

January 14, 2020

Dear Commissioner Allan:

**RE: Public inquiry into anti-Alberta energy campaigns**

I write concerning the above-mentioned inquiry under the *Public Inquiries Act* (the “Inquiry”). Progress Alberta, who I represent, cautions that Order-in-Council 125/2019 establishing the Terms of Reference of the Inquiry violates s. 2 of *Canadian Charter of Rights and Freedoms*, and is unconstitutional.

About Progress Alberta and its campaigns:

Progress Alberta is an Edmonton based independent non-profit organization that does research and publishes online content, as well as community and political organizing on a variety of progressive issues that matter to its supporters. It launched in January of 2016 and its executive director since its founding has been Duncan Kinney.

Jason Kenney and the United Conservative Party (UCP) attacked Progress Alberta several times during the Alberta provincial election, specifically in the last ten days of the election after an article penned by Vivian Krause appeared in the *National Post*. Some of the incorrect allegations therein were reiterated in an April 13, 2019 news release from the United Conservative Party and Mr. Kenney, which announced that a “UCP government will pursue legal action against US-funded campaign targeting Alberta energy.” That news release is attached, and reads in part:

*United Conservative leader Jason Kenney announced that a UCP government would obtain legal advice and pursue all possible legal remedies against the foreign-funded Tar Sands Campaign whose explicit goal has been to landlock Alberta oil and gas.*

[...]

*Speaking to hundreds gathered at the pro-resource Rally for the North, Kenney also outlined the broader United Conservative strategy to fight back against the opponents of Alberta’s energy industry, including:*

[...]

- *Launching a public inquiry under the Inquiries Act into the foreign sources of funds behind the anti-Alberta energy campaign*

[...]

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*Since 2009, the American-based Tides Foundation and its Canadian affiliate Tides Canada gave at least 400 payments and \$25 million to Canadian, American, and European organizations to oppose pipelines in Canada. This includes groups like Progress Alberta, who received foreign funds specifically to oppose “dirty fuels and pipelines” and is putting those funds to use by running a “Stop Kenney” campaign in support of the Notley NDP.*

*“It is now clear that Rachel Notley and the NDP surrendered to the foreign funded special interests campaigning to landlock Alberta energy, because those same groups support the NDP. As Vivian Krause has documented, NDP front groups like Progress Alberta have received money to campaign against Alberta energy jobs,” Kenney said.*

Mr. Kenney, the UCP, and others associated with them made these false, malicious, arguably defamatory attacks on Progress Alberta repeatedly. Progress Alberta has never campaigned against Alberta energy jobs or pipeline projects, has never been a part of the Tar Sands Campaign, and never had the goal to landlock Alberta’s oil and gas.

The attacks by Mr. Kenney and the UCP appear to be retaliation for Progress Alberta’s decision to exercise its constitutional freedom of expression to campaign against them during the provincial election. Now that Mr. Kenney and the UCP have formed government, the Inquiry promised in the news release is a continuation and culmination of those attacks.

I am now instructed by Progress Alberta to examine legal action against this course of conduct. The attacks on Progress Alberta have created a chilling effect that has discouraged Progress Alberta’s traditional donors from supporting the organization. The threat of the Inquiry has also forced Progress Alberta to divert resources towards research and legal defense, rather than reaching its target audience.

#### Charter issues:

Section 2 of the Terms of Reference sets out the Inquiry’s mandate, and therefore the jurisdiction of the Commissioner in exercising powers under the *Public Inquiries Act*.

Under s. 2(1)(a), it is mandated that the Inquiry “shall inquire into any anti-Alberta energy campaigns” that receive support from foreign organizations, and whether that support includes “financial assistance to a Canadian organization that has disseminated misleading or false information about the Alberta oil and gas industry”.

This mandate violates freedom of expression and freedom of association of Canadian organizations under ss. 2(b) and 2(d) of the *Charter*.

