

ENVIRONMENTAL RIGHTS IN ALBERTA:

AN ANNOTATED ENVIRONMENTAL BILL OF RIGHTS FOR ALBERTA

A publication of the Environmental Law Centre's Environmental Rights Program



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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment. Our vision is a society where laws secure an environment that sustains current and future generations.

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The ELC's Environmental Rights series can be found online here: <http://elc.ab.ca/our-focus/environmental-rights/>

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Introduction

Because humans require a healthy environment to flourish and thrive, environmental rights provide a cornerstone for human health and economic prosperity. An environmental right may be substantive (i.e. ensuring a certain level of environmental quality) or procedural in nature. Environmental rights may protect the environment as a matter of human rights, may protect nature itself¹, or both. An **Environmental Bill of Rights** (“EBR”) is one way to expressly entrench and protect environmental rights.

It should be noted at the outset that the Environmental Law Centre drew greatly from David Boyd’s enormous academic contributions in this area. In particular, his article *Elements of an Effective Environmental Bill of Rights* was an invaluable resource in designing our model EBR. Also invaluable were previous bills in Alberta and other jurisdictions, and existing legislation in other jurisdictions that are designed to protect environmental rights.

What is an Environmental Bill of Rights?

Environmental rights can either be entrenched into an existing bill of rights or in a stand-alone piece of legislation. While the *Alberta Bill of Rights*² does provide an express declaration of rights and freedoms, there is no mention of environmental rights. Similarly, the *Canadian Charter of Rights and Freedoms*³ (which forms part of the *Canadian Constitution*) does not expressly protect environmental rights. Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Many consider this *Charter* provision as being sufficiently broad to encompass environmental rights⁴ and that it should be interpreted by the Courts accordingly. Even in light of this, constitutional amendment to expressly include environmental rights would provide greater certainty and clarity around environmental rights throughout Canada. In addition to the potential for constitutional

¹ For more on protecting the rights of nature, see David Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (Toronto: 2017, ECW Press).

² *Alberta Bill of Rights*, R.S.A. 2000, ch. A-14.

³ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11 (the “Charter”).

⁴ See for instance, Julie DeWolf, *Linking Constitutional and Environmental Rights: Applying section 7 of the Canadian Charter of Rights and Freedoms to adverse environmental impacts*, A thesis presented to the University of Waterloo in fulfillment of the thesis requirements for the degree of Master of Environmental Studies in Environment and Resource Studies (Waterloo, ON: 2015).

protection of environmental rights, both the federal and provincial governments possess authority to provide legislative protection of environmental rights via statute.

There is currently no federal EBR⁵ nor an Alberta EBR. In Alberta, while there are some legal rights that may support environmental quality, our laws do not often expressly recognize substantive or procedural environmental rights.⁶ A substantive environmental right may be expressed as a stated level of environmental quality (in this Model EBR, a right to a healthy environment). Procedural rights include protections designed to ensure meaningful public participation in environmental decision-making and to ensure accountability in the implementation of environmental laws. Further, procedural rights can enable legal recourse for breaches of environmental laws and of environmental rights.

Previous research by the Environmental Law Centre has found:⁷

... that all sectors of environmental management (oil and gas, mining, forestry, agriculture, development under municipal jurisdiction, public lands management) have various deficiencies. These deficiencies include:

- Narrow standing tests for legal reviews and hearings;
- Gaps and insufficiency in cost awards to support participation and informed decision making;
- Failures to adequately recognize and manage cumulative environmental effects;
- Insufficient review or hearing options for policies, regulation and administration of environmental decision making;
- Insufficient tools for engaging public participation in enforcement.

In order to address these deficiencies, an EBR for Alberta should be designed to:⁸

1. Provide participation rights for environmental or public resource decision making;
2. Enable participation in enforcement and compliance;
3. Integrate environmental law principles in laws and regulations; and

⁵ Calvin Sandborn (ed), *Maintaining Natural BC for our Children: Section Law Reform Proposals* (Victoria: 2012, Environmental Law Centre (Victoria)) see Section G: Ensuring Justice for Nature.

⁶ Jason Unger, *Environmental rights in Alberta: Phase I: Do we have the rights we need? Environmental Bill of Rights today and in the future* (Edmonton: Environmental Law Centre, 2016) available at http://elc.ab.ca/?smd_process_download=1&download_id=18875.

⁷ *Ibid* at 5.

⁸ *Ibid*.

4. Provide strategic and operational oversight of policies, regulations, laws and enforcement/compliance.

This report consists of model provisions for an Alberta EBR, along with annotations providing background information.

An Environmental Bill of Rights for Alberta

The model provisions for an Alberta EBR appear in blue font, along with annotations providing background information in black font.

Preamble

Whereas Albertans have a right to a healthy environment, and the Government of Alberta holds and manages Alberta's air, water, land and other components of the environment in trust for all Albertans;

Whereas Albertans have a right to environmental justice and that environmental harms and benefits should be equitably distributed and shared amongst all Albertans regardless of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or analogous characteristics;

Whereas Albertans have a right to life, liberty and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*;

Whereas the environment and all its components should be granted substantive and procedural rights at law and such rights may be utilized by governments and citizens to ensure a healthy environment for current and future generations;

Whereas Albertans recognize that a healthy environment is necessary for economic, social, cultural and intergenerational security;

Whereas Albertans recognize their individual and collective responsibility, and the responsibility of the Government of Alberta, to protect the environment for the benefit of present and future generations;

Whereas Albertans are entitled to be directly involved in decision-making, to receive environmental justice, and to have access to courts to ensure the Government of Alberta fulfils its fiduciary duties as trustee of Alberta's air, water, land and other components of the environment;

The preamble sets the context for the EBR. It expressly acknowledges the right of all Albertans to enjoy a healthy environment, and the connection between a healthy environment and other important aspects of human existence (economic, social, cultural and intergenerational). The preamble also recognizes the importance of environmental justice as a comprehensive principle underlying many of the procedural rights guaranteed by the EBR. Environmental justice refers to the need to ensure that no specific group (such as a particular race or socio-economic group) is overly-burdened by environmental harms.⁹ The concept of environmental justice seeks to avoid disproportionate adverse effects on people who are marginalized in our society and to ensure equal ability for people to participate in decisions which may affect them.¹⁰

Also referenced in the preamble is recognition of individual, collective and government responsibility with respect to the environment. This responsibility encompasses the concept of public trust wherein the Government of Alberta holds and manages the environment for the benefit of all Albertans.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Short Title

1. This Act may be cited as the Alberta Environmental Bill of Rights.

Interpretation

2. The definitions in this section apply in this Act.¹¹

environment means the components of the earth and includes

- (i) air, land and water,
- (ii) all layers of the atmosphere,
- (iii) all organic and inorganic matter and living organisms,

⁹ *Ibid* at 18.

¹⁰ See Kaitlyn Mitchell, *Environmental Racism: The first step in recognizing we have a problem*, Ecojustice Blog May 6, 2015, online: Ecojustice <http://www.ecojustice.ca/enviro-racism-we-have-a-problem/>

¹¹ In some cases (but not all), where terms appear in both the model Alberta EBR and in the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (“EPEA”), we have adopted the definition from the EPEA.

