

# ENVIRONMENTAL RIGHTS IN ALBERTA: THE INTERACTION OF ENVIRONMENTAL RIGHTS & PROPERTY RIGHTS

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



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FRONT COVER PHOTO: GATE IN SOUTHWEST ALBERTA. PHOTO COURTESY JILLIAN LYNN LAWSON

## 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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PROGRAM SUPPORTER: ENVIRONMENTAL BILL OF RIGHTS IN ALBERTA



## Executive Summary

An Environmental Bill of Rights (“EBR”) is a way to express, entrench and protect environmental rights via legislation. An environmental right may be substantive in nature, protecting the right of every Albertan to a healthy environment. Environmental rights may also ensure that Albertans have process rights such as access to environmental information, meaningful participation in environmental decision-making, and effective means to enforce environmental laws.

In presenting our *Model EBR*, we heard concerns from landowners that it may have impacts on their private property rights. Our new report - *Environmental Rights in Alberta: The Interaction of Environmental Rights & Property Rights* - outlines the connection, convergence and potential divergence of environmental rights and property rights.

The role of an EBR is not to impose regulatory regimes upon the use of land and other natural resources. Rather, an EBR is meant to protect the right of all Albertans to a healthy environment. This means that an EBR will benefit landowners and those with interests in land (as well as Albertans without interests in land) by providing additional tools to prevent and remedy adverse environmental impacts.

Some of these tools – such as investigations and environmental protection actions - can be used to directly protect a person’s interests in land. Other tools, such as enhanced participation and procedural rights in environmental decision-making and planning, can also protect a person’s interests in land by improving access to information and opportunities to be heard. Third party oversight assists with ensuring that environmental rights, along with environmental laws, are being respected.

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## INTRODUCTION

The ELC has recommended the adoption of an *Environmental Bill of Rights* (“EBR”) for Alberta<sup>1</sup> as a way to express and entrench environmental rights via legislation. An environmental right may be substantive in nature, protecting the right of every Albertan to a healthy environment. Environmental rights may also ensure that Albertans have process rights such as access to environmental information, meaningful participation in environmental decision-making, and effective means to enforce our environmental laws.

The EBR proposed by the ELC offers clear protection of the rights of current and future generations of Albertans to:

- a healthy environment;
- be involved in environmental decision-making including access to environmental information, mechanisms for direct public participation, and other procedural rights;
- environmental justice;
- accountability in the implementation of environmental laws; and
- legal protection against reprisals for employees who take action to protect the environment.

As well, it confirms that the Government of Alberta holds and manages Alberta’s air, water, land and other components of the environment in trust for all Albertans.

Components of the environment do not respect legal boundaries. The hydrological cycle means that water flows and crosses national, provincial, territorial and private land boundaries. Likewise, air and species are not contained by legal boundaries.

This means that activities on a single parcel of land have the potential to impact the water, air and biodiversity that is shared globally. Such activities may also impact surrounding lands and their owners (whether private or public).

So how does an EBR, which is focused on components of the environment, affect landowners and those with interests in land? Will an EBR inevitably lead to further regulation of private land use? Or will an EBR provide enhanced tools to protect a person’s interests in land?

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<sup>1</sup> Brenda Heelan Powell, *An Annotated Environmental Bill of Rights for Alberta* (Edmonton: 2018, Environmental Law Centre) available at <http://elc.ab.ca/environmental-bill-rights-alberta/>.

This paper considers these questions and concludes that an EBR will benefit landowners and those with interests in land (as well as other Albertans without interests in land). The role of an EBR is not to impose regulatory regimes upon the use of land and other natural resources. Rather, an EBR is meant to protect the right of all Albertans to a healthy environment.

## What are Property Rights?

In this discussion, the reference to property rights is made with respect to **real property** (i.e. land and interests in land).<sup>2</sup> Property rights are often described as a “bundle of rights” which may include rights to own, access, possess, use, enjoy, manage, control, exclude, profit from or alienate the property.<sup>3</sup> The characterization of property as a bundle of rights:<sup>4</sup>

... means that property does not refer to the thing, but rather to a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people concerning claims to tangible and intangible items.

In addition to rights such as ownership, use or possession associated with land and interests in land, there are often concurrent obligations associated with land. These can include respecting the common law rights of neighbours, zoning laws and regulation of land use for the public good.

The principles of property law - existing in both common law and legislation- deal with property rights and obligations which can be enforced through the courts and some administrative tribunals.<sup>5</sup> These principles operate to determine what “bundle of rights” a person holds in relation to land and to other persons, as well as, determining duties, restrictions, prohibitions and takings of property rights. As stated by Professor Ziff:<sup>6</sup>

Property law allocates entitlements and regulates the means by which those initial rights can be exchanged. The law balances the conflicting claims of owners: disputes that can arise, for example, between

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<sup>2</sup> This contrasts with **personal property** which deals with property that is not related to land such as a car or furniture.