The Inquiry’s mandate has as its stated purpose to inquire not just into any association, but into a very specific kind of association: those between a foreign and a Canadian organization, in which an “anti-Alberta energy campaign” allegedly uses “misleading or false information.”

It is impossible for the Commissioner to exercise that mandate without, as a preliminary matter, making an affirmative factual finding that a Canadian organization has exercised its freedom of expression in a manner that is “anti-Alberta” and “misleading or false”. The Commissioner must arrive at a value determination of the content of the Canadian organization’s expression, simply to cross the threshold of acquiring jurisdiction over it.

We do not believe that it is legal for the Inquiry's jurisdiction to be predicated upon the value of constitutionally-protected expression. Section 2(b) of the *Charter* requires government neutrality on the content expression: *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30. While government can place proportionate restrictions on the right of free expression where there is a pressing and substantial objective, that is not the Inquiry's function.

Instead the Inquiry, by its Terms of Reference, has the intent of subjecting organizations who campaign and advance allegedly "anti-Alberta" beliefs about the oil and gas industry to a legal process in which their associations with foreign organizations are examined by a Commissioner having coercive powers in the *Public Inquiries Act*. This has a chilling effect *a priori* upon organizations wishing to express themselves, and hinders their participation in political discourse about the oil and gas industry.

Government interference in political discourse is highly unconstitutional. As the Supreme Court ruled in *R. v. Keegstra*, [1990] 3 SCR 69:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons... The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

The Canadian and foreign organizations whose campaigns the Inquiry appears to be aimed at are lawfully participating in social and political discourse about Alberta's energy resources. It is unconstitutional for the Government of Alberta to hinder the political expression of such organizations, as the Inquiry does, merely because the Commissioner is of the view they are participants in an "anti-Alberta energy campaign". Such an approach is reminiscent of the historical, illegal suppression of communism, which Quebec's government failed to accomplish even before the *Charter* existed in *Switzman v. Elbling*, [1957] S.C.R. 285:

Since in my view the true nature and purpose of the *Padlock Act* is to suppress the propagation of communism in the Province, the next question which must be answered is whether such a measure, aimed at suppressing the propagation of ideas within a Province, is within the legislative competence of such Province.

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.

Even more problematic is the Inquiry's effect in hindering freedom of association. When the Terms of Reference have as their intent for the Inquiry to scrutinize foreign and Canadian groups associating to exercise freedom of expression collectively, which is indisputably a violation of freedom of

association under s. 2(d) of the *Charter*. As the Supreme Court ruled in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1:

[Freedom of association], viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

Both the second and third classes of activities identified by the Supreme Court are violated by the Inquiry.

With respect to the second class: when Canadian and foreign organizations associate with the purpose of campaigning together about Alberta's oil and gas resources, they do so "in the pursuit of" their freedom of expression under s. 2(b). Freedom of association under s. 2(d) then becomes engaged with nothing more. By targeting associations having that purpose, the Terms of Reference violate freedom of association.

With respect to the third class: when foreign organizations provide financial assistance to Canadian organizations to campaign about Alberta's oil and gas resources, that is an exercise of their s. 2(d) "right to join with others to meet on more equal terms the power and strength" of those extremely well-financed industries. The fact that the Terms of Reference place the foreign funding of the organizations under a microscope, but not the foreign funding of the oil and gas industry, demonstrates Alberta's intent of procuring inequality of power and strength, which violates freedom of association.

None of the *Charter* violations discussed herein even remotely serves pressing and substantial objectives in a free and democratic society under s. 1. The ideological inquisition that the Inquiry represents would be more at home in Russia or Saudi Arabia than in Alberta.

Progress Alberta accordingly cautions that the Terms of Reference and Inquiry cannot survive *Charter* challenge. This is in addition to concerns about whether the mandate comports with Alberta's powers under the *Constitution Act, 1867*, which are the subject of litigation brought by others.