- (iv) biodiversity within and among species, and
- (v) the interacting natural systems that include components referred to in subclauses (i) to (iv);

Environmental Commissioner means the person appointed pursuant to section 35 of this Act to provide third party oversight of the actions of provincial decision-makers in light of this Act;

healthy environment means an environment that protects human health and wellbeing, and that maintains all components of the environment, including ecological processes, for their own sake and for the wellbeing of present and future generations of humans;

in dubio, pro natura means¹² that any doubt or ambiguity regarding legal interpretation must be resolved in favour of the environment;

intrinsic value means the essential value of the environment or a component of the environment without reference to its value to human wellbeing;

limits to ecological capacity means that ecological systems have productive and assimilative limits and that these limits may be stressed, approached or surpassed by human activity;

pro personae means¹³ that provisions related to rights be given a broad and generous interpretation, particularly in the context of an alleged or potential violation of an individual's rights;

provincial decision-maker means a department of the Government of Alberta; or a public agency as defined by the *Alberta Public Agencies Governance Act*, c. A-31.5 including, without limitation, the Alberta Energy Regulator, the Environmental Appeals Board, the Alberta Utilities Commission, and the Natural Resources Conservation Board, that acts pursuant to authority under this Act or a prescribed enactment;

provincial undertaking means a Government of Alberta project, policy, plan or program;

significant adverse effect¹⁴ is an effect resulting from an action or failure to act which results in a release into or change to the environment which, alone or combination with existing background conditions,

¹² David Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27(3) J. Env. L. & Prac. 201.

¹³ *Ibid.*

¹⁴ The language used in the EPEA is "significant adverse effect". While the act defines "adverse effect" as "impairment of or damage to the environment, human health or safety or property", there is no definition of "significant". For a judicial interpretation of "significant adverse effect", see *R v Auto Body Services Red Deer Ltd.*,

- (a) impairs or damages the environment or any component of the environment;
 - (b) surpasses the productive and assimilative limits of the relevant ecological system; or
 - (c) has a negative impact on human health and wellbeing,
- in a manner which is not trivial or minimal.
3. (1) This Act must be interpreted consistently with the existing and emerging principles of environmental law including, but not limited to
- (a) the **principle of environmental justice** which means environmental harms and benefits should be equitably distributed and shared amongst all Albertans without disproportionate impacts on persons of a particular race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or analogous characteristics;
 - (b) the **principle of intergenerational equity** which requires present generations of Albertans to hold the environment in trust for future generations and to ensure that burdens and costs are not passed onto future generations;
 - (c) the **principle of non-regression** which means that existing environmental laws and policies in the Province of Alberta at the time of proclamation of this Act form a baseline of environmental protection which may not be reduced;
 - (d) the **polluter pays principle** which requires that environmental costs associated with undertakings should be internalized and should be borne by the polluter so as not to pass liabilities to future generations;
 - (e) the **pollution prevention principle** which requires projects, policies, plans or programs to be designed to prevent, or at the least minimize, the use of pollutants that persist and bioaccumulate thereby affecting future generations;
 - (f) the **precautionary principle** which means that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to postpone measures to prevent environmental degradation;
 - (g) the **principle of public trust** which requires that the Government of Alberta hold components of the environment as trustee for the benefit of all Albertans and bears a

2014 ABPC 168 (CanLii). See also *R v Castonguay Blasting Ltd.*, 2013 SCC 52 for a judicial interpretation of “adverse effect”. The model Alberta EBR provides a different definition for “significant adverse effect” than the EPEA and its jurisprudence.

fiduciary responsibility for preserving and protecting the public interest in those components for present and future generations; and

(h) the **principle of sustainable development** which means development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.

(2) In addition, this Act must be read in accordance with the statutory interpretation principles of *in dubio, pro natura* and *pro personae*.

(3) Every provincial decision-maker must consider the principles set out in subsections (1) and (2) when making a decision under a prescribed enactment.

(4) Every provincial decision-maker must recognize there are limits to ecological capacity when making a decision under a prescribed enactment.

Core Principles

The EBR references several principles of environmental law meant to guide interpretation of and decision-making under the Act with the ultimate goal of supporting environmental rights. These principles include (a) environmental justice, (b) intergenerational equity, (c) non-regression, (d) polluter pays, (e) pollution prevention, (f) precautionary principle, (g) public trust, and (h) sustainable development. Many of these principles reflect aspects of sustainability which is an overarching principle that seeks to balance economic, social, cultural and environmental sustainability in harmony. A brief discussion of these principles follows.

Environmental Justice¹⁵

Environmental justice refers to the need to ensure that no specific group is overly-burdened by environmental harms. Development of polluting activities may have a disproportionate adverse effect on people who are marginalized in our society based on race, ethnicity, gender and income. The concept of environmental justice seeks to address this inequality and ensure equal ability for people to participate in decisions which may affect them.¹⁶

It should be noted that, in some instances, there may be *bona fide* reasons to have pollutants concentrated in an area (such as the location of the resource being extracted). The principle of environmental justice is not meant to ensure each individual bears the exact same environmental

¹⁵ *Supra* note 6 at 18.

¹⁶ *Supra* note 10.

burden (and receives the exact same environmental benefit) but rather that no particular group bears a disproportionate burden.

Intergenerational Equity

This principle is tied to the definition of sustainable development as put forth in the *Brundtland Report* which references the needs of future generations. Intergenerational equity expands the right of the environment temporally to recognize the resource needs of future generations.

In discussing the principle, Edith Brown Weiss notes:¹⁷

This ethical and philosophical commitment acts as a constraint on a natural inclination to take advantage of our temporary control over the earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants.

... [and that] we, the living, are sojourners on earth and temporary stewards of our resources.

This principle is also tied to the principles of pollution prevention and polluter pays. The principle of pollution prevention is designed to prevent or, at least, minimize the use of pollutants that persist and bioaccumulate thereby affecting future generations. The principle is also designed to ensure that liabilities are not deferred to future generations.

Non-Regression

This principle embraces the idea that existing environmental laws form a baseline of environmental protection which should not be reduced by subsequent legal amendments.¹⁸ This principle is closely tied to the principles of sustainable development and intergenerational equity. As stated by Michel Prieur:¹⁹

The concept of sustainable development now means that the right to life and health of future generations must not be overlooked and measures that would be detrimental to them must not be adopted. Minimizing or repealing rules protecting the environment would result in imposing a more degraded environment on future generations.

¹⁷ Weiss, Edith Brown. "In Fairness to Future Generations and Sustainable Development" (1992) 8(1) American University International Law Review 19.

¹⁸ *Supra* note 12. See also Linda Collins and David Boyd, "Non-Regression and the Charter Right to a Healthy Environment" (2016) 29 J. Env. L. & Prac. 285.

¹⁹ Michel Prieur, Non-regression in environmental law (2012) 5(2) S.A.P.I.EN.S (online).

The principle of non-regression does not mean that repeal or amendment of existing environmental laws is not possible.²⁰ Rather, new or amended laws must contribute in the same or better manner to environmental protection and not result in increased pollution or loss of biodiversity.

Precautionary Principle

The precautionary principle was enunciated as Principle 15 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992) stating “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

In a fairly recent decision, the Court considered the “the exact meaning of the precautionary principle and its application in a legal context”.²¹ The Court defined the precautionary principle as:²²

The precautionary principle recognizes that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm of public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law.

Several other decisions, including some by the Supreme Court of Canada, have discussed and adopted the precautionary principle.²³

Polluter Pays

The principle of polluter pays was enunciated as Principle 16 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992) as “the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

The Supreme Court of Canada commented on the polluter pays principle in *Imperial Oil v. Quebec (Minister of Environment)* as follows:²⁴

²⁰ *Ibid.*

²¹ *Morton v. Ministry of Fisheries and Ocean*, (2015) FC 575 (CanLii) at para.41.

²² *Ibid* at para.43.

