natural gas and 30% of Canada's conventional oil production. Mr. Goodman states that EPAC's mission is to promote a thriving independent oil and gas industry.

24 EPAC is actively involved in improving laws and policies affecting the oil and gas industry. Examples of this are set out in paragraph 8 of the Goodman Affidavit. These include intervening in a case before the Supreme Court of Canada on the constitutionality of legislative amendments, providing evidence on various oil and gas issues before the courts, working with provincial and federal governments to modernize laws and regulations affecting the industry, collaborating with Indigenous groups and government to improve Bill C-69 (on the review and approval of infrastructure projects), and sitting on task forces and government committees. In paragraph 8(d) of his affidavit, Mr. Goodman states:

> EPAC is recognized across multiple jurisdictions and political parties for its balanced and reasonable approach to the development of public policy. We are often sought for our legal, industry, policy and regulatory expertise by governments across Canada, foreign and domestic investors, the media, academics and other non-profit groups. As a result of our expertise we have sat on task forces and government committees. . . .

25 Other examples of EPAC's activities include providing input and testimony to parliamentary and legislature committees, making submissions to Ministers, senior civil servants and the media on current or future issues regarding energy development in Canada, appearing before courts on energy regulatory issues, and making fact-based statements in the media about the oil and gas industry.

Mr. Wilson

26 In 1993, Mr. Wilson co-founded FirstEnergy Capital Corp. ("FirstEnergy") and was its Chair until 2008. Mr. Wilson describes FirstEnergy as an investment dealer focused on financing companies in the energy sector "from cradle to grave". As part of its business, FirstEnergy held annual international investor conferences to showcase Canada's energy sector and the Alberta oil and gas industry. Currently, Mr. Wilson is the Chairman of Prairie Merchant Corporation, a private merchant bank focussed in part on business opportunities in the energy sector.

27 Mr. Wilson describes himself as an investor in the Alberta oil and gas industry, philanthropist, entrepreneur, published author, business and sports team owner and commentator on public policy and investing. He states that he has been directly involved in thousands of financing and mergers and acquisitions valued at well over $200 billion, either himself or through companies he founded. Mr. Wilson also delivered numerous presentations in 2019 on "The Lost Art of Critical Thinking", which he explains "explored, among other things, the widespread acceptance of disinformation about the Alberta oil and gas industry".

28 In response to the Intervenor Application, Ecojustice filed the Affidavit of Daniel Cheater, affirmed March 13, 2020 (the "Cheater Affidavit"). Mr. Cheater is an articling student with Ecojustice. His affidavit appends as exhibits various screenshots of Mr. Wilson's Twitter account, accessed on March 13, 2020. The tweets, dated between March 2018 and March 2020, are politically charged and combative:

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• In response to a tweet that he ""jokes" about hanging anti-pipeline activists as traitors", Mr. Wilson tweets: "I didn't joke. I was serious about hanging foreign funded protestors — undermining our nation — for treason."

• In a tweet directed at @ElizabethMay, @DavidSuzukiFDN and @Greenpeace, Mr. Wilson tweets: "[T]he likes of you have outlived your welcome in Canada. Your eco-terrorism tactics — misleading — misguiding — anti-Canadian rhetoric is toast. Please leave. Now. If another country will have you. Or — join our nation."

• After referencing an article on Western fury published in the Toronto Sun, Mr. Wilson tweets: "Basically we need to conceptually castrate eco-terrorists who through acts of *treason* are killing Canada. Maybe we should hang them for *treason*? Dunno. All Canadians need to feel Western fury."

• In another tweet, he refers to "foreign funded eco-morons (aka *terrorists*)".

• Again directing a tweet at environmental organizations, Mr. Wilson states: "We allow @Greenpeace and @leadnowca and @Change and @DavidSuzukiFDN to commit *treason*. . . . RT kill their charity tax status?" In another tweet directed at these organizations, he refers to them as "eco-terrorists" and states they "are allowed to use lies to capture the "eco-flag" without accountability for their lies. It's a form of *treason* and they need to be stopped. Harshly."

• Mr. Wilson posts an article from the Financial Post in his Twitter account and tweets: "Why would the @liberal_party destroy our nation with Bills C69 and C48? Misguided input from eco-terrorists and eco-alarmist organizations like @DavidSuzukiFDN and @ecojustice_ca and @Pembina and @Greenpeace Worlds greatest hypocrites — campaigning against ONLY #CANADA"

• In his Twitter feed, Mr. Wilson comments on a job posting from Greenpeace: "So here goes @GreenpeaceCA attempting to hire a Campaign NutJob — for the express purpose of sodomizing Canada's energy industry. . . . As to @Greenpeace — watch your steps carefully."

[Emphasis in original]

29 In addition to the above tweets, the Cheater Affidavit contains examples of Mr. Wilson's tweets commenting on Ecojustice:

• Mr. Wilson tweets an article from the Calgary Herald with the headline "Alberta inquiry into oil and gas foes could face legal challenge from @ecojustice_ca". He then comments: "A quick review of the eco-justice banter leads many Albertans to offer: #KindlyF[**]kOff"

• In another tweet, Mr. Wilson states: "Hey @ecojustice_ca — had coffee with a few fellow Albertans — who are tired of the bullshit you espouse — cut the crap (ie the threatened lawsuit) and file the lawsuit — show us your stuff. AND watch your back."