<sup>3</sup> Environmental Law Centre, *Project Backgrounder: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*.

<sup>4</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 2.

<sup>5</sup> Environmental Law Centre, *Project Backgrounder: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*.

<sup>6</sup> Bruce Ziff, *Principles of Property Law*, 5th Ed. (Toronto: 2010, Carswell) at 50.

neighbours, concurrent or successive owners of the same property, or surface and subsurface owners. The law provides protection, through the criminal and civil law, against wrongful action by others. It also serves as a mechanism to ascertain and facilitate the dispositional preferences of owners by creating rules for property transfers.

## Ownership and Interests in Land

In looking at property rights, a person may come across the maxim *cuius est solum, eius est usque ad coelum et ad inferos* which means whoever owns the soil, holds title all the way up to the heavens and down to the depths of the earth.<sup>7</sup> However, as explained by Professor Ziff:<sup>8</sup>

[t]he courts have resisted applying the maxim literally. [The maxim] may be a useful point of departure in examining the scope of ownership rights, but it is so laden with qualifications that it best regarded as a “fanciful phrase” and an “imperfect guide”.

So what exactly does ownership or an interest in land confer?

The answer varies widely with the land title itself and the type of interest in land that is held. The land title sets out the legal boundaries of the piece of land, notes any reservations held by the Crown (e.g. mines and minerals) and notes any other interests in land that may be held by a person other than the owner (e.g. utility easements). Effectively, the land title reflects the original grant of land from the Crown and existing interests in that land which have accrued over time.

In addition, the “bundle of rights” held by a person will vary with the type of interest in land that is held. There are several types of interests in land:<sup>9</sup>

- fee simple,
- leases,
- easements,

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<sup>7</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 94.

<sup>8</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 94-95.

<sup>9</sup> Environmental Law Centre, *Project Background: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*. See also Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014 University of Alberta, Alberta Land Institute).

- restrictive covenants, and
- conservation easements.

Fee simple confers the largest bundle of rights and is what most people mean when they say they own land. A person with a fee simple interest effectively owns the land outright subject to reservations by the Crown (such as, mines and minerals),<sup>10</sup> to any limitations imposed by legislation (for example, zoning bylaws), and to any lesser interests held by others (for example, leases).

Other interests in land – such as leases or easements - confer smaller “bundles of rights” which will mean limited rights to access, possess, use, enjoy, manage, control, exclude, or profit from the land. For instance, an easement allows use or access to land for limited purposes (for example, a utility easement which allows access and use of land only for the installation and maintenance of utility infrastructure). Some interests, such as leases, confer a right to exclusive possession whereas others, such as licenses, just create a right to do something that otherwise would be a trespass.

An interest in land may or may not run with the land.<sup>11</sup> An interest that runs with the land binds subsequent landowners whereas interests that do not run with the land do not bind subsequent landowners and are more like personal property than real property. For example, a lease creates an interest in land whereas a licence generally does not.<sup>12</sup>

It should be noted that the Crown, by virtue of laws it has passed over the years, owns provincial lands, wildlife, water, and the beds and shores of permanent naturally occurring water bodies, such as permanent wetlands, and the “beds and shores of all naturally occurring rivers, streams, watercourses and lakes”. It is possible to obtain an interest in land that is owned by the Crown via grants issued pursuant to legislation. The “bundle of rights” conferred by such a grant is determined by looking at the grant itself and the legislation under which it is issued.<sup>13</sup>

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<sup>10</sup> It is estimated that about 10% of titles in Alberta include some rights to mines and minerals. See Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 104.

<sup>11</sup> Environmental Law Centre, *Project Backgrounder: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*.

<sup>12</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 294.

<sup>13</sup> Environmental Law Centre, *Project Backgrounder: Buying a Better Environment? Advanced Property Rights: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*.

## Obligations Associated with Ownership and Interests in Land

While ownership of land can confer broad rights to use and enjoy property, these rights are not unlimited.<sup>14</sup> In other words, many of the components that make up the bundle of rights are subject to some qualification or limitation to avoid unacceptable harm.<sup>15</sup> As well, ownership confers obligations and liabilities<sup>16</sup> (such as occupiers' liability)<sup>17</sup>.

As noted by Professor Ziff, property law is primarily concerned with the allocation of rights over things and rarely functions to protect property for its own sake.<sup>18</sup> This approach is highlighted by environmental matters where changes to the common law approach to resource use have typically occurred through the imposition of regulatory schemes. It may be that the next step in property law principles will be to introduce a general obligation of stewardship that imposes restrictions on land exploitation and a positive duty of environmental care.<sup>19</sup>

## Common Law Remedies, Rights & the Environment

Over time, the common law developed rights and remedies to address impacts on real property, some of which have been and can be used to address environmental matters. Common law is the law created over time by judicial decisions, in contrast with legislative law which is passed by the government. These include actions in nuisance, trespass and strict liability, and actions to protect property based riparian rights. These rights and remedies impact on the use of land by an owner or a person with an interest in land. That is, an owner or person with an interest in land must be mindful of their neighbour's common law rights and remedies when making use of the land.