²³ See for instance: 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241; *Castonguay Blasting Ltd. v Ontario (Environment)* 2013 SCC 52; *Blaney et al. v. British Columbia (The Minister of Agriculture Food and Fisheries) et al.*, (2005) BCSC 283; *Weir v. Canada (Minister of Health)*, (2011) FC 1322; *Pembina Institute for Appropriate Development et al. v. Canada (Attorney General) et al.*, (2008) FC 302; *Hanna v. Ontario (Attorney General)*, (2011) ONSC 609; *Sierra Club Canada v. Ontario (Natural Resources & Transportation)*, (2011) ONSC 4655.

In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation...That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of Rio Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

Aside from being accepted by the Supreme Court of Canada, the principle of polluter pays has been adopted in legislation. For instance, the *Alberta Environmental Protection and Enhancement Act*²⁵ recognizes the “responsibility of polluters to pay for the costs of their actions”.

Pollution Prevention

The Canadian Council of Ministers of the Environment defined pollution prevention in *A Strategy to Fulfil the CCME Commitment to Pollution Prevention* (May 1996) as:²⁶

The use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes, at the source.... Pollution prevention is the preferred strategy for protecting the environment. Pollution prevention does not include measures such as diluting constituents to reduce hazard or toxicity, or transferring hazardous or toxic contaminants from one medium to another or to the work place.

The principle of pollution prevention is reflected in several pieces of Canadian legislation including the *Alberta Environmental Protection and Enhancement Act*.²⁷

Public Trust

As stated in a previous Environmental Law Centre publication:²⁸

All aspects of the natural environment can be undermined by government decisions about what destructive activities are allowed to take place. In the absence of a statutory or common law legal obligation towards the environment the government largely need not concern itself with the results of its approvals.

²⁴ *Imperial Oil v. Quebec (Minister of Environment)*, [2003] 2 S.C.R. 624 at para. 23.

²⁵ EPEA, s. 2.

²⁶ The Canadian Council of Ministers of the Environment (CCME), online: CCME http://www.ccme.ca/files/Resources/pollution_prevention/commitment_to_p2_eng.pdf.

²⁷ EPEA and the related *Substance Release Regulation*, A.R. 124/1993.

²⁸ *Supra* note 6 at 18-19.

As such, environmental rights legislation often stipulates that Crown management of natural resources be governed as a public trust.²⁹ The public trust doctrine is not without precedent in Canada. For example, the doctrine of public trust was considered *in obiter* by the Supreme Court of Canada in *British Columbia v. Canadian Forests Products* wherein the Court stated “[t]he notion that there are public rights in the environment that reside in the Crown has deep roots in the common law.”³⁰

The public trust doctrine has received considerable judicial attention in United States. However, its application is rather limited in scope. The public trust doctrine has been primarily applied to tidal and submerged lands, and to inland navigable waters.³¹ It also has been used by several states to advance public access rights to waterways.³² The most significant expansion of the public trust doctrine in the United States has been its application to water rights³³ albeit with more focus on consumptive rights than on water quality.³⁴ Although traditionally associated with fish and wildlife, there has not been vigorous application of the public trust doctrine to these resources in the United States.³⁵ Similarly, there has been little development of the public trust doctrine with respect to air quality and resources.³⁶

A recent federal bill defined the “public trust” as “the federal government’s responsibility to preserve and protect the collective interest of the people of Canada in the quality of the environment for the benefit of present and future generations.”³⁷ The model EBR uses the public trust doctrine to require that the Government of Alberta hold components of the environment as trustee for the benefit of all Albertans and to impose a fiduciary responsibility for preserving and protecting the public interest in those components for present and future generations.

It is suggested by the model EBR that the public trust doctrine should apply to Crown management of natural resources and would not necessarily be limited only to those resources existing on public lands (i.e. the public trust doctrine may extend to components of the environment on private lands). To some degree, existing laws already impose restrictions on the use of private lands for the general benefit of the public (for example, the *Environmental Protection and Enhancement Act* restricts air and water pollution regardless of whether it occurs on public or private land, and zoning bylaws restrict activities

²⁹ The previous federal Bill C-634, An Act to establish a Canadian Environmental Bill of Rights, 2nd Sess, 41st Parl, 62-63 Elizabeth II, 2013-104 stated at s.9: “The Government of Canada is the trustee of Canada’s environment within its jurisdiction and has the obligation to preserve it in accordance with the public trust for the benefit of present and future generations.”

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6746697&File=50#7>.

³⁰ *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 at 38.

³¹ Richard Frank, “The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future”, (2012) 45 UC Davis L. Rev. 665.

³² *Ibid.*

³³ *Ibid* at 675.

³⁴ *Ibid* at 677.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Supra* note 29, s.2.

on private lands). Such existing restrictions can be seen as an operationalization of the public trust doctrine.

Sustainable Development

The most commonly referenced definition of sustainable development is found in the *Brundtland Report*.³⁸

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

The principle of sustainable development incorporates the concept of development being socially, economically and environmentally sound. This principle has been widely accepted by Canadian courts³⁹ and in legislation.⁴⁰

4. Nothing in this Act abrogates or derogates from existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*.⁴¹
5. Nothing in this Act is to be interpreted so as to repeal, remove or reduce any remedy available to any person under law in force in Alberta.

Purpose

6. The purposes of this Act are

³⁸ World Commission on Environment and Development (WCED). *Our Common Future*. Oxford: Oxford University Press, 1987 (hereinafter the "Brundtland Report").

³⁹ See for example, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; and *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283.

⁴⁰ See for example, EPEA, s. 2 and *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8, s. 1(2).

⁴¹ For more on non-derogation clauses, see Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights* (2007).

- (a) to protect the right of current and future generations of Albertans to a healthy environment;
- (b) to confirm that the Government of Alberta holds and manages Alberta's air, water, land and other components of the environment in trust for all Albertans;
- (c) to protect the right of Albertans to be involved in environmental decision-making including, without limitation:
 - (i) access to environmental information,
 - (ii) access to mechanisms for direct public participation in decision-making processes to represent individual rights and the interests of the environment, and
 - (iii) the provision of procedural rights.
- (d) to protect the right of Albertans to receive environmental justice;
- (e) to ensure accountability in the implementation of environmental laws which includes, without limitation:
 - (i) the availability of remedies to enforce environmental rights,
 - (ii) access to courts to ensure the Government of Alberta fulfils its fiduciary duties as trustee of all components of Alberta's environment, and
 - (iii) independent third party oversight;
- (f) to provide legal protection against reprisals for employees who take actions to protect the environment.

This purpose provision sets out the primary goals to be achieved by the EBR. The EBR aims to protect both substantive and procedural environmental rights. The substantive right is the right of current and future generations of Albertans to a healthy environment. Procedural rights include protections designed to ensure meaningful public participation in environmental decision-making and to ensure accountability in the implementation of environmental laws. Further, procedural rights enable legal recourse for breaches of environmental laws and of environmental rights.