• In a later tweet in the same thread, Mr. Wilson comments: "We are seeing moronic courage of a tiny minority who are defending the hypocritical @ecojustice_ca who are in turn threatening our great province w/ legal action when AB is simply searching for evidence of bad guys doing bad things to the non-BC West. What are they scared of?"

30 It is clear that Mr. Wilson has strong views on the Alberta oil and gas industry, and those who speak out against it. This is the type of rhetoric the Court will not permit on the hearing of the Application for Judicial Review.

Proposed Intervenor Arguments on Application for Judicial Review

31 The applicants seek leave to intervene in the Application for Judicial Review to present what they state are the unique perspectives and special expertise of those in Alberta's oil and gas industry: First Nation resource owners and industry partners; junior, mid-sized and independent oil and gas producers; and industry investors. The Industry Consortium argues that each of

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its members (the applicants) is directly and specially affected by the outcome of this case, as each of them faces potential harm from anti-Alberta energy campaigns.

32 The applicants collectively seek to present their perspectives on two of the three issues raised on the Application for Judicial Review:

(i) Whether an inquiry into foreign funding of anti-Alberta energy campaigns was ordered in the public interest within section 2 of the *Public Inquiries Act*, such that the Inquiry was ordered for a proper purpose; and,

(ii) Whether the Inquiry falls within the constitutional jurisdiction of the Province of Alberta.

33 If granted leave to intervene, the Industry Consortium advises that it will focus its submission on the need to interpret both section 2 of the *Public Inquiries Act* and the constitutional jurisdiction of the Province of Alberta broadly to protect constituent interests.

34 In respect of the first issue, the Industry Consortium would argue that the Lieutenant Governor in Council's powers under the *Public Inquiries Act* must be interpreted broadly to order an inquiry for the purpose of gathering accurate information and developing government policy to protect the public interest. The public interest identified by the Industry Consortium is that in order to effectively respond to anti-Alberta energy campaigns supported by foreign organizations, the government (and industry) require information about such campaigns.

35 In support of this argument, the Industry Consortium refers to Supreme Court of Canada authority on the value of inquiries for gathering information to assist in the development of government policy: *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366 (S.C.C.) at para 44 [*Starr*]. There is recognition that "good government depends in part on the availability of good information": *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.) at para 26 [*Consortium Developments*]. These decisions relate to challenges to judicial inquiries initiated pursuant to Ontario legislation to investigate certain incidents, and are not as broad in scope as the OIC and Terms of Reference in this case.

36 If leave to intervene is granted, the Industry Consortium would also argue that the power to order an inquiry should not be lessened by an overly technical and restrictive interpretation of the legislative requirements for exercising that power: *Consortium Developments* at para 26. In its submissions on the Application for Judicial Review, the Industry Consortium would suggest that to find the inquiry was brought for an improper purpose, the purpose must be irrelevant, extraneous or completely unrelated to good government or the public interest. In support of this point, the Industry Consortium refers to a decision of the Supreme Court of Canada regarding whether regulations are *ultra vires* the statutory purposes of their enabling legislation: *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64 (S.C.C.) at para 28.

37 In respect of the second issue, the Industry Consortium would argue that the Inquiry falls within Alberta's broad constitutional authority over property and civil rights, matters of a local and private nature, and natural resources: *Constitution Act, 1867*, 30 & 31 Vict c 3, ss 92(10), (13) and (16) [*Constitution*]; *Constitution Act, 1982*, Part VI, ss 50-51, Amendment to the *Constitution Act, 1867*, s 92A(1) [*Resource Amendment*]. The Court of Appeal of Alberta has recently considered division of powers related to resource development and management in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (Alta. C.A.), which concerned the *Resource Amendment* and the federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12. There, the court noted that the provinces have power with respect to their natural resources as a result of the *Resource Amendment* regarding authority over non-renewable natural resources and section 109 of the *Constitution* regarding proprietary rights over lands, mines, minerals and royalties.

38 The Industry Consortium would argue that Alberta has the jurisdiction to inquire into activities that adversely affect economic activity within provincial boundaries, to responsibly regulate natural resources, and to gather the necessary information to defend those interests, which extends to other issues concerning development of Alberta's natural resources. It would argue that while the subject matter may have an incidental impact on federal jurisdiction, the pith and substance relates to subject matter within provincial jurisdiction. The Industry Consortium would submit that the pith and substance of the Inquiry is an investigation into the source of funding which seeks to undermine Alberta's oil and gas industry, which the Terms of

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Reference defines as including "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". On the Application for Judicial Review, the Court will have to consider if an alleged campaign of misleading or false information about the oil and gas industry would fall under provincial economic activity or provincial resource development and management, such that the subject matter of the Inquiry is within provincial jurisdiction.

39 In summarizing these proposed arguments, I do not make any determination on their merits.

III. Issue

40 The sole issue for determination on this Application is whether the Industry Consortium should be granted leave to intervene in the Application for Judicial Review.

IV. Legal Analysis and Decision

A. Test for Intervenor Status

41 The Court has the discretion to grant intervenor status in a proceeding, subject to any terms and conditions and with the rights and privileges it specifies: *Alberta Rules of Court*, AR 124/2010, r 2.10 [*Rules*]. This discretion ought to be exercised sparingly: *Orphan Well Assn. v. Grant Thornton Ltd.*, 2016 ABCA 238 (Alta. C.A.) at para 11 [*Orphan Well*]. Courts are generally more lenient in granting intervenor status in cases involving constitutional issues: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.) at para 6 [*Papaschase*].