As explained by Professor Kwasniak:

A private nuisance requires an *unreasonable* interference with use and enjoyment of property, which to a degree involves a *balancing* of conflicting rights and interests including the utility of the defendant's

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<sup>14</sup> Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute). See also Jason Unger, Environmental Law Centre Blog, *Property Rights vs. Planning shouldn't be a battle to the death* (February 28, 2011).

<sup>15</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 4.

<sup>16</sup> Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute).

<sup>17</sup> Occupiers' liability is the duty of an occupier of premises (often the property owner) to take reasonable care to ensure visitors will reasonably safe in using the premises. See the *Occupiers' Liability Act*, R.S.A. 2000, ch. O-4.

<sup>18</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 58-60.

<sup>19</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 58-60.

conduct; the interference with use and enjoyment of the property must be *substantial*, and the tort does not apply to *abnormal or delicate* uses of property.<sup>20</sup>

A trespass occurs when a person or substance has merely entered onto the land of another.<sup>21</sup> As explained by Stuart Buck, there is probably not much practical difference between the activity that causes an environmental nuisance versus that which causes an environmental trespass<sup>22</sup> as both offer essentially the same substantive rights.

Strict liability (also known as *Rylands v Fletcher*) may be used in response to environmental matters (although it has limited applicability). In order to establish strict liability, a person must demonstrate that there was a non-natural use of the land, there was a substance likely to cause mischief, the substance escaped, and there was damage to person seeking a remedy. If these four elements can be established, then the offending party is strictly liable to pay damages.

Riparian rights are held by an owner of land that borders or is crossed by a water body. Riparian rights include domestic use of water, access to water and undiminished water quality. Riparian rights do not confer ownership to water or to the beds and shores of a water body. It should be noted that, although perhaps still existent to some extent, common law riparian rights in Alberta have been modified greatly by legislation.

## Regulation of Property Use

The use of land is subject to regulation by all levels of government (municipal, provincial and federal). Regulation may occur to achieve societal goals such as clean water, to protect the interests of others, or both. A common example is municipal land zoning which restricts the types of activities permitted on parcels of land within a municipality. It is zoning that prevents the construction of a factory in the middle of a residential neighbourhood.

In some cases, a landowner may argue that regulation which greatly restricts land use amounts to an expropriation (or a taking of land) and that compensation is payable. This argument was made, unsuccessfully, in *Hartel Holdings Ltd. v Calgary*.<sup>23</sup> In that case, Hartel was a developer who owned a parcel of land (zoned as agricultural land) in

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<sup>20</sup> Arlene Kwasniak, "Book Review: Property Rights in Defence of Nature by Elizabeth Brubaker (Toronto: Earthscan, 1995)", (1996) 34(4) Alberta L. Rev. 993 at 995.

<sup>21</sup> Stuart Buck, "The Common Law and the Environment in the Courts", (2008) 58 Cas. W. Res. L. Rev. 621.

<sup>22</sup> Stuart Buck, "The Common Law and the Environment in the Courts", (2008) 58 Cas. W. Res. L. Rev. 621 at 626.

<sup>23</sup> *Hartel Holdings Ltd. v Calgary*, [1984] 1 S.C.R. 337.

Calgary with the intention of developing it for residential purposes since 1971. In that same timeframe, the City had plans to use Hartel's land and other land in the same vicinity to create a municipal park. Over time, the City developed a number of policy documents and municipal plans reflecting its intention to create a park.

In making its decision, the Supreme Court of Canada noted that the land was not re-zoned to suit the City's purpose rather it refused to rezone to suit Hartel's purpose or to buy him out at a fair price. There is nothing inherently wrong with a development freeze.<sup>24</sup> The Court concluded that since there was no bad faith, and the decision was made pursuant to legitimate and valid planning purposes, the "resulting detriment is one that must be endured [by the property owner] in the public interest".<sup>25</sup>

A similar conclusion was reached by the Supreme Court of Canada in its *Canadian Pacific Railway v Vancouver (City)*<sup>26</sup> decision. In that case, the Court considered a municipal development plan pertaining to a corridor of land owned by Canadian Pacific Railway (CPR) which was no longer in use for rail traffic and which CPR wanted to develop for commercial and residential uses. The municipal development plan prescribed that the land could only be used as a (non-motor vehicle) transportation corridor. CPR argued that, as a result of the municipal development plan, there had been a *de facto* taking and compensation ought to be provided. The Supreme Court of Canada held that there was no *de facto* taking which required compensation. As expressed by the Court:<sup>27</sup>

For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.

In other words, unless the restrictions on the owner's rights are so drastic as to amount to an effective taking of the land within the meaning of the *Expropriation Act*, there is no common law right to compensation for regulation of land.<sup>28</sup> However, it should be noted that legislation can create compensation rights for regulatory impacts on land (for example, the *Surface Rights Act* and the *Alberta Land Stewardship Act*, discussed further below).