Her Majesty

7. This Act is binding on Her Majesty in right of Alberta.

Application

8. The provisions of this Act apply to all decisions emanating from provincial decision-makers, or related to provincial land or to a provincial undertaking.
9. For the purposes of this Act, the following are prescribed enactments:
 - (a) *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7;
 - (b) *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8;
 - (c) *Coal Conservation Act*, R.S.A. 2000, c. C-17;
 - (d) *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;
 - (e) *Gas Resources Preservation Act*, R.S.A. 2000, c. G-4;
 - (f) *Gas Utilities Act*, R.S.A. 2000, c. G-5;
 - (g) *Electric Utilities Act*, R.S.A. 2000, c. G-5;
 - (h) *Forest and Prairie Protection Act*, R.S.A. 2000, c. F-19;
 - (i) *Forest Reserves Act*, R.S.A. 2000, c. F-20;
 - (j) *Forests Act*, R.S.A. 2000, c. F-22;
 - (k) *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16;
 - (l) *Irrigation Districts Act*, R.S.A. 2000, c. I-11;
 - (m) *Mines and Minerals Act*, R.S.A. 2000, c. M-17;
 - (n) *Municipal Government Act*, R.S.A. 2000, c. M-26;
 - (o) *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3;
 - (p) *Oil and Gas Conservation Act*, R.S.A. 2000 c. O-6;
 - (q) *Oil Sands Conservation Act*, R.S.A. 2000, O-7;
 - (r) *Pipeline Act*, R.S.A. 2000, c. P-15;
 - (s) *Provincial Parks Act*, R.S.A. c. P-35;

- (t) *Public Lands Act*, R.S.A. 2000, c. P-40;
- (u) *Public Utilities Act*, RSA 2000, c. P-45;
- (v) *Responsible Energy Development Act*, S.A. 2012, c. R-17.3;
- (w) *Soil Conservation Act*, R.S.A. 2000, c. S-15;
- (x) *Surface Rights Act*, R.S.A. 2000, c. S-24;
- (y) *Water Act*, R.S.A. 2000, c. W-3;
- (z) *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, c. W-9;
- (aa) *Wilmore Wilderness Park Act*, R.S.A. 2000, c. W-11.

This provision ensures that the EBR guides the decisions and actions of all provincial decision-makers (which includes a department of the Government of Alberta and public agencies such as the Alberta Energy Regulator, the Alberta Utilities Commission, the Environmental Appeals Board and the Natural Resources Conservation Board). Furthermore, the EBR guides the actions of the Government of Alberta including projects (either undertaken or regulated by the Government) and the development of programs and policies.

The EBR prescribes certain enactments – those with implications for Alberta’s air, water, land and other components of the environment – to ensure that decision-making under those enactments is subject to the procedural protections provided by the EBR and is guided by the principles adopted in the EBR.

Third party oversight

Environmental Commissioner

10. The office of Environmental Commissioner is created for the purposes of supporting, enhancing and enforcing environmental rights.
11. (1) The Environmental Commissioner is responsible for:
 - (a) establishing the Technical and Policy Advisory Group;
 - (b) reviewing the implementation and management of this Act and prescribed enactments;

- (c) reviewing government compliance with this Act and prescribed enactments;
- (d) maintaining the environmental registry;
- (e) providing education programs about this Act to provincial decision-makers and to the public; and
- (f) providing advice and assistance to members of the public who wish to participate in decision-making or to enforce environmental rights as provided in this Act.

(2) The Environmental Commissioner must report annually to the Legislative Assembly on the work of the Commissioner during the previous 12 months. The report must be public and include information on matters relevant to:

- (a) the implementation and management of this Act;
- (b) government compliance with this Act;
- (c) a report on the work of the Environmental Commissioner including its handling of applications under sections 23, 24 and 39 of this Act;
- (d) a report on the work of the Technical and Policy Advisory Group;
- (e) progress of activities in Alberta to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels;
- (f) progress of activities in Alberta to reduce emissions of greenhouse gases;
- (g) regional planning implementation and management achieved by the government;
- (h) status of Species at Risk in Alberta and their associated habitat; and
- (i) progress in Alberta toward meeting the *Aichi Biodiversity Targets* established under the *United Nations Convention on Biological Diversity* for the protection of land, water and biological diversity;
- (j) any information prescribed by the regulations under this Act; and
- (k) any other information that the Environmental Commissioner considers appropriate.

(3) The Environmental Commissioner may publish a special report at any time on any matter related to the Act that the Commissioner considers should not be deferred until the annual report.

- (4) A report of the Environmental Commissioner may contain recommendations to the government. The government must consider the recommendations, take steps to implement those recommendations which the government decides ought to be implemented, and provide a response which outlines its actions to implement recommendations and the rationale for not accepting a recommendation to the Environmental Commissioner within 6 months of the date of the Commissioner's report.
12. In conducting its reviews, the Environmental Commissioner may exercise the same powers and rights as those granted to the Auditor General under the *Auditor General Act*, RSA 2000, c. A-46, namely:
- (1) the power to access information under section 14 of that Act;
 - (2) the power to obtain evidence under oath under section 14.1 of that Act; and
 - (3) the right to information under section 15 of that Act.

Technical and Policy Advisory Group

13. The Environmental Commissioner will establish a Technical and Policy Advisory Group to provide advice on the conditions necessary to ensure Alberta's environment is healthy.
14. (1) The Technical and Policy Advisory Group shall be chaired by the Environmental Commissioner.
- (2) The Technical and Policy Advisory Group shall include at least one Indigenous representative appointed by the Lieutenant Governor in Council on the advice of Assembly of First Nations, Alberta Region.
- (3) The Technical and Policy Advisory Group will include 6 non-government members equally representing environmental, social, community, health, scientific, and industry perspectives to be appointed by the Lieutenant Governor in Council.
- (4) Each of Alberta Environment and Parks, Alberta Energy, and Alberta Agriculture and Forestry shall appoint one representative to the Technical and Policy Advisory Group.
- (5) Each member of the Technical and Policy Advisory Group, including the representatives appointed in subsections (2), (3) and (4) shall be appointed for a term of not more than 5 years.
- (6) The members of the Technical and Policy Advisory Group appointed in subsection (2) and (3) shall receive

(a) remuneration, and

(b) payment for travelling and other expenses while absent from their place of residence in the course of exercising their powers or performing their duties as members of the Technical and Policy Advisory Group, as determined by the Lieutenant Governor in Council in accordance with any applicable regulations under the *Alberta Public Agencies Governance Act*.

15. The Technical and Policy Advisory Group shall:

- (1) meet at least four times annually;
- (2) provide advice to the Government of Alberta on:
 - (a) the conditions necessary to ensure Alberta's environment is healthy; and
 - (b) the need for the introduction or amendment of legislation, policy or both to address environmental matters in the province;
- (3) assist the Environmental Commissioner in handling applications pursuant to sections 23, 24 and 39 of this Act.

Our previous publication – *Environmental Rights in Alberta: Module 2: Third Party Oversight and Environmental Rights*⁴² – considered the factors necessary to provide effective oversight of environmental rights in Alberta. The primary recommendation from that paper is that a third party oversight body – independent from government – ought to be established. The oversight body should be granted a clear legislative mandate to support, enhance and enforce environmental rights and be granted specific powers and responsibilities. Responsibilities of the oversight body should include:

- carrying out reviews or audits;
- reporting on specific topics relating to environmental rights with certain topics, such as climate change, being pre-assigned; and
- handling citizen petitions.

Our previous recommendations included that the oversight body should also be authorized and responsible for issuing recommendations that are either binding or trigger a process wherein outcomes

⁴² Astrid Kalkbrenner, *Environmental Rights in Alberta: Module 2: Third Party Oversight and Environmental Rights* (Edmonton: 2016, Environmental Law Centre) http://elc.ab.ca/?smd_process_download=1&download_id=18871.

are considered and used to achieve change in the respective recommended area. An alternative (or additional) option is to establish a standing committee on the environment for receiving, discussing and helping to implement reports of the oversight body. The model Alberta EBR establishes an Environmental Commissioner, along with a Technical and Policy Advisory Group. While the Alberta EBR does not make recommendations of either oversight body binding upon the government, the government is required to consider and respond to recommendations in accordance with the Alberta EBR.

In order to enable the oversight body to fulfill all assigned tasks and responsibilities, the oversight body must be granted appropriate procedural rights. These include access to required information, an obligation on government entities and organizations to cooperate with requests, and examination and investigation powers. In addition to procedural rights, adequate resources (i.e. funding) will be necessary to enable the Environmental Commissioner and the Technical and Policy Advisory Group to fulfil their functions.