I caution the Government of Alberta to repeal the Terms of Reference and disband the Inquiry forthwith, failing which we may commence litigation, in anticipation of which I instruct the Government of Alberta to retain all records in connection with the Inquiry or its establishment.

Progress Alberta reserves without prejudice all its legal rights to all remedies, in respect of all causes of action and arguments, whether outlined in this letter or not.

Sincerely,



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Professor Amir Attaran  
Faculty of Law and Faculty of Medicine  
University of Ottawa

ENCL: News release of April 13, 2019



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ELECTION VICTORY SPEECH

# Kenney announces UCP government will pursue legal action against US-funded campaign targeting Alberta energy

April 13, 2019



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### ***Groups pushing to landlock Alberta energy are supporting the Trudeau-Notley alliance***

**VALLEYVIEW, AB (April 13, 2019):** Today, United Conservative leader Jason Kenney announced that a UCP government would obtain legal advice and pursue all possible legal remedies against the foreign-funded Tar Sands Campaign whose explicit goal has been to landlock Alberta oil and gas.

Independent researcher Vivian Krause has detailed how groups like the Rockefeller Brothers Fund and the Hewlett Foundation have poured tens of millions of dollars into the campaign, including funding last year's Federal Court application that led to a suspension of the Trans Mountain Pipeline Expansion. She has also highlighted that groups like Lead Now and Progress Alberta who are campaigning for the Alberta NDP have received funds from US Tar Sands Campaign donors to landlock Alberta energy.

"We now know that for months Rachel Notley has been sitting on a legal



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...we now know that for months Rachel Notley has been asking for a legal opinion indicating that the Government of Alberta could take action against groups behind the Tar Sands Campaign,” Kenney said. “Some have estimated that Alberta is losing up to \$16 billion a year in value from the price discount that results from our oil producers being captive to the US market. This is a direct result of the campaign to landlock Canadian energy supported by the Tar Sands Campaign, which in the last year has succeeded in delaying the Trans Mountain Expansion, Keystone XL, and the Line 3 replacement project.”

In a column published in the Financial Post (<https://business.financialpost.com/opinion/vivian-krause-rachel-notley-the-rockefellers-and-albertas-landlocked-oil>), Krause reveals that since July 2018 she has sought to work with the Notley government to implement a legal strategy to push back against the Tar Sands Campaign, but that ultimately the NDP decided to do and say nothing to oppose the effort to landlock Alberta oil.

When asked about the memo by a reporter earlier this week, NDP leader Rachel Notley said that such a fight would be “a waste of resources.” (<https://twitter.com/UniteAlberta/status/1117145733088497664>)

Krause writes that “it is clear to me that Notley will never do what is necessary for any Alberta pipeline project to go ahead... Rockefeller-supported organizations are helping to defeat the UCP, the only political party in the Alberta election that is committed to breaking the U.S. monopoly on Alberta’s overseas oil exports. Does this explain why Notley refuses to stand up to the Rockefeller Brothers Fund and its campaign to landlock Canadian oil? Is this why Notley has rarely if ever publicly mentioned the Rockefeller-funded Tar Sands Campaign?”

Kenney said that a UCP government would challenge the groups behind the Tar Sands Campaign. “The NDP is supported by the very same groups that have been fighting to landlock our energy. That’s why they have done nothing and will do nothing to challenge the foreign funded special interests that are attacking our vital economic interests. The jobs crisis in Alberta has been caused in part by the flight of tens of billions of dollars of investment from our oil and gas sector to the booming US energy industry. The NDP has said and done nothing to push back against this campaign that is killing Alberta jobs. That is why I am announcing today that a UCP government would immediately pursue an aggressive legal strategy to hold the Tar Sands Campaign funders to account for what they have done to our province.”