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<sup>24</sup> *Hartel Holdings Ltd. v Calgary*, [1984] 1 S.C.R. 337 at 355.

<sup>25</sup> *Hartel Holdings Ltd. v Calgary*, [1984] 1 S.C.R. 337 at 354.

<sup>26</sup> *Canadian Pacific Railway Co. v Vancouver (City)*, [2006] 1 S.C.R. 227.

<sup>27</sup> *Canadian Pacific Railway Co. v Vancouver (City)*, [2006] 1 S.C.R. 227 at para. 30.

<sup>28</sup> *Hartel Holdings Ltd. v Calgary*, [1984] 1 S.C.R. 337.

In the case of expropriation – that is, an outright taking of land for the benefit of public purposes (such as a roadway or school site) - compensation is presumed to be required.<sup>29</sup> As stated by Professor Ziff, “unless the words of a statute demand a different reading, a statute is not to be interpreted as taking away private property without compensation.”<sup>30</sup> Further, expropriation is only allowed pursuant to legislative authority<sup>31</sup> which sets out which government bodies may expropriate and for which purposes. In addition, the process and requisite compensation are set by the *Expropriation Act*.

## Legislation affecting Property Rights

Many of the principles of property law come from the common law (i.e. the law created over time by judicial decisions). However, there are also several pieces of provincial legislation which address various aspects of property law, ranging from title registration (*Land Titles Act*, R.S.A. 2000, c. L-4) to expropriation and compensation.

Some of the legislation establishes ownership of resources associated with land such as water, and mines and minerals. As a starting point, section 56 of the *Law of Property Act*, R.S.A. 2000, c. L-7 declares certain naturally occurring substances to be minerals (these include anhydrite, gypsum, sandstone). For these particular substances, a person who owns or has an interest in the surface of the land but does not own or have an interest in such substance has the right to excavate or disturb for construction incidental to use or occupation of the land, in the course of permitted operations, or farming. Furthermore, the *Law of Property Act* clarifies that clay and marl, and sand and gravel are not minerals and are owned by the surface owner (ss. 57 and 58).

The *Mines and Minerals Act*, R.S.A. 2000, c. M-17 regulates all mines and minerals, pore space and related natural resources belonging to the Crown. This act reiterates that clay and marl, and sand and gravel are not minerals and belong to the surface owner (s.58). The same with peat (ss. 57).

The *Public Lands Act*, R.S.A. 2000, P-40 deals with management of public lands and governs dispositions of public lands. This act clarifies that the Crown (Government) owns the beds and shores of all permanent and naturally

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<sup>29</sup> Environmental Law Centre, *Project Backgrounder: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act (2016)*.

<sup>30</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 88.

<sup>31</sup> In Alberta, expropriation is allowed by several statutes including the *Municipal Government Act*, the *Forest Reserves Act*, and others. See Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute).

occurring bodies of waters, and all naturally occurring rivers, streams, watercourses and lakes (s.3). Relatively recent amendments to the *Public Lands Act* declared all coal-bed methane to be natural gas (subject to any specific grants which state otherwise) (s. 10.1) and pore space contained in, occupied by or formerly occupied by minerals or water below the surface of the land is property of the Alberta Crown (s. 15.1).<sup>32</sup>

At common law, a mineral owner was entitled to enter upon land to extract minerals.<sup>33</sup> The mineral owner was not permitted to commit waste but otherwise was not required to seek permission of the surface owner or to pay compensation for access. This common law principle has been modified by the *Surface Rights Act*, R.S.A. 2000, c. S-24. Section 12 of the Act requires that a mineral owner either obtain consent of the surface owner or a right of entry order to enter land for removal of minerals, construction of tanks, stations, structures, pipelines, power transmission lines, or telephone lines. Right of entry orders may also be issued for well conservation schemes, for reclamation under the *Environmental Protection and Enhancement Act*, and injection of captured carbon dioxide (ss. 13, 13.1, and 13.2). In addition, compensation must be provided either via agreement or determined by the Surface Rights Board in issuing a right of entry order (s.23).

Under common law, a person cannot be deprived of his property arbitrarily.<sup>34</sup> This principle is reinforced by section 1 of the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14 which guarantees “the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law”. There is no constitutional protection of property rights in Canada.<sup>35</sup>

If the government intends to deprive a person of his property, the requirements of the *Expropriation Act*, R.S.A. 2000, c. E-13 must be met. This Act sets out the procedure for expropriation and for compensation. It applies to any expropriation authorized by Alberta law and prevails over contrary provisions (except those exceptions enumerated

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<sup>32</sup> See also the *Carbon Capture and Storage Funding Act*, S.A. 2009, c. C-2.5 which has the purpose of encouraging and expediting the design, construction and operation of carbon capture and storage projects in Alberta.