Similar recommendations have been made in the B.C. context.⁴³ The recommended mandate for a B.C. Environmental Commissioner (appointed under the B.C. Auditor General's office) is to review government decisions, policies and laws that negatively impact the environment, and to address citizen complaints.⁴⁴ As well, it is recommended that the B.C. Environmental Commissioner provide both legislators and the public with information, analysis and recommendations on proposed environmental policies and laws; conduct performance audits of the government by tracking sustainability indicators; and mediate environmental conflicts.⁴⁵

In addition to the creation of an Environmental Commissioner office, the EBR also establishes a Technical and Policy Advisory Group to provide a connection between the people of Alberta, the Environmental Commissioner and the Government of Alberta. The Technical and Policy Advisory Group is to be a multi-stakeholder body with representatives from different sectors of the Alberta public (environmental, Indigenous, health, community, scientific and industry) along with representatives from the Government of Alberta. A key role of the Technical and Policy Advisory Group will be to advise the Environmental Commissioner on the conditions necessary to ensure Alberta's environment is healthy.

⁴³ *Supra* note 5 at Part 32: The Case for BC Environment Commissioner by Murray Rankin and Anneliese Sanghara.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Environmental Rights

Right to a Healthy Environment

16. Every resident of Alberta has a right to a healthy environment.

Obligations of the Government of Alberta to Protect the Right to a Healthy Environment

17. (1) The Government of Alberta has an obligation, within its jurisdiction, to protect the right of Albertans to a healthy environment.

(2) The Government of Alberta is trustee of Alberta's air, water, land and other components of the environment and has a fiduciary obligation to hold and manage the same for the benefit of current and future generations of Albertans.

This provision creates a substantive right to a healthy environment. In other words, it is outcome based and creates a right to a specific environmental condition (i.e. a healthy environment). David Boyd enumerates several reasons for enunciating a substantive environmental right:⁴⁶

- acts as an impetus for stronger environmental laws;
- provides a safety net;
- prevents environmental rollbacks; and
- fosters accountability and environmental justice.

It is the ELC's assumption that a substantive environmental right must be grounded in science.⁴⁷

Once entrenched in an EBR, there are several possible approaches to implementing and operationalizing a substantive environmental right (as identified in our previous work: *Environmental Rights in Alberta: Module 1: Substantive Environmental Rights*):⁴⁸

⁴⁶ David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: 2012, UBC Press).

⁴⁷ Jason Unger, *Environmental Rights in Alberta: Module 1: Substantive Environmental Rights* (Edmonton: 2016, Environmental Law Centre) at 10 http://elc.ab.ca/?smd_process_download=1&download_id=18873.

⁴⁸ *Ibid.*

- An adjudicated substantive right: an independent tribunal or the courts may determine the nature of the substantive right to determine when there is infringement of the right.
- A technocratic determination: the right is informed by experts in the field of relevance, which may be made up of academics, public servants, and interest groups, and is then translated into law.
- A democratic determination: elected politicians may formalize a process for voting on what environmental quality should be or seek a referendum from constituents on the environmental quality that citizens expect.
- A political or executive determination: the ruling government determines when and if a specific environmental standard should be upheld.

It may be that a hybrid of these approaches will be used to determine the appropriate standard of environmental quality.⁴⁹ Ultimately, the manner in which the substantive right is determined impacts on what actually will be protected by the right (and, conversely, which activities will be allowed).

The substantive environmental right entrenched in the EBR is also supported by the procedural environmental rights – such as information and public participation rights – protected by the EBR. As well, the EBR provides a process to determine infringement of the substantive environmental right, along with appropriate remedies.

Information Rights

18. In addition to rights that exist under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, in order to contribute to the environmental rights of Albertans, the Government of Alberta must provide effective access to environmental information by making such information available in a reasonable and timely fashion without placing an undue financial burden on individual Albertans.

19. (1) Environmental information includes all information concerning:

- (a) the air, water, land and other components of the environment;
- (b) activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment; or

⁴⁹ *Ibid.*

- (c) the state of human health, safety and conditions of life.
- (2) Provincial decision-makers have a duty to document decisions, activities, administrative measures, agreements, policies, legislation, plans, and programs. Once documented, such information shall not be destroyed or deleted except in accordance with the *Records Management Regulation, AR 224/2001*.
- (3) Environmental information must be made available except in the following limited circumstances, which are to be construed in a strict and narrow manner:
 - (a) where release of the environmental information will cause more environmental harm than will be caused by the refusal to disclose said environmental information; or
 - (b) the environmental information is subject to solicitor-client privilege.
- (4) For ease of access, environmental information shall be maintained in an environmental registry established by the Environmental Commissioner and made available without charge online.
- (5) If a request for information in a hard copy format is made, a reasonable fee may be charged unless it is in the public interest to waive such fees.
- (6) The environmental registry shall contain:
 - (a) documentation of provincial decision-makers' decisions, activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment;
 - (b) monitoring information pertaining to Alberta's air, water, land and other components of the environment;
 - (c) enforcement activity information pertaining to Alberta's air, water, land or other components of the environment;
 - (d) legal actions brought under this Act or otherwise regarding adverse environmental effects;
 - (e) environmental emergencies;
 - (f) annual report and other reports published by the Environmental Commissioner;
 - (g) any environmental information that could be obtained pursuant to the *Freedom of Information and Protection of Privacy Act, RSA 2000, c. F-25*;
 - (h) any other environmental information specified by legislation or regulations; and

(i) any other environmental information that provincial decision-makers consider relevant.

20. In the event of an environmental emergency with threat of imminent harm, the Government of Alberta must immediately disseminate information to enable the public to prevent, avoid or mitigate the harm.

In our previous publication, *Environmental Rights in Alberta: A Right to a Healthy Environment: Module 4: Access to Environmental Information*,⁵⁰ the following design features were identified as being necessary for a strong access regime:

- maximum information disclosure and transparency of governmental (and sometimes private) information,
- narrow, limited and justifiable exceptions to deny access to information,
- access must be free of charge or at reasonable cost,
- access provided within a reasonable time, and
- remedies for denial of access to information.

It is important to make a distinction between records and information. The term “records” is referenced in the *Freedom of Information and Protection of Privacy Act*⁵¹ (FOIP) and is subject to a comprehensive list of information types that do not constitute records. The term “information” is broader than the term “records”. Further, unlike FOIP which contains a lengthy list of exceptions to the disclosure of records, any exceptions to disclosure of environmental information should be narrow, limited and justified.

Furthermore, Alberta’s FOIP contains a lengthy list of exceptions to the disclosure of records. The EBR, in contrast, should contain narrow, limited and justified exceptions to the release of environmental information. In addition, the EBR should contain an explicit interpretation provision requiring exceptions to be interpreted in a very restrictive manner.

⁵⁰ Astrid Kalkbrenner, *Environmental Rights in Alberta: A Right to a Healthy Environment: Module 4: Access to Environmental Information* (Edmonton: 2017, Environmental Law Centre) http://elc.ab.ca/?smd_process_download=1&download_id=19341.

⁵¹ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.

It is important to note that the EBR requires that environmental information be provided in a reasonable, timely and affordable manner to remove obstacles to the right to access environmental information. At least in some instances, these outcomes will be achieved by maintaining an online environmental registry of information.

Public Participation

21. Every resident of Alberta has a right to meaningful participation in environmental decision-making and shall not be denied that right on the grounds that a person
 - (a) does not have a private or special legal interest in the matter; or
 - (b) is seeking to protect the public interest in air, water, land or other components of the environment without having a personal legal interest or experiencing a specific harm greater than other residents of Alberta.
22. Provincial decision-makers must provide a reasonable opportunity for meaningful, effective, informed and timely participation in environmental decision-making including the development of Acts, regulations and policies, and the issuance of approvals, licenses and authorizations that may cause significant adverse effects.