42 In *Orphan Well*, the Court of Appeal of Alberta granted applications for leave to intervene to four entities in a constitutional appeal concerning the interpretation of legislation, the division of powers and the doctrine of paramountcy. In deciding the applications, Justice Sheilah Martin (as she then was) summarized the test for granting intervenor status, starting with the two-step process set out by the Supreme Court of Canada: the court must first consider the subject matter of the proceeding, and then determine the proposed intervenor's interest in the subject matter: *Orphan Well* at para 8, citing *Papaschase* at para 5.

43 In determining whether a proposed intervenor has an interest in a proceeding, the court will consider: (a) whether the intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the intervenor has some expertise or fresh perspective to assist the court in resolving the matter: *Papaschase* at para 5; *Orphan Well* at para 8. Although *Papaschase* established that intervenor status could be granted if either criterion was met, subsequent decisions have held that establishing an affected interest is not enough; both criteria must be met for leave to intervene to be granted: *Orphan Well* at para 9.

44 The Court of Appeal of Alberta has also established that the answers to the following questions are relevant factors to consider in determining whether to grant intervenor status:

1. Will the intervenor be directly affected by the outcome of the matter?
2. Is the presence of the intervenor necessary for the court to properly decide the matter?
3. Might the intervenor's interest in the proceedings not be fully protected by the parties?
4. Will the intervenor's submission be useful and different or bring particular expertise to the subject matter before the court?
5. Will the intervention delay the proceedings?
6. Will there possibly be prejudice to the parties if the intervention is granted?
7. Will intervention widen the *lis* between the parties?
8. Will the intervention transform the court into a political arena?

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Orphan Well at para 10, citing *Pedersen v. Van Thournout*, 2008 ABCA 192 (Alta. C.A.) at para 10 [*Pedersen*]

45 In the applicants' affidavits, the affiants set out how they are directly affected by the outcome of the Application for Judicial Review, as well as the unique perspectives they would provide the Court. The test for granting leave to intervene is applied below.

B. Application of Test

46 Applying the two-step process, I first discuss the subject matter of the Application for Judicial Review, and then determine the proposed intervenor's interest in that application by applying the factors outlined by the Court of Appeal of Alberta in *Pedersen* and deciding (a) whether the proposed intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the proposed intervenor has some expertise or fresh perspective to assist the court in resolving the matter.

Subject matter of Application for Judicial Review

47 On the Application for Judicial Review, Ecojustice seeks to end the Inquiry, and to prevent the publication of the Commissioner's findings or the evidence and submissions provided in the Inquiry. Ecojustice argues that the basis for this relief is that:

> (a) the Inquiry is unlawful, as it has been brought for an improper purpose and not as a matter of public interest pursuant to the *Public Inquiries Act*, and is therefore *ultra vires* the Province of Alberta's statutory powers;
>
> (b) the Inquiry concerns matters of exclusive federal jurisdiction and therefore is *ultra vires* the constitutional authority of the Province of Alberta; and,
>
> (c) there is a reasonable apprehension of bias in the conduct of the Inquiry in the circumstances.

48 As outlined above, the Industry Consortium seeks leave to intervene on (a) and (b).

Proposed Intervenor's Interest

Applying the Pedersen Factors

Question 1: Will the intervenor be directly affected by the outcome of the matter?

49 The Industry Consortium says that the IRC, EPAC and Mr. Wilson are all directly affected by the Application for Judicial Review. Specifically, they have an interest in the Inquiry proceeding because they depend on the economic success of the oil and gas industry in Alberta. Further, they (and their respective memberships) are directly affected by misleading or false information that harms that industry.

50 The IRC, EPAC and Mr. Wilson all provide general statements as to how they are directly affected by the subject matter of the Application for Judicial Review:

> (a) In his affidavit filed on behalf of the IRC, Mr. Buffalo states generally that its members are directly affected by adverse economic impacts to the oil and gas industry in Alberta, including those caused by disinformation and anti-Alberta energy campaigns supported by foreign organizations. The Buffalo Affidavit includes exhibits to show the economic impact, including royalty information, the number of Aboriginal workers in the oil and gas industry, and the value of funding provided by the industry to Indigenous governments. Mr. Buffalo states that declining investment in the Alberta oil and gas industry causes significant economic harm to [Indigenous] communities, which in turn negatively affects the quality of [their] community services and infrastructure and employment and business opportunities for Indigenous peoples. The IRC provides no specific examples of economic impacts that have been directly affected by the alleged campaigns that are the subject matter of the Application for Judicial Review.

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(b) EPAC relies on similar general statements by Mr. Goodman in his affidavit. He comments that EPAC's members are directly affected by adverse economic impacts to Alberta's oil and gas industry (including profitability and viability of member companies), including any adverse impacts caused by disinformation and anti-Alberta energy campaigns supported by foreign organizations. Mr. Goodman also asserts that disinformation that contributes to a negative international perception about oil and gas operations in Alberta causes its members direct financial harm (although no specific evidence was provided of such harm). He asserts that the Inquiry is the best opportunity that EPAC members have had to date to address disinformation campaigns.

(c) Mr. Wilson indicates he is directly affected by the judicial review as an Alberta resident and a significant investor in the Alberta energy industry. While he has tried on an individual level to correct widespread disinformation about Alberta's oil and gas industry through his public profile, global network and public speaking opportunities, he relies on the Government of Alberta to create a positive investment climate and defend the Alberta oil and gas industry from disinformation, using powers that only the Government has available to it. Again, there are no specific examples of how Mr. Wilson is directly affected, beyond the suggestion that there is a negative impact on the energy investment climate.