Speaking to hundreds gathered at the pro-resource Rally for the North, Kenney also outlined the broader United Conservative strategy to fight back against the opponents of Alberta’s energy industry, including:

- Establishing an ‘Energy War Room’ to respond in real time to the lies and myths told about Alberta’s energy industry through paid, earned, and social media
- Using the persuasive power of the Premier’s “bully pulpit” to tell the truth in both official languages across Canada and around the world about how Albertans produce energy with the world’s highest environmental, human rights, and labour standards
- Creating a \$10 million litigation fund to support pro-development First

Nations in defending their right to be consulted on major energy projects

etting-alberta-back-to-work/)

**Getting Alberta Back to Work**  
(<https://www.albertastrongandfree.ca/getting-alberta-back-to-work/>)



(<https://www.albertastrongandfree.ca/making-life-better-for-albertans-2/>)

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- ...ations in determining their right to be consulted on major energy projects
- Asking the energy industry to significantly increase its advocacy efforts
  - Boycotting multinational companies that boycott Alberta's energy sector
  - Challenging the charitable status of groups that are funneling foreign money into anti-Alberta campaigns
  - Ending provincial government funding for groups involved in the Tar Sands campaign
  - Launching a public inquiry under the *Inquiries Act* into the foreign sources of funds behind the anti-Alberta energy campaign
  - Banning foreign money from interfering in Alberta politics by making it illegal for foreign entities to finance political action committees
  - Supporting adoption of Senator Linda Frum's Bill S-239, which would ban foreign money from federal Canadian politics

Since 2009, the American-based Tides Foundation and its Canadian affiliate Tides Canada gave at least 400 payments and \$25 million to Canadian, American, and European organizations to oppose pipelines in Canada. This includes groups like Progress Alberta, who received foreign funds specifically to oppose "dirty fuels and pipelines" and is putting those funds to use by running a "Stop Kenney" campaign in support of the Notley NDP.

"It is now clear that Rachel Notley and the NDP surrendered to the foreign funded special interests campaigning to landlock Alberta energy, because those same groups support the NDP. As Vivian Krause has documented, NDP front groups like Progress Alberta have received money to campaign against Alberta energy jobs," Kenney said.

Kenney's speech comes in the final days of an election campaign in which the United Conservative Party has put forward hundreds of solutions to the problems plaguing the economy and holding Albertans back from realizing their full potential, including standing up against foreign-funded pro-NDP groups determined to landlock Alberta oil.

The United Conservative Party has put forward the most comprehensive platform in Alberta political history. With more than 375 concrete points, Albertans have been given a clear roadmap for positive change, something that Kenney says is driving United Conservative momentum in the final days of the campaign.

"We have a positive mainstream plan to get Alberta moving again. It's a plan that sends a message that a United Conservative government will act with boldness to get our economy moving, a plan that announces to the world: Alberta is open for business again."

"In just 3 days, Albertans will make a critical decision. Do they want four more years of debt, job losses, higher taxes, and a Trudeau-Notley alliance, or are they ready for positive change that kick starts the economy, gets Albertans back to work, and stands up for Alberta against foreign funded special interests and Justin Trudeau's Liberal government?" Kenney concluded.

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B-Roll video from today's announcement is available **here**.  
([https://drive.google.com/file/d/1v4hVQK9x1xjYINa9PsV8lrw\\_m\\_zmyXYI/view?usp=sharing](https://drive.google.com/file/d/1v4hVQK9x1xjYINa9PsV8lrw_m_zmyXYI/view?usp=sharing))

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# News

(<https://www.albertastrongandfree.ca/premier-designate-names-senior-staff/>)

## Premier Designate names senior staff (<https://www.albertastrongandfree.ca/premier-designate-names-senior-staff/>)

April 22, 2019

Premier Designate Jason Kenney today announced the senior staff that will serve in the Office of the Premier and lead his transition team.

**MORE** (<https://www.albertastrongandfree.ca/premier-designate-names-senior-staff/>)



# News

(<https://www.albertastrongandfree.ca/premier-designate-kenney-announces-priorities-to-get-alberta-working-again/>)

## Premier-Designate Kenney Announces Priorities to Get Alberta Working Again (<https://www.albertastrongandfree.ca/premier-designate-kenney-announces-priorities-to-get-alberta-working-again/>)

April 17, 2019

The new United Conservative Government will focus on jobs, pipelines and getting a fair deal in Canada.