Review of Legislative and Policy Instruments

23. Every resident of Alberta, who believes that a new Act, regulation, instrument, policy or program is necessary for environmental protection may request consideration of the proposed initiative by the responsible minister.
24. Every resident of Alberta, who believes that an existing Act, regulation, instrument, policy or program should be amended, repealed or revoked to protect the environment may seek review of said Act, regulation, instrument, policy or program by the responsible minister.
25. (1) A review under section 23 or 24 of this Act shall be commenced by written application to the Environmental Commissioner who, within 10 days of receipt of the application, must commence a preliminary review of the application to determine if a full review is warranted having regard to:
 - (a) the potential for harm to the environment if the review is not undertaken;
 - (b) whether the matters for which a review is sought are already subject to periodic review;

- (c) relevant social, economic, scientific, traditional or other evidence;
 - (d) the resources required to conduct a full review; and
 - (e) any other relevant information.
- (2) If the Environmental Commissioner determines that a full review is not warranted, the Environmental Commissioner must communicate the decision and provide written reasons to the party requesting the review within 60 days of receipt of the application.
 - (3) If the Environmental Commissioner determines that a full review is warranted, the Environmental Commissioner must communicate the decision to the person requesting the review and a copy of the review application must be forwarded to the responsible minister within 60 days of receipt of the application.
 - (4) The responsible minister must acknowledge receipt of the review application within 10 days and provide any information to the Environmental Commissioner that is relevant for full review of the matter within 30 days.
 - (5) Environmental Commissioner must report to the applicant on the progress of the review, including an explanation for lack of completion, every 90 days until completion of the review. At the conclusion of the full review by the Environmental Commissioner, a written report including advice and recommendations must be provided to the party requesting the review and to the relevant minister.

Meaningful public participation is an essential element of environmental decision-making and, as previously stated by the ELC:⁵²

In order to achieve meaningful public participation, there must be full and convenient access to information by the public, as well as sufficient notice and time to enable preparation of public input. All public input must be fairly and explicitly considered by the relevant decision-maker.

These provisions are meant to ensure public participation in decisions that may have an impact on the environment. Rights to participate would include regulatory processes (such as the issuance of an approval), as well as the development of laws and policy. Further, the EBR would ensure that any Albertan could request that existing laws and policies be reviewed or that new laws and policies be developed.

⁵² *Supra* note 47 at 14.

The EBR requires a reasonable opportunity for effective, informed and timely participation rather than prescribing a mandatory procedure and timelines for public participation. This approach is adopted to allow procedural flexibility to accommodate differing circumstances. It is recognized that the level of participation required and public interest will vary according to the type of decision-making (for example, a fundamental revision of legislation versus than an administrative change).

Importantly, the EBR expressly moves away from the requirement that a person be directly and adversely affected by a decision in order to participate in a decision-making process (in other words, not denying the opportunity to participate because a person lacks a private or special legal interest in the matter). In Alberta, many decision-makers - such as the Alberta Energy Regulator - will only allow persons who are directly and adversely affected to participate in environmental proceedings (this is known as standing). By adopting narrow standing tests, the result is that public interests, such as environmental concerns, may not be adequately represented and considered in decision-making. Further discussion of the law pertaining to standing and recommendations for reform can be found in our publication *Standing in Environmental Matters*.⁵³

In order to be effective, the right of public participation must be supported with other procedural rights such as:⁵⁴

- being granted standing by statute or by the decision-maker;
- access to relevant information;
- the ability to present evidence (and to test the evidence of other parties); and
- the ability to recover costs.

As well, the right of public participation may be expressed as individuals pursuing enforcement of environmental laws or bringing legal actions to protect the environment.

Specific Procedural Rights under Prescribed Enactments

26. As a matter of natural justice, all provincial decision-makers must meet, at minimum, the following procedural requirements when making decisions under a prescribed enactment:

⁵³ Adam Driedzic, *Standing in Environmental Matters* (Edmonton: 2014, Environmental Law Centre) available at <http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf>.

⁵⁴ *Supra* note 47 at 13.

- (1) notice in an adequate, timely and effective manner of a provincial undertaking including information about the nature of the undertaking (including related but separate undertakings), possible decisions, the responsible decision-maker and the process;
 - (2) a person must be provided the opportunity to participate in environmental decision-making if he or she has a private or special legal interest in the matter, or is seeking to protect the public interest in air, water, land or other components of the environment without having a personal legal interest or experiencing a specific harm greater than other residents of Alberta.
 - (3) public participation must be enabled early in each environmental decision-making process, when alternative options to or for the proposed undertaking remain available;
 - (4) there must be sufficient procedures for public participation to the public to submit, in writing or otherwise, any comments, information, analyses or opinions that it considers relevant to the proposed undertaking;
 - (5) there must be reasonable time-frames which allow no less than 30 days for notice, for information sharing and for public preparation to effectively participate in the decision-making process; and
 - (6) decisions must be in writing, publicly available, and explicitly consider the information, comments and evidence provided by the public.
27. Provincial decision-makers must establish a public participation funding program to facilitate public participation in environmental decision-making.

The Victoria Environmental Law Centre has identified several barriers to access to justice in the environmental context.⁵⁵ These include matters such as standing, costs associated with participating in environmental decision-making processes, lack of accessibility to decision-makers, and a tendency to not recognize a choice to not act as a decision which can be appealed.

These matters can be addressed in an EBR by ensuring that procedural rights are granted for environmental decision-making processes. Further, mechanisms to enhance the citizen role in environmental protection and enforcement – such as environmental protection actions and a right to request investigations – can be adopted in an EBR.

⁵⁵ *Supra* note 5 at Part 27: Access to Justice: Reforming Environmental Tribunals by Ethan Krindle, Mark Haddock and Calvin Sandborn and at Part 28: Citizen Access to Courts by Erin Pritchard and Calvin Sandborn.

Remedies

Judicial Review

28. (1) Any resident of Alberta, regardless of whether or not they are directly affected by the matter, may bring an application to the Court of Queen’s Bench for review of a decision or refusal to make a decision made by a provincial decision-maker under this Act or a prescribed enactment provided that:

- (a) the matter is related to protection of the public interest in air, water, land or other components of the environment which are held by the Government of Alberta as trustee for the benefit of present and future generations of Albertans;
 - (b) the applicant raises a serious issue;
 - (c) the applicant has a genuine interest in the matter; and
 - (d) there is no other reasonable or effective way for the matter to get before the court.
- (2) The right to bring an application for judicial review applies regardless of the existence of a provision or provisions within a prescribed enactment limiting the rights to judicial review or appeal.
- (3) The court hearing an application for judicial review may appoint an *amicus environment et curiae* to provide specialized legal argument on environmental matters related to the protection of the public interest in air, water, land or other components of the environment.
- (4) The court hearing an application for judicial review may allow a third party to intervene if the court is satisfied that that person will make submissions that are relevant to the proceedings, that will be useful to the court, and that will be different from those of other parties.

The Canadian Environmental Law Association (CELA)⁵⁶ has recommended that a right to judicial review, incorporating express public trust language, be incorporated into the Ontario *Environmental Bill of Rights Act*.⁵⁷ CELA recommends that the right be framed as follows:⁵⁸

⁵⁶ Richard D. Lindgren and Theresa A. McClenaghan, *Ensuring Access to Environmental Justice: How to Strengthen Ontario’s Environmental Bill of Rights, Submissions of the Canadian Environmental Law Association To the Ministry of the Environment and Climate Change* (Environmental Registry No. 012-8002) November 4, 2016.

⁵⁷ *Environmental Bill of Rights Act*, S.O. 1993, c.28.