51 The IRC, EPAC and Mr. Wilson do not provide specific examples of misleading or false information, or provide specific examples of harm that flow from that information. [1] It is logical that widespread negative information about the Alberta oil and gas industry could harm the profitability and investment climate in that sector. Indeed, Ecojustice does not dispute that members of the Industry Consortium are directly affected by adverse economic impacts to Alberta's oil and gas industry. However, there is no evidence before me of the extent of the negative impacts or of a connection between the negative impacts and any alleged anti-Alberta energy campaign. Ecojustice says the allegations of misleading or false information causing harm to the Alberta energy industry are bald assertions and are speculative, and I agree.

52 I do not think that is fatal to the Intervenor Application. The stated purposes of the Inquiry are to determine the facts about foreign funding of anti-Alberta energy campaigns, and to ascertain whether any Canadian organization has disseminated misleading or false information about Alberta's oil and gas industry. It does not make sense to require the Industry Consortium to provide evidence of the results of dissemination of such information before it is permitted to intervene to oppose the Application for Judicial Review that seeks to halt the Inquiry, when the extent of that dissemination is precisely what the Inquiry is mandated to investigate.

53 In the Commissioner's mandate set out in section 2(3) of the Terms of Reference, the goals of the Inquiry include making the Government of Alberta and Albertans aware of whether foreign funds are being provided to disseminate misleading or false information about the Alberta oil and gas industry, to enable the Government of Alberta to respond to this activity, and to recommend eligibility criteria for issuing government grants and attaining or maintaining charitable status. Ecojustice argues that the parties likely to be directly affected are not the members of the Industry Consortium, but rather, the organizations and charities identified in the Inquiry whose sources of funding and charitable status may be at risk.

54 In contrast, for the Inquiry to affect the Industry Consortium, Ecojustice argues that the Inquiry first would have to make recommendations to the Government of Alberta, who then might take actions to impact certain organizations' funding and charitable status, which may then impact on the work of these organizations including possibly reducing any alleged misleading or false information about the Alberta oil and gas industry, which may then impact on the Industry Consortium members.

55 It is not as indirect a connection as Ecojustice suggests. The Industry Consortium is comprised of representatives of different facets of the Alberta oil and gas industry who want the Inquiry to proceed. Theirs is part of the public interest that the Inquiry states that it seeks to protect, although whether it was properly initiated to protect the public interest, as opposed to for an improper purpose, remains an issue for determination on the Application for Judicial Review. If the Inquiry is halted, their perspective will not be considered. Because it is in issue on the Application for Judicial Review as to whether the Inquiry actually is in the public interest, and the Industry Consortium members' interests are part of the public interest that the Inquiry was established to serve, the applicants comprising the Industry Consortium are directly affected by the outcome of the Application for Judicial Review.

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Questions 2, 3, 4: Is the presence of the intervenor necessary for the court to properly decide the matter? Might the intervenor's interest in the proceedings not be fully protected by the parties? Will the intervenor's submission be useful and different or bring particular expertise to the subject matter before the court?

56 These three questions are related, and are considered together.

57 Presently, the Application for Judicial Review includes perspectives from Ecojustice (an environmental non-profit group) and various government representatives. The Industry Consortium is comprised of industry participants: IRC (resource owners and First Nations), EPAC (junior, mid-sized and independent oil and gas producers in Alberta) and Mr. Wilson (an industry investor).

58 As noted above, the Industry Consortium seeks leave to make submissions on two aspects of the Application for Judicial Review: (1) that the Inquiry has been brought for an improper purpose and not as a matter of public interest, and was therefore not properly brought pursuant to the *Public Inquiries Act*; and, (2) that the Inquiry has been brought in respect of matters of federal jurisdiction and is outside the constitutional authority of the Province of Alberta.

59 The Industry Consortium has provided with specificity its proposed submissions. The level of detail given is helpful for the Court in deciding whether its submissions will be useful and different or bring particular expertise to the Application for Judicial Review. As the Court of Appeal commented in *Orphan Well*, "[t]he court's ability to assess whether an [intervenor] has something useful and different to add is tied to how clearly the [intervenor] articulates the submissions they seek to advance": at para 13.

60 Ecojustice argues that the Industry Consortium members are not likely to present argument different from that of the Lieutenant Governor in Council or the Minister. As their interests are aligned, Ecojustice says the Lieutenant Governor in Council and the Minister will protect the interests of the Industry Consortium members. Further, Ecojustice points out that the Industry Consortium has not established how their submissions on the issues of improper purpose and constitutional jurisdiction would differ from the Lieutenant Governor in Council or the Minister. Finally, Ecojustice argues that it is unlikely that counsel for the Industry Consortium can advance arguments with respect to improper purpose and constitutional jurisdiction that cannot be determined or advanced by counsel for the Lieutenant Governor in Council and the Minister. On this last point, when considering whether to grant intervenor status in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 (Alta. C.A.) [*Reference re GGPPA (Intervention)*], Justice Slatter commented, at para 35:

> . . . This application for intervention must be based on the premise that the [proposed intervenor] has constitutional lawyers who are aware of, or can advance arguments that will elude the lawyers retained by the other parties. Providing "second counsel" to one or the other of the parties is not, however, the purpose of intervention: *R. v. Ndhlovu*, 2019 ABCA 132at para. 4. ...