<sup>33</sup> Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute). See also Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 104.

<sup>34</sup> As well, there are international obligations to protect property such as the 1948 *Universal Declaration of Human Rights*. See Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute). See also Jason Unger, Environmental Law Centre Blog, [Property Rights vs. Planning shouldn't be a battle to the death \(February 28, 2011\)](#).

<sup>35</sup> Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute). See also Jason Unger, Environmental Law Centre Blog, [Property Rights vs. Planning shouldn't be a battle to the death \(February 28, 2011\)](#).

in the Schedule to the Act). The government may expropriate any estates in the land including lesser interests by way of profit, easement, right, privilege or benefit in, over or derived from land (s. 3).

An example of authority to expropriate can be found in the *Municipal Government Act*, R.S.A. 2000, c. M-26 (MGA). Section 14 indicates that a municipality may expropriate for specific purposes such as carrying out an area redevelopment plan under Part 17 of the MGA. Municipal expropriations must abide with the *Expropriation Act* and cannot be used to expropriate mines and minerals.

Other pieces of legislation address the issue of whether compensation is necessitated as a result of operation of the act. For example, the *Historical Resources Act*, R.S.A. 2000, c. H-9 operates to preserve archaeological, paleontological or historic resources and sites. This may include prohibition or regulation and control of the use, development or occupation of land or buildings. If designation of a historic resource or site decreases the economic value of a building, structure or land, then compensation may be payable (ss. 28 and 50).<sup>36</sup>

Another piece of legislation which may impact on property rights is the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 ("ALSA"). This legislation establishes regional planning for Alberta and enables the use of land management tools such as conservation easements, conservation directives, stewardship units and offsets, and transfer of development credit schemes.<sup>37</sup>

The ALSA contains some provisions which directly address the issue of compensation for regulatory impacts on property rights (namely, ss. 2(3), 19, 19.1, 39-42). Section 2(3) provides:

s. 2(3) Nothing in this Act, a regulation under this Act or a regional plan is to be interpreted as limiting, reducing, restricting or otherwise affecting the compensation payable or rights to compensation provided for under any other enactment or in law or equity.

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<sup>36</sup> The compensation provision is not applicable to a Municipal Historic Resource that is designated as part of a tradable development credit scheme under the *Alberta Land Stewardship Act*.

<sup>37</sup> To learn more about these land management tools, see the ELC four volume report on *ALSA and Market-Based Instruments* available at <http://elc.ab.ca/publications/available-to-download/>.

Sections 19 and 19.1 allow compensation for a **compensable taking** which is defined as a “diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”. As discussed by Kaplinsky and Percy:<sup>38</sup>

The critical question is what counts as a compensable taking? ALSA defines it as “the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”. The main difficulties with this definition, other than that it is circular, are that the traditional view in Canada is that there is no compensation in law or equity (all compensation claims originate in statute), and further, that unless the government acquires an interest in the land while denying the owner all reasonable private uses, there is no “taking” at all. In sum, it is likely that the legal and practical effect of sections 19 and 19.1 is only to create a right of compensation for owners whose lands are sterilized by a conservation directive. Otherwise, those sections neither expand nor restrict the right to compensation.

Sections 30 to 42 of ALSA establish and regulate the right to compensation for a conservation directive.

## What are Environmental Rights?

Environmental rights operate to protect the environment thereby providing a cornerstone for human health and economic prosperity. Environmental rights may be viewed as fundamental human rights, as rights for nature itself<sup>39</sup>, or both. Although there are some legal rights in Alberta that support environmental quality, our laws do not often expressly recognize environmental rights.<sup>40</sup>

An environmental right may guarantee a stated level of environmental quality, such as a healthy environment (i.e. a substantive environmental right). As well, an environmental right may protect process rights such as meaningful public participation in environmental decision-making and accountability in the implementation of environmental

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<sup>38</sup> Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Edmonton: 2014, University of Alberta, Alberta Land Institute) at 25.

<sup>39</sup> 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).

<sup>40</sup> 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: 2016, Environmental Law Centre, available at <http://elc.ab.ca/wp-content/uploads/2016/12/Environmental-Rights-PHASE-1-Do-We-Have-the-Right-We-Need-1.pdf>).

laws (i.e. procedural rights). The ELC has recommended that Alberta adopt an EBR (Environmental Bill of Rights) which is a piece of legislation that expressly recognizes and protects both substantive and procedural environmental rights.<sup>41</sup>

The Model EBR proposed by the ELC explicitly recognizes and protects the substantive right of all Albertans to a healthy environment.<sup>42</sup> Under the Model EBR, the Government of Alberta is charged with the obligation to protect the right of Albertans to a healthy environment.<sup>43</sup> As well, the Alberta Government is recognized as trustee of Alberta's land, air, water and other components of the environment with a fiduciary duty to hold and manage the same for the benefit of all Albertans.<sup>44</sup>

In addition, the Model EBR provides express recognition and protection of numerous procedural environmental rights including:

- access to information;
- public participation in environmental decision-making, and the development of legislative and policy instruments;
- access to remedies such as environmental protection actions, investigations and judicial review; and
- protection from strategic lawsuits against public participation and from employee reprisals (whistleblower protection).