Any Ontario resident may bring an application for judicial review in the Superior Court of Justice where the Government of Ontario has:

- (a) failed to comply with its duties under this Act or regulations;
- (b) contravened, or failed to enforce, a prescribed statute or regulation;
- (c) violated the right to a healthy environment; or
- (d) failed to fulfill its duty as trustee of the environment.

The Model EBR for Alberta provides a right to judicial review of decisions related to environmental matters. This right applies regardless of whether a specified enactment contains a privative clause limiting judicial review. While the person seeking judicial review need not be directly affected by the matter, he or she would be required to demonstrate a genuine interest in the matter.

Environmental Protection Actions against the Government of Alberta

29. (1) Any resident of Alberta may bring an environmental protection action against the Government of Alberta for:

- (a) failing to fulfil its duties as trustee of the air, water, land and other components of the environment;
 - (b) failing to enforce an environmental law; or
 - (c) violating a right granted pursuant to this Act including the right to a healthy environment.
- (2) Environmental protection actions may be brought for any action or inaction by the Government of Alberta that has resulted or may result, in whole or in part, in significant adverse effects.
- (3) It is not a defence to an environmental protection action that the Government of Alberta has or has not exercised its power to authorize an activity that may result in significant adverse effects.

⁵⁸ *Supra* note 56.

Environmental Protection Actions against Persons, Statutory Breach

30. (1) Any resident of Alberta may bring an environmental protection action against any person who has contravened or likely to contravene a prescribed enactment, regulation or other statutory instrument.

(2) In making an order pursuant to an environmental protection action under this section, the court may suspend or cancel an approval, licence or other authorization issued to the defendant, in addition to any other of the remedies in section 34.

Environmental Protection Actions against Persons, Significant Adverse Effects

31. (1) Any resident of Alberta may bring an environmental protection action against any person who by any action or inaction has caused or may cause, in whole or in part, significant adverse effects.

(2) It is not a defence to an environmental protection action under this section that the defendant's activity was authorized under an Act, regulation or other statutory instrument unless the defendant proves that:

(a) significant adverse effects are or were an inevitable result of the activity authorized by the Act, regulation or statutory instrument; and

(b) there was no reasonable alternative that would have prevented the significant adverse effects.

Environmental Protection Actions, General Provisions

32. A person is not prohibited from commencing an environmental protection action by reason only that the person is unable to demonstrate

(a) a greater or different right, harm or interest than any other person; or

(b) any financial, proprietary or other legal interest in the subject matter.

33. Environmental protection actions are subject to a civil standard of proof and will be adjudicated on a balance of probabilities.

34. (1) In making an order pursuant to an environmental protection action, the court may do one or more of the following:

- (a) grant declaratory relief;
- (b) grant an injunction to halt or prevent the contravention;
- (c) order the defendant to establish and maintain a monitoring and reporting program;
- (d) order the defendant to clean up, rehabilitate or restore any part of the environment;
- (e) order the defendant to take specified preventative measures;
- (f) order the responsible government department to monitor compliance with the terms of any order;
- (g) order the defendant to pay a fine that directs money to environmental protection or monitoring activities;
- (h) make any other order, with the exception of imprisonment, that the court considers just.

(2) In making an order relating to an environmental protection action, the court maintains jurisdiction over the matter so as to ensure compliance with its order.

(3) If any party to the environmental protection action has reason to believe that there is failure to comply with any terms of a resulting order, that party may apply to the court to seek compliance.

35. (1) A person bringing an environmental protection action may only be ordered to pay costs if the action is found to be frivolous, vexatious or harassing.

(2) A person bringing an environmental protection action shall not be required to provide security for costs.

36. A person bringing an environmental protection action may be entitled to

- (a) counsel fees regardless of whether or not they were represented by counsel;
- (b) expert fees incurred; and
- (c) an advance costs award if, in the opinion of the court, it is in the public interest.

37. The court adjudicating an environmental protection action may appoint an *amicus environment et curiae* to provide specialized legal argument on environmental matters related to the protection of the public interest in air, water, land or other components of the environment.

38. The court adjudicating an environmental protection action may allow a third party to intervene if the court is satisfied that that person will make submissions that are relevant to the proceedings, that will be useful to the court, and that will be different from those of other parties.

As stated in our previous publication, *Environmental Rights in Alberta. Module 3: A Right to a Healthy Environment: Citizen Enforcement for Environmental Quality*⁵⁹

Private enforcement of environmental laws is constrained under current approaches in Alberta and Canada. In Alberta enforcement of environmental laws focuses on private prosecutions and the ability to request an investigation. Successful private prosecutions are undermined by a criminal burden of proof and the related barriers facing a private prosecutor in gathering evidence. Similarly, the ability to question or challenge government decisions around how they choose to administer and enforce environmental legislation is lacking.

Accordingly, it is recommended that legislation supporting private environmental enforcement options be adopted. In so doing, the observed pitfalls of other jurisdictions should be avoided. These include:⁶⁰

- requiring additional proof of harm or novel nature of harm;
- limitations on the temporal aspect of the violation (excluding existing limitation periods); and
- unduly limiting initiation or continuation of a citizen action based on unduly narrow standing tests or other preconditions to a suit, including excessive security for costs.

As an example, the Ontario *Environmental Bill of Rights Act*⁶¹ provides a right of action for any contravention or imminent contravention of legislation that “has caused or will imminently cause significant harm to a public resource of Ontario”.⁶² The requirement to demonstrate significant harm, along with other conditions precedent, has proven to be excessively restrictive rendering the cause of action provision “essentially useless”.⁶³

⁵⁹ Jason Unger, *Environmental Rights in Alberta. Module 3: A Right to a Healthy Environment: Citizen Enforcement for Environmental Quality* (Edmonton: 2016, Environmental Law Centre) at 30 http://elc.ab.ca/?smd_process_download=1&download_id=18869.

⁶⁰ *Ibid* at 30.

⁶¹ *Environmental Bill of Rights Act*, S.O. 1993, c.28 (“Ontario EBR”).

⁶² Ontario EBR, s. 84.

⁶³ *Supra* note 56 at 21 (quoting ECO Special Report, page 7).

Because of its success in the adoption and use of citizen suits, helpful lessons can be gathered from the US experience in developing an EBR. Some of the core approaches taken in the US to citizen suits, include:⁶⁴

- adopting a civil standard of proof;
- coverage of legal costs where successful;
- enabling transparent and open access to monitoring and reporting information;
- the ability to hold government accountable to legislative obligations and responsibilities; and
- limiting remedies to orders to restore the environment and financial penalties.

In order to create an effective environmental protection action mechanism, the EBR addresses several issues that may arise in respect of such actions. The EBR explicitly addresses standing, the standard of proof and burden of proof, remedies and costs. As well, the EBR addresses the use of statutory authorization and due diligence as defences to an environmental protection action.

Investigations

39. (1) Any resident of Alberta who believes that that an Act, regulation or other statutory instrument has been contravened may apply to the Environmental Commissioner for an investigation into the alleged contravention.

(2) The application must be made in the form approved by the Environmental Commissioner and include the following information:

- (a) the name and address of the applicant;
- (b) the specific Act, regulation or statutory instrument alleged to be contravened;
- (c) the nature of the alleged contravention; and
- (d) a summary of the evidence supporting the applicant's allegations.

(3) The Environmental Commissioner may request such additional information as is considered necessary.

⁶⁴ *Supra* note 59 at 30.