61 The affidavit evidence filed by the Industry Consortium on the Intervenor Application sets out the perspective and expertise that each of the applicants will bring if leave to intervene is granted:

> (a) IRC members have decades of experience in oil and gas production and development. In the Buffalo Affidavit, Mr. Buffalo discusses the benefits from oil and gas production and development that flow to First Nations and Indigenous communities, including significant opportunities for employment, as well as for Indigenous-owned businesses and entrepreneurs. In their written submissions, the Industry Consortium describes these benefits in some cases as transformational for community development and individual quality of life. The IRC seeks leave to intervene because it is concerned that if the IRC is not at the table, the long history of political, policy and legal determinations with profound impacts on Indigenous peoples will continue without an Indigenous voice present.

> (b) EPAC is experienced with law and policy development in the oil and gas industry. EPAC seeks leave to intervene to provide its perspective as junior, mid-sized, and independent oil and gas producers operating in Alberta. Mr. Goodman expressed EPAC's concern that if it is not permitted to intervene, no party that represents the views of the oil and gas

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industry will have the opportunity to present its perspective on the need for inquiry powers to be interpreted broadly to protect the property, jobs and economic rights of oil and gas producers.

(c) Mr. Wilson is an investor in the Alberta oil and gas industry, and is experienced in global financial markets and capital investment. He seeks leave to intervene to provide that perspective, which is not currently before the Court.

62 As to the particular expertise that can be brought by the Industry Consortium, Ecojustice accepts that its members have demonstrated expertise in the operational, technological and financial aspects of the oil and gas industry, but argues that they do not have any special expertise relevant to the legal issues of improper purpose or constitutional jurisdiction. Ecojustice acknowledges that EPAC was an intervenor on jurisdictional issues in *Reference re Environmental Management Act*, 2020 SCC 1 (S.C.C.), but notes that in that case, the potential outcome dealt with the regulation of interprovincial transport of petroleum products, which could legally impact EPAC members. In this case, Ecojustice argues that the outcome of the Application for Judicial Review has a much more indirect impact on EPAC members.

63 There are two issues on which the Industry Consortium seeks leave to intervene: that the Inquiry has been brought for an improper purpose, and that the subject matter of the Inquiry is outside the constitutional jurisdiction of the Province of Alberta. The Industry Consortium has expertise as participants in Alberta's oil and gas industry, a perspective that is not presently before the Court.

64 When assessing whether the Industry Consortium brings a particular expertise to the issues to be determined on the Application for Judicial Review, regard must be had to the existing participants: *Reference re Impact Assessment Act*, 2020 ABCA 94 (Alta. C.A.) at para 13 [*Reference re IAA*]; *Reference re GGPPA (Intervention)* at para 30. On the constitutional jurisdiction issue, I have regard to the fact that the respondents on the Application for Judicial Review include Alberta, the Lieutenant Governor in Council and the Minister. I agree with Ecojustice that it is unlikely that the Industry Consortium could raise constitutional jurisdiction arguments that would not occur to the respondents. I do not think the Industry Consortium's participation as an intervenor is necessary for the Court to properly decide this issue; nor do I find the Industry Consortium has any particular expertise in respect of the Province of Alberta's constitutional jurisdiction, other than EPAC who has intervened previously on a constitutional jurisdiction issue. In my view, the Industry Consortium's interest on this issue will be fully protected.

65 With respect to the other issue on which the Industry Consortium seeks to intervene on the Application for Judicial Review, that the Inquiry was brought for an improper purpose, one of the considerations will be whether the public interest is served by the Inquiry. The industry perspective represented by the Industry Consortium is necessary for this Court to properly consider the public interest aspect of this issue.

66 This is consistent with decisions of other courts. For example, the Federal Court of Appeal granted the Canadian Association of Petroleum Producers ("CAPP") leave to intervene on a matter of "public, important and complex dimension": *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) at para 37. In that case, a project was approved in part because it was in the public interest. Where the legality and reasonableness of the approval was challenged, the court concluded that CAPP was "well-placed to speak to the issue of the public interest", as it represented "a broad segment of the public affected by the decisions below": at para 34.

67 In another example, a single justice of the Court of Appeal of Alberta granted intervenor status to the Urban Development Institute — Edmonton Region, whose members were developers: *Edmonton (City) v. Urban Development Institute*, 2014 ABCA 340 (Alta. C.A.). The appeal concerned a condition attached to a subdivision permit and its outcome would "affect the funding model of future light rail transit expansion through undeveloped land in Edmonton": at para 1. The court concluded that the Institute could provide special insight and perspective that would be of assistance on the appeal, noting: "Its members are major players in the development business in Edmonton. They are ideally situated to assist the Court [to] appreciate the consequences of any potential outcome": at para 14.

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68 On the issue of whether the Inquiry was brought for an improper purpose, the Industry Consortium's participation as an intervenor would assist the Court by representing the perspective of participants in Alberta's oil and gas industry. The Industry Consortium's submissions on the public interest aspect of the Inquiry would be useful and different from the submissions of the respondents on the Application for Judicial Review, and it is not clear that perspective would otherwise be presented.

Questions 5 and 6: Will the intervention delay the proceedings? Will there possibly be prejudice to the parties if the intervention is granted?