The Model EBR also recommends ensuring effective third party oversight via an Environmental Commissioner that is supported by a multi-stakeholder Technical and Policy Advisory Group. These procedural rights are integral to supporting and implementing the substantive right to a healthy environment.

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<sup>41</sup> Brenda Heelan Powell, *Environmental Rights in Alberta: An Annotated Environmental Bill of Rights for Alberta* (Edmonton: 2018, Environmental Law Centre).

<sup>42</sup> *Model EBR*, s. 16.

<sup>43</sup> *Model EBR*, s. 17.

<sup>44</sup> *Model EBR*, s. 17.

## Will environmental rights infringe on my property rights?

It is reasonable to ask whether environmental rights can be used as a tool to prevent a landowner or person with an interest in land from exercising his property rights. As previously mentioned, although a landowner or person with interests in land will have rights to use property, these rights are not unlimited. Rights to use land are limited by the type of interest in land that is held (some interests confer limited rights to access or use land). Further, the use of land is limited by regulatory regimes, by zoning and planning legislation, and by common law obligations to respect the rights of neighbours.

An EBR is not intended to impose additional regulatory controls or limits on land use. Rather, the purpose is to express an individual's right to a healthy environment and to provide comprehensive procedural tools to enforce that right. These tools include the ability to request investigations into an alleged contravention of an environmental law. As well, a landowner can commence an environmental protection action against the Government for failing to fulfil its duties as a trustee of the environment, failing to enforce an environmental law, or violating an environmental right. Environmental protection actions may also be brought against a person who breaches an environmental law or causes a significant adverse environmental effect.

Thus, if a person is using his land in accordance with prevailing laws (i.e. abiding by zoning and pollution regulations) and without causing significant adverse effects to the environment, then the EBR will not impact on that use of land. However, if a person is using land in a manner that violates prevailing laws or causes significant adverse environmental effects, then the tools provided by an EBR may be used to enforce relevant laws or environmental conditions (such as investigations or environmental protection actions).

## How can environmental rights protect my property rights?

In the course of a public engagement on property rights in Alberta, the Property Rights Task Force found three major concerns:<sup>45</sup>

- lack of consultation,

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<sup>45</sup> Government of Alberta, *Report of the Property Rights Task Force: Engagement with Albertans* (Edmonton: 2012, Government of Alberta).

- compensation issues (its scope and valuation), and
- access to courts and representation.

The members of the public consulted by the Property Rights Task Force expressed concern with the lack of consultation in the development of several pieces of legislation which could impact on property rights (*ALSA, Land Assembly Project Area Act*,<sup>46</sup> *Electric Statutes Amendment Act*, and *Carbon Capture and Storage Statutes Amendment Act*). As well, the public expressed concerns with the lack of flexibility of regulatory bodies – such as the Surface Rights Board - to adapt to growing pressures faced by property owners and land users.

With respect to access to courts and representation, the public indicated that it had little assistance when faced with potential infringements. Concern was also raised about limited rights to appeal. It was suggested that an independent advocate for landowners was needed to provide information about property rights and compensation, tools for negotiation, and information and assistance with navigating regulatory bodies.

The ELC has previously stated that provincial systems of planning and regulation need to respect property rights by ensuring due process is adhered to and that planning is governed by sound environmental principles.<sup>47</sup> The Model EBR proposed by the ELC strives to achieve this goal and addresses issues of consultation, access to information, access to courts, and representation.

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<sup>46</sup> The *Land Assembly Project Area Act* was never proclaimed and has been repealed.

<sup>47</sup> Environmental Law Centre, *Comments on Property rights and the regulatory and planning powers of government*, January 23, 2012.