**MORE** (<https://www.albertastrongandfree.ca/premier-designate-kenney-announces-priorities-to-get-alberta-working-again/>)



# News

(<https://www.albertastrongandfree.ca/kenney-announces-ucp-government-will-pursue-legal-action-against-us-funded-campaign-targeting-alberta-energy/>)

## Kenney announces UCP government will pursue legal action against US-funded campaign targeting Alberta energy (<https://www.albertastrongandfree.ca/kenney-announces-ucp-government-will-pursue-legal-action-against-us-funded-campaign-targeting-alberta-energy/>)

April 13, 2019

Groups pushing to landlock Alberta energy are supporting the

**MORE** (<https://www.albertastrongandfree.ca/kenney-announces-ucp-government-will-pursue-legal-action-against-us-funded-campaign-targeting-alberta-energy/>)



# News

(<https://www.albertastrongandfree.ca/documents-ndp-lied-about-electricity-fiasco/>)

## Documents: NDP lied about electricity fiasco (<https://www.albertastrongandfree.ca/documents-ndp-lied-about-electricity-fiasco/>)

April 11, 2019

Government records contradict NDP claims about contract clause awareness.

**MORE** (<https://www.albertastrongandfree.ca/documents-ndp-lied-about-electricity-fiasco/>)





(https://www.albertastrongandfree.ca/609-pages-what-tax-hikes-are-the-ndp-hiding/)

**609 pages: What Tax Hikes are the NDP Hiding?**  
(https://www.albertastrongandfree.ca/609-pages-what-tax-hikes-are-the-ndp-hiding/)

April 9, 2019

609 pages could detail how the NDP plan to fill their \$8.6 billion platform hole.

**MORE**  
(https://www.albertastrongandfree.ca/609-pages-what-tax-hikes-are-the-ndp-hiding/)



(https://www.albertastrongandfree.ca/kenney-warns-trudeau-ucp-government-will-take-no-more-pipelines-law-to-court/)

**Kenney Warns Trudeau: UCP Government Will Take 'No More Pipelines' Law to Court**

(https://www.albertastrongandfree.ca/kenney-warns-trudeau-ucp-government-will-take-no-more-pipelines-law-to-court/)

April 9, 2019

"We will end the Trudeau-Notley alliance, and go to court to defend Alberta's constitutional power to control our resources" Kenney vows.

**MORE**  
(https://www.albertastrongandfree.ca/kenney-warns-trudeau-ucp-government-will-take-no-more-pipelines-law-to-court/)



(https://www.albertastrongandfree.ca/just-the-facts-notley-ndp-record-on-c-48/)

**Just the Facts: Notley NDP record on C-48**  
(https://www.albertastrongandfree.ca/just-the-facts-notley-ndp-record-on-c-48/)

April 8, 2019

With a week to go in the election campaign, NDP leader Rachel Notley today announced that she would be speaking to the Senate committee on Justin Trudeau's Tanker Ban, Bill C-48.

**MORE**  
(https://www.albertastrongandfree.ca/just-the-facts-notley-ndp-record-on-c-48/)



(https://www.albertastrongandfree.ca/from-the-gas-city-kenney-threatens-to-turn-off-taps-to-bc/)

**From 'The Gas City,' Kenney Threatens to Turn Off Taps to BC**  
(https://www.albertastrongandfree.ca/from-the-gas-city-kenney-threatens-to-turn-off-taps-to-bc/)

April 8, 2019

Kenney visits Medicine Hat, renews call for BC to end opposition to Alberta pipelines.

**MORE**  
(https://www.albertastrongandfree.ca/from-the-gas-city-kenney-threatens-to-turn-off-taps-to-bc/)

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