69 These two questions are related and are considered together.

70 The Industry Consortium states it will act to minimize any risk of delay or disruption to the Application for Judicial Review. Ecojustice accepts that the proposed timeline provided at the time the briefs were filed will not delay the proceedings, but argues that it would create undue time pressures on Ecojustice for filing an additional brief and preparing an oral response to the Industry Consortium's arguments. Ecojustice argues that these time pressures are prejudicial. It is significant that this argument was raised before COVID-19 resulted in the adjournment *sine die* of the Application for Judicial Review. As a result of the adjournment, Ecojustice's concerns over undue time pressures are not an issue.

71 I am satisfied that the intervention will not delay the proceedings or create unfair time pressures for Ecojustice. Ecojustice will not be prejudiced if the Industry Consortium is granted leave to intervene. The court can control the timing of the intervention to ensure there is no delay caused by the intervention and no prejudice in that regard.

Question 7: Will intervention widen the lis between the parties?

72 There is no suggestion by Ecojustice that allowing the Industry Consortium to intervene in the Application for Judicial Review will widen the *lis*. Indeed, their proposed submissions relate entirely to issues that will already be before the Court. Further, the Court can control the scope of the intervention so it does not widen the *lis* between the parties.

Question 8: Will the intervention transform the court into a political arena?

73 The Industry Consortium argues that it does not seek to transform the court into a political arena, but will focus on the legal issues before the court on the Application for Judicial Review, which include the statutory and constitutional jurisdiction of the Government of Alberta to establish the Inquiry. It proposes to respond to the two issues identified, adding the perspective of the Alberta oil and gas industry.

74 Ecojustice notes that this matter is already highly politicized, and that the Inquiry and the Application for Judicial Review have already been the subject of extensive political and public comment. It argues that the participation of the Industry Consortium is likely to further politicize the debate before the Court.

75 Ecojustice is specifically concerned that Mr. Wilson's participation as an intervenor risks transforming the court into a political arena. In light of his inflammatory comments on social media that are before me, I share that concern. As each of the members of the Industry Consortium is a separate applicant on the Intervenor Application, I considered granting the application for leave to intervene only in favour of IRC and EPAC. At the same time, IRC, EPAC and Mr. Wilson have requested leave to intervene collectively and have demonstrated an intention to cooperate and coordinate their submissions. As a result, I will not separate the members of the Industry Consortium, but will caution them that inflammatory comments along the lines of the examples exhibited to the Cheater Affidavit are not acceptable in this proceeding.

Conclusion on Proposed Intervenor's Interest

76 As discussed in *Orphan Well*, in determining a proposed intervenor's interest, the court should examine: (a) if the proposed intervenor will be directly and significantly affected by the outcome of the matter before the court; and (b) if the proposed intervenor has some expertise or fresh perspective to assist the court in resolving the matter: at para 9. I consider the analysis of the *Pederson* factors above to address these requirements.

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Directly and Significantly Affected

77 The Court of Appeal of Alberta has recently commented in two decisions that the proposed intervener's interest must be a legal interest, and that having a policy-based concern or personal interest is *generally* not sufficient: *Reference re IAA* at para 12. In *Reference re GGPPA (Intervention)*, the Court of Appeal stated, at para 29:

> The "interest" required to meet the first branch of the test is wide, but it must be a legal interest. Mere curiosity, an intellectual interest, a policy-based concern, or a personal interest are generally not sufficient. The interest must be more than a jurisprudential interest. . . . " [citations omitted]

78 The Industry Consortium members do not have a legal interest in the outcome of the Application for Judicial Review. Its members' interests are policy-based and personal in having the Inquiry proceed. I interpret the Court of Appeal's recent comments requiring a legal interest to apply generally, not in every case regardless of the circumstances. For example, in another recent decision of the Court of Appeal of Alberta, a not-for-profit society whose mandate included to promote the rights and interests of incarcerated people was permitted to intervene in a *habeas corpus* appeal involving an inmate who had been placed in segregation upon admission to a correctional institution: *Wilcox v. Her Majesty the Queen in right of Alberta*, 2019 ABCA 385 (Alta. C.A.). The court concluded: "An organization may be "specially affected" by a decision that would have a significant effect on its ability to achieve its mandate. . . . ": at para 14.

79 In considering the first *Pedersen* factor in this matter, I concluded that the Industry Consortium will be directly affected by the outcome of the Application for Judicial Review because its members' interests are part of the public interest that the Inquiry was established to serve. Further, whether the Inquiry was established in the public interest is directly in issue on the Application for Judicial Review. The Industry Consortium will be directly and significantly affected by a finding on the Application for Judicial Review that the Inquiry should not go forward, and meets the first branch of the test.

Expertise or Fresh Perspective

80 In the discussion of the second, third and fourth *Pedersen* factors above, I considered whether the Industry Consortium's intervention would be useful and different or bring particular expertise to two issues raised on the Application for Judicial Review. Those findings are useful to answer the second branch of the test.

81 I found that the Industry Consortium could provide expertise and that its submissions would be useful and different on the issue of whether the Inquiry was brought for an improper purpose. The perspective of the Alberta oil and gas industry is necessary for a proper consideration of the public interest aspect of this issue, and it is not clear that this perspective would otherwise be provided on the Application for Judicial Review.

82 Conversely, I found that the Industry Consortium's participation as an intervenor on the constitutional jurisdiction issue would not provide particular expertise. I was not satisfied that it would be different from the arguments that may be led by the respondents on the Application for Judicial Review.