## The Intersection of Property Rights and Environmental Rights

Environmental Matter	Common Law	Statutory Law	Environmental Rights
<b>Water Pollution</b>	<p>Riparian Rights</p> <ul style="list-style-type: none"> <li>• use of water for domestic purposes</li> <li>• undiminished quantity and quality of water</li> <li>• incidental protection of water</li> </ul> <p>Nuisance</p> <ul style="list-style-type: none"> <li>• unreasonable interference with use and enjoyment of property</li> </ul> <p>Trespass</p> <ul style="list-style-type: none"> <li>• a person or substance has entered onto the land of another</li> </ul> <p><i>Rylands v Fletcher</i></p> <ul style="list-style-type: none"> <li>• strict liability for damages if a non-natural use of the land, there was a substance likely to cause mischief, the substance escaped, and there was damage to person seeking a remedy</li> </ul>	<p><i>Water Act</i></p> <ul style="list-style-type: none"> <li>• protected right to domestic use as defined in the Act</li> <li>• priority licensing system for use of water</li> </ul> <p><i>EPEA</i></p> <ul style="list-style-type: none"> <li>• protection of water quality (substance release)</li> <li>• issuance of approvals</li> </ul> <p><i>Fisheries Act (federal)</i></p> <ul style="list-style-type: none"> <li>• prohibition against deposition of deleterious substances</li> </ul>	<p>Right to a Healthy Environment</p> <ul style="list-style-type: none"> <li>• substantive right held by all Albertans</li> <li>• components of the environment held as a public trust by the government</li> </ul> <p>Environmental Protection Actions</p> <ul style="list-style-type: none"> <li>• against government</li> <li>• against persons for breach of legislation</li> <li>• against persons for significant environmental harm</li> </ul> <p>Third Party Oversight &amp; Investigations</p> <ul style="list-style-type: none"> <li>• Commissioner of the Environment</li> <li>• Technical and Policy Advisory Group</li> <li>• Investigation for alleged breach of environmental law</li> </ul> <p>Participation and Process Rights</p> <ul style="list-style-type: none"> <li>• opportunity to participate</li> <li>• information rights</li> <li>• reasonable timeframes</li> </ul>
<b>Air Pollution</b>	Nuisance	<p><i>EPEA</i></p> <ul style="list-style-type: none"> <li>• protection of air quality (substance</li> </ul>	

Environmental Matter	Common Law	Statutory Law	Environmental Rights
	<p>Trespass</p> <p><i>Rylands v Fletcher</i></p>	<p>release)</p> <ul style="list-style-type: none"> <li>• issuance of approvals</li> </ul> <p><i>Canadian Environmental Protection Act</i> (federal)</p> <ul style="list-style-type: none"> <li>• pollution prevention</li> </ul>	<ul style="list-style-type: none"> <li>• written, public decisions</li> <li>• anti-SLAPP provisions</li> </ul> <p>Whistleblower Protection</p>
<b>Habitat Protection</b>		<p><i>ALSA</i></p> <ul style="list-style-type: none"> <li>• regional planning</li> <li>• conservation directives, conservation easements</li> </ul> <p>Various Pieces of Provincial Parks Legislation</p> <ul style="list-style-type: none"> <li>• provide a range of habitat protection for designated areas</li> </ul> <p><i>Species at Risk Act</i> (federal)</p> <ul style="list-style-type: none"> <li>• protection of critical habitat and species residences</li> </ul> <p><i>National Parks Act</i> (federal)</p> <ul style="list-style-type: none"> <li>• protection of ecological integrity is a legislative priority</li> </ul> <p><i>Fisheries Act</i> (federal)</p> <ul style="list-style-type: none"> <li>• fish habitat</li> </ul>	<ul style="list-style-type: none"> <li>• extended to all members of the public</li> </ul>

## General Protections offered by Environmental Rights

The Model EBR contains several provisions designed to improve consideration and application of environmental matters in legal and policy development, as well as, implementation of those laws and policies. Existing and

emerging environmental principles – such as polluter pays and sustainable development - are adopted as guidance for application of the Model EBR.<sup>48</sup>

As well, the Model EBR confirms 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 fiduciary responsibility for preserving and protecting the public interest in those components for present and future generations.

The over-riding purposes of the Model EBR are:<sup>49</sup>

- (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

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<sup>48</sup> See Model EBR, s. 3 for a list and explanation of all the environmental principles adopted in the Model EBR.

<sup>49</sup> Model EBR, s. 6.

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.

The Model EBR is designed to ensure that the decisions and actions of all provincial decision-makers (which includes any 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), and the Government of Alberta are subject to the procedural protections provided by the EBR and are guided by the principles adopted in the EBR.<sup>50</sup>

## Environmental Rights improve Consultation

As mentioned above one of the findings made by the Property Rights Task Force was that members of the public were concerned with lack of consultation.<sup>51</sup> The Model EBR addresses this concern by protecting several process rights and by providing opportunities for public participation in environmental decision-making.

Under the Model EBR, provincial decision-makers would be required to 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.<sup>52</sup> The Model EBR also proposes a process for residents of Alberta to request the development, amendment or repeal of an Act, regulation, instrument, policy or program necessary for environmental protection.

In order to facilitate public participation in environmental decision-making, the Model EBR proposes that provincial decision-makers must establish a public participation funding program.

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<sup>50</sup> Model EBR, s. 8.

<sup>51</sup> Government of Alberta, *Report of the Property Rights Task Force: Engagement with Albertans* (Edmonton: 2012, Government of Alberta).

<sup>52</sup> Model EBR, ss.21-27.

Other process rights that would be protected by the Model EBR include the provision of adequate, timely notice; an opportunity to participate; an opportunity to present comments or other information to the decision-maker; reasonable timeframes for information sharing and preparation; and the issuance of written, public decisions.