40. (1) Upon receipt of the application for investigation, within 15 days, the Environmental Commissioner must request information from the Minister responsible for that Act, regulation or statutory instrument that will assist the Commissioner in his or her consideration of the application for investigation.
- (2) Within 30 days of receipt of the Environmental Commissioner's request under subsection (1), the Minister must either provide the Commissioner with the specified information or advise the Commissioner if the information does not exist or cannot be located.
- (3) Within 30 days after receipt of the information collected in subsection (2), the Environmental Commissioner shall investigate all matters that he or she considers necessary for a determination of the facts relating to the alleged contravention.
- (4) The Environmental Commissioner may deny an investigation if he or she is of the opinion that:
- (a) the application is vexatious or frivolous; or
 - (b) an investigation has been or is being conducted by the responsible government department.
- (5) If the Environmental Commissioner denies an investigation by reason of subsection 4(b), then there is a requirement that the responsible government department must report on the progress of the investigation to the applicant every 90 days until its completion. The final results of the investigation must be communicated to the applicant in writing.
- (6) The applicant must be notified in writing as to whether an investigation has been directed, and the Environmental Commissioner must report on the progress of the investigation to the applicant every 90 days until its completion. The final results of the investigation must be communicated to the applicant in writing.

The right to request investigation into alleged breaches of environmental laws is a procedural right akin to public participation. It allows an individual to actively participate in protecting the environment by providing an avenue to bring potential environmental harm to the attention of the government. In other words, this right provides another means to empower citizen enforcement of environmental laws.⁶⁵

⁶⁵ *Supra* note 5 at Part 29: Enhancing Citizen Enforcement Powers by Jennifer Cameron.

To some extent this option already exists in Alberta. For example, under the *Environmental Protection and Enhancement Act*,⁶⁶ residents of Alberta may formally request an investigation of alleged violation of that Act. The government has broad discretion in carrying out such an investigation and in deciding whether any compliance and enforcement arising from the investigation should be pursued. Inclusion of a right to request an investigation in the EBR will ensure that this option exists for all actions that may cause environmental harm regardless of whether those actions fall within the scope of the *Environmental Protection and Enhancement Act* or another Act, regulation or statutory instrument.

Strategic Lawsuits against Public Participation

41. No person exercising any right or rights granted or protected by this Act, including without limitation, seeking a review, investigation, or other proceeding under this Act, shall be subject to a strategic lawsuit against public participation.
42. For the purposes of sections 41 and 43, a strategic lawsuit against public participation is a meritless civil legal action filed against a person for an improper purpose and designed to stifle public participation in an environmental matter of public concern.
43. (1) If a person is a defendant in a civil legal action and considers that the whole of the proceeding or any claim within the proceeding is a strategic lawsuit against public participation, the defendant may bring an application for one or more of the following orders:
 - (a) to dismiss the proceeding or claim, as the case may be;
 - (b) for reasonable costs and expenses;
 - (c) for punitive or exemplary damages against the plaintiff.(2) On an application brought by a defendant under subsection (1), the defendant may obtain an order if the defendant satisfies the court, on a balance of probabilities, that, when viewed on an objective basis,
 - (a) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and
 - (b) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.

⁶⁶ EPEA, ss.196 and 197.

Strategic lawsuits against public participation (SLAPP suits) are meritless civil actions which are filed with the purpose of stifling public participation. As defined by Justice Singh in *Fraser v. Saanich*:⁶⁷

A SLAPP suit is a claim for monetary damages against individuals who have dealt with a government body on an issue of public interest or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making.

The EBR includes anti-SLAPP provisions as a means to support and augment the right of public participation. According to David Boyd, effective anti-SLAPP legislation must contain provisions that facilitate rapid identification and dismissal of SLAPP suits, offer appropriate remedies, and create economic disincentives to filing SLAPP suits.⁶⁸ Further, defendants of a SLAPP suit should be reimbursed for all of the costs incurred as a result of the proceeding.⁶⁹

Employee Reprisal Protection (Whistleblowers)

44. An employer may not take or threaten to take adverse employment action against a person for

- (1) exercising any right or rights granted or protected by this Act, including without limitation, seeking a review, investigation, or other proceeding under this Act,
- (2) seeking the enforcement of any Act or regulation that is designed to protect the environment,
- (3) refusal to take an action or omit to take an action that would constitute an offense under this Act or any Act or regulation that is designed to protect the environment,
- (4) providing information to an appropriate authority for the purposes of a review, investigation, or other proceeding under this Act, or
- (5) giving evidence in a proceeding under this Act or other Act that is designed to protect the environment.

45. For the purposes of sections 44 and 46, an adverse employment action means an act or omission of an employer or a person acting on behalf of an employer that adversely affects the

⁶⁷ *Fraser v. Saanich*, [1999] B.C.J. No. 3100 (S.C.).

⁶⁸ *Supra* note 12. See also *supra* note 5 at Part 31: Protecting Public Participation: The Need for an Anti-SLAPP Law by Carmen Gustafson.

⁶⁹ *Supra* note 12.

employee's employment or working conditions including disciplinary measures, transfer, demotion, layoff or dismissal.

46. A person may file a written complaint with the Public Interest Commissioner alleging that an adverse employment action has been taken against them. The *Public Interest Disclosure (Whistleblower) Protection Act*, SA 2012, c. P-39.5 applies with necessary changes.

Whistleblower legislation is designed to protect employees from reprisals by their employers for reporting illegal action or inaction. While Alberta does currently have whistleblower protection legislation, its application is limited to employees of the public sector (i.e. government employees). The EBR extends application of *Alberta's Public Interest Disclosure (Whistleblower) Protection Act*⁷⁰ to the private sector recognizing that private sector employees may, in good faith, take action to protect the environment and should be afforded protection as whistleblowers.

Interaction with other Enactments

47. This Act supersedes every other provincial Act, whether enacted or made before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act.

This provision enunciates a principle of paramountcy. In other words, the rights provided in the EBR take precedence over the provisions of other provincial legislation. This ensures that the EBR has sufficient strength to fulfil its purpose.

Consequential Amendments, Transitional and Coming into Force Provisions

These provisions would address changes to other legislation that may be required as a result of the passage of the EBR, provide a framework for transitioning from a legal landscape without an EBR to one with an EBR, and indicate the date on which the EBR comes into effect.

Possible consequential amendments may include:

1. Changes to the *Alberta Rules of Court*⁷¹ pertaining to costs awards.

⁷⁰ *Alberta's Public Interest Disclosure (Whistleblower) Protection Act*, SA 2012, c. P-39.5

⁷¹ *Alberta Rules of Court*, AR 124/2010.

These changes would include eliminating or limiting the requirement for public interest environmental litigants to provide security for costs under Rule 4.22; enhancing the requirement for payment of advance or interim cost awards to public interest environmental litigants; and adopt a no-costs assumption for public interest litigants.⁷²

2. Changes to the *Legal Aid Alberta Rules*⁷³ to enable legal aid funds for public interest environmental actions.

Conclusion

It is our hope that the ELC's model Alberta EBR will generate discussion about the extent of environmental rights in Alberta, as well as the most appropriate approach to expressly entrench and protect those rights. Because there is an existing Alberta Bill of Rights, it is possible that environmental rights could be incorporated into that legislation. We recommend, however, a stand-alone piece of legislation – *An Environmental Bill of Rights for Alberta* – which clearly enunciates substantive and procedural environmental rights for all Albertans.

⁷² For further information, see Chinomso Iliya-Ndule and Jason Unger, *Environmental Rights in Alberta: Module 5: Costs in court and regulatory proceedings* (Edmonton: 2017, Environmental Law Centre).
http://elc.ab.ca/?smd_process_download=1&download_id=19683.

⁷³ *Alberta Legal Aid Rules Alberta 2015*, available at <http://www.legalaid.ab.ca/information-resources/Documents/Rules%20and%20Policies/LAA%20Rules%20Dec%207%202015.pdf>.