83 Both branches of the test have been satisfied, establishing that the Industry Consortium has an interest in the issue of whether the Inquiry was brought for an improper purpose.

V. Conclusion

84 I am satisfied that the Industry Consortium has an interest in the outcome of the Application for Judicial Review. The applicants will be directly and significantly affected by the outcome of the proceeding, and will provide expertise and a fresh perspective on the issue of whether the Inquiry has been brought for an improper purpose. In addition, the intervention of the Industry Consortium will not prejudice the parties, delay the proceedings or widen the *lis*. It is unlikely to transform the court into a political arena.

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85 Accordingly, the three applicants comprising the Industry Consortium are granted leave to intervene in the Application for Judicial Review on the issue of whether 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*. Leave to intervene is denied on the issue of whether certain matters identified in the OIC and Terms of Reference are matters of exclusive federal jurisdiction and therefore are *ultra vires* the jurisdiction of the Lieutenant Governor in Council to so order.

86 The applicants comprising the Industry Consortium may collectively file a brief not exceeding 15 pages, due on the same date the other respondents' briefs are due, and may make oral submissions at the hearing of the Application for Judicial Review. They may not file any evidence on the Application for Judicial Review or introduce new issues.

87 The Industry Consortium has indicated it will not seek costs on the Application for Judicial Review, and asks that it not be held liable for the costs of any other party or intervenor. Ecojustice agrees with this position. No costs, either in favour or against the intervenors, shall be payable in respect of the Application for Judicial Review.

88 The parties to this Intervenor Application shall bear their own costs.

Application granted in part.

Footnotes

1 In fact, they set a higher standard for the information they allege is harmful by referencing "disinformation", as opposed to "misleading or false information", which is how the information is referenced in the OIC and Terms of Reference. To establish "disinformation" would also require evidence of an intention to deceive. According to the Merriam-Webster Dictionary (online), "disinformation" means "false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth". As the OIC and Terms of Reference use "misleading or false information", that is the term I use unless directly quoting from the evidence.

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TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2008 ABCA 192
Alberta Court of Appeal

Pedersen v. Van Thournout

2008 CarswellAlta 648, 2008 ABCA 192, [2008] A.W.L.D. 2564, [2008] A.J. No. 543, 171 A.C.W.S. (3d) 506, 424 W.A.C. 219, 432 A.R. 219

Brea Pedersen (Respondent / Appellant by Cross-Appeal / Plaintiff) and Darin James Van Thournout and Robert Van Thournout (Not Parties to Appeal / Defendants) and Her Majesty the Queen in Right of Alberta (Appellant / Respondent by Cross-Appeal / Statutory Intervener)

Pearl Morrow (Respondent / Appellant by Cross-Appeal / Plaintiff) and Jian Yue Zhang and Xiao Fei Wei (Appellants / Respondents by Cross-Appeal/ Defendants) and Insurance Bureau of Canada (Appellant / Intervener) and Her Majesty the Queen in Right of Alberta (Appellant / Respondent by Cross-Appeal / Statutory Intervener) and The Dominion of Canada General Insurance Company (Applicant / Proposed Intervener)

M. Paperny J.A., P. Martin J.A., and P. Rowbotham J.A.

Heard: May 15, 2008
Judgment: May 21, 2008
Docket: Calgary Appeal 0801-0041-AC, 0801-0067-AC

Counsel: J. Campion, J.A. Kotkas for Applicant
F.S. Kozak, Q.C. for Respondents / Appellants by Cross Appeal
F.R. Foran, Q.C. for Appellant / Respondent by Cross Appeal, Her Majesty the Queen in Right of Alberta
D.C. Rolf for Appellant / Respondent by Cross Appeal, Insurance Bureau of Canada
A. D'Silva for Appellants / Respondents by Cross Appeal, Jian Yue Zhang, Xiao Fei Wei

Subject: Civil Practice and Procedure; Torts

Headnote

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal

Province enacted Minor Injury Regulation, which imposed $4,000 cap on non-pecuniary damages for minor injuries caused by motor vehicle accident — Two injured plaintiffs successfully brought separate actions for declaration that regulation was unconstitutional and invalid — Trial judge found regulation violated s. 15 of Canadian Charter of Rights and Freedoms — Province appealed in both actions while defendants in only one action appealed — Plaintiffs cross-appealed seeking declaration that regulation also violated s. 7 of Charter — Insurance Bureau of Canada had been granted intervenor status at one trial and was party to appeal — Proposed intervenor was insurer with some 600-700 claims directly affected by outcome and 50 litigated claims raising same constitutional issue — Proposed intervenor brought application for leave to intervene — Application dismissed — Perspective of insurance industry would already be provided in these appeals — Defendants who appealed were represented through their insurer — Insurance Bureau of Canada was national trade association of non-government insurers whose members included proposed intervenor — Current test for intervenor status in constitutional matters required demonstrating fresh information or fresh perspective — Proposed intervenor was in no different position than other insurers in province — Nothing in proposed intervenor's materials indicated it would be bringing fresh perspective — Merely establishing outcome would have direct effect on proposed intervenor was not sufficient — Permitting intervention by all similarly-situated proposed intervenors could result in undue delay without corresponding benefit to hearing.