Given the importance of access to information for effective consultation and public participation, the Model EBR protects information rights.<sup>53</sup> In particular, the Model EBR would require effective access to environmental information which includes information about:

- (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
- (c) the state of human health, safety and conditions of life.

Currently, information about the various components of the environment is incomplete (for example, there are limited inventories of Alberta's groundwater) and this is especially true for the state of land that is held privately.

As well, to ensure transparency, the Model EBR proposes that all decision-makers are required to document decisions, activities, administrative measures, agreements, policies, legislation, plans, and programs. The Model EBR would establish an environmental registry to provide a central depository for ease of access to environmental information.

## **Environmental Rights improve Access to Courts and expand Enforcement Options**

As previously mentioned, members of the public expressed concern with access to courts and representation to the Property Rights Task Force.<sup>54</sup> The Model EBR addresses these concerns by providing novel legal actions to enable enforcement of environmental rights. As well, the Model EBR proposes third party oversight to ensure compliance with the requirements set by the Model EBR.

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<sup>53</sup> Model EBR, ss. 18-20.

<sup>54</sup> Government of Alberta, *Report of the Property Rights Task Force: Engagement with Albertans* (Edmonton: 2012, Government of Alberta).

The Model EBR proposes several novel legal actions to improve access to courts:<sup>55</sup>

- environmental protection actions against the Government of Alberta;
- environmental protection actions against persons for statutory breaches;
- environmental protection actions against persons for causing significant adverse effects; and
- protection against Strategic Lawsuits against Public Participation (SLAPP suits).

In the case of environmental protection actions against the Government of Alberta, a person may commence an action for the Government:

- (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 under the Model EBR.

Environmental protection actions may also be commenced against individuals or corporations for contravening an environmental law or for causing a significant adverse effect on the environment.

Unlike traditional common law action, such as nuisance, a person does not have to demonstrate a greater or different right, harm or interest than any other person to commence an environmental protection action. Further, a person need not have a financial, proprietary or other legal interest in the subject matter. These provisions are meant to alleviate some of the common barriers to common law court actions in environmental matters.

In addition, to improve access to courts via environmental protection actions, the Model EBR proposes that barriers created by costs be eliminated. This includes ensuring a claimant is not liable for costs (unless the claim was frivolous, vexatious or harassing), eliminating the requirement to provide security for costs, and enabling payment of counsel and expert fees.

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<sup>55</sup> Model EBR, ss. 29-38, and 41-43.

In addition, where a person is seeking judicial review of a government decision, the Model EBR proposes that the genuine public interest standing test be applied.<sup>56</sup> In other words, a person can bring an application for judicial review if:

- (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

regardless of whether that person has a direct personal or legal connection to the decision.

Recognizing the public interest in environmental matters, the Model EBR would allow appointment of an *amicus environment et curiae* (i.e. friend of the environment and court) 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. Similarly, the Model EBR also enables third party intervention to 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 Model EBR also address strategic lawsuits against public participation (known as SLAPP suits).<sup>57</sup> A SLAPP suit 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. The Model EBR would allow a person who is a defendant in a civil legal action and considers that the action is a SLAPP suit to bring an application to dismiss the claim. This is an express legal process designed to safeguard the right to public participation as provided in the Model EBR.

The Model EBR also would allow public triggered investigations (in a sense, augmenting access to the courts). In this case, a person who believes that an environmental law has been contravened may apply to the Environmental

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<sup>56</sup> Model EBR, s. 28.

<sup>57</sup> Model EBR, ss. 41-43.

Commissioner for an investigation. Unless the matter is determined to be vexatious or frivolous, the Environmental Commissioner will investigate the matter. If the matter already has been or is being investigated by the responsible government department, then the Environmental Commissioner will not conduct an investigation. Whether the investigation is conducted by the Environmental Commissioner or by the responsible government department, periodic progress report and a final report must be provided to the applicant.

In order to support, enhance and enforce environmental rights, the Model EBR proposes that an office of Environmental Commissioner be created.<sup>58</sup> The Environmental Commissioner would review government compliance with established environmental rights. The Environmental Commissioner would also provide advice and assistance to members of the public who wish to participate in decision-making or to enforce environmental rights.

The Environmental Commissioner would also be required to establish a Technical and Policy Advisory Group to provide advice on the conditions necessary to ensure Alberta's environment is healthy.<sup>59</sup>

## CONCLUSION

In looking at the Model EBR, it is clear that its role is to protect the right of all Albertans to a healthy environment. This is accomplished by expressly stating the right of every Albertan to a healthy environment and by providing the necessary tools to protect that right.

An EBR can provide enhanced tools to protect a person's interests in land. Property owners have previously expressed a concern with consultation, compensation, and access to courts and representation.<sup>60</sup> An EBR can address these concerns by providing additional avenues for public participation in environmental decision-making including at a legislative and policy level. Public participation can be enhanced by the creation of third party oversight (in the case of the Model EBR, an Environmental Commissioner) that facilitate information