Table of Authorities

Cases considered:

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Morrow v. Zhang (2008), 2008 ABQB 98, 2008 CarswellAlta 151, 421 A.R. 1, 59 C.C.L.I. (4th) 16, 86 Alta. L.R. (4th) 137 (Alta. Q.B.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — followed

R. v. Morgentaler (1993), 1993 CarswellNS 429, 1993 CarswellNS 429F, [1993] 1 S.C.R. 462 (S.C.C.) — followed

Telus Communications Inc. v. T.W.U. (2006), 2006 ABCA 297, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 401 A.R. 57, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 391 W.A.C. 57, 2006 CarswellAlta 1310 (Alta. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — referred to

s. 15 — referred to

Regulations considered:

Insurance Act, R.S.A. 2000, c. I-3

Minor Injury Regulation, Alta. Reg. 123/2004

Generally — referred to

APPLICATION by proposed intervenor for leave to intervene on appeal from judgment declaring particular regulation unconstitutional.

***Per curiam*:**

Introduction

1 The Dominion of Canada General Insurance Company (Dominion) seeks leave to intervene in two appeals from the decision finding the *Minor Injury Regulation*, Alta. Reg. 124/2004, unconstitutional. The Regulation imposes a $4,000 cap on non-pecuniary damages for minor injuries caused by a motor vehicle accident. Wittmann, A.C.J. [2008 CarswellAlta 151 (Alta. Q.B.)] held the cap was contrary to section 15 of the *Charter* and declared the Regulation invalid. He assessed damages for Pedersen and Morrow, the respondents in these appeals.

2 The defendants in the Morrow case, Her Majesty the Queen in Right of Alberta and the Insurance Bureau of Canada, appeal the declaration of invalidity. A cross-appeal has been filed by Morrow seeking a declaration that the cap also violates section 7 of the *Charter*. The appeals are scheduled for hearing in September 2008.

Test for leave

3 As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." The case authorities on granting leave have considered the following questions as factors in determining whether to grant intervener status:

1. Will the intervener be directly affected by the appeal;

2. Is the presence of the intervener necessary for the court to properly decide the matter;

3. Might the intervener's interest in the proceedings not be fully protected by the parties;

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4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;

5. Will the intervention unduly delay the proceedings;

6. Will there possibly be prejudice to the parties if intervention is granted;

7. Will intervention widen the *lis* between the parties; and

8. Will the intervention transform the court into a political arena?

4 The applicant submits that leave is more leniently granted in cases with a constitutional issue. That may have been the response when judicial consideration of the *Charter* was in its infancy. However, there is now a considerable body of authorities on the *Charter* and less need for assistance from an intervener. This Court in a recent appeal involving a *Charter* issue, *Telus Communications Inc. v. T.W.U.*, 2006 ABCA 297 (Alta. C.A.), stated at para. 4 that "Granting intervener status is discretionary and ought to be exercised sparingly."

5 The respondents, Morrow and Pedersen, oppose the application. The appellants, Zhang and Wei, and their insurer, State Farm Insurance Company, and Her Majesty the Queen in Right of Alberta do not oppose the application as long as the test for intervention is satisfied and there is no delay in the hearing.

Application of the test

6 In this case, the applicant can show it will be directly affected by the outcome of the appeal. It submits that it has 600-700 claims directly affected by the outcome and 50 litigated claims raising the same constitutional issue. The affidavits of Walter Cockburn and Brigid Murphy, in support of the application, support this. They describe the monetary and non-monetary impact of this appeal on the business of Dominion.

7 The position of the applicant, however, is no different from other companies in Alberta providing motor vehicle insurance policies. They, too, will be directly affected by these appeals. The insurance industry will provide its perspective in these appeals. The insurer of the appellants in the Morrow action, State Farm Insurance Company, is an automobile insurer in Alberta. The appellant Insurance Bureau of Canada (IBC) is a national trade association of non-government insurers in Canada whose members include the applicant, Dominion.

8 The affidavit of Randall Bundus sworn in support of IBC's application to intervene before the Court of Queen's Bench deposed that:

1. Although the defendants' insurer and the Attorney General were involved in the action, they did not represent the views and interests of the insurance industry as a whole, nor were they as well informed about the potential impact of this case on the insurance industry; and

2. Because of its broad membership base, including Dominion, it had access to information not otherwise available to the Attorney General or the defendants' insurer.

IBC participated fully in the litigation, including the submission of much of the expert evidence.

9 The applicant submits that it is required to do no more than establish that it will be directly affected by the outcome of the appeal. It submits that the test for intervention set out in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, 380 A.R. 301 (Alta. C.A.) at para. 9 is disjunctive, and that there is no need to demonstrate that the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it. The Court in *Lameman* stated at para. 9:

> In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already

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noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 S.C.R. 335 at 340:

> an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

10 We do not read the *Lameman* decision so narrowly, particularly in light of the Supreme Court of Canada's comments in *Morgentaler* . The test requires demonstration of fresh information or a fresh perspective. Moreover, in the circumstances of this case, without some special expertise or fresh perspective, the applicant's position is the same as other automobile insurers in Alberta who might seek to intervene. Merely establishing that they will be directly affected by the outcome is not a sufficient basis to grant leave to intervene on these appeals as the number of potential interveners is significant; permitting all of them to intervene could result in undue delay of these appeals and add no corresponding benefit to the hearing.

11 The applicant asserts that it wishes to bring an alternative and unique perspective to the constitutional argument. It submits that it does not agree with the approach that the IBC took in the proceedings below. However, neither the applicant's material nor its oral submissions articulate where the difference lies nor do they demonstrate any special expertise or fresh perspective.

Conclusion

12 The application for leave to intervene is dismissed.

Application dismissed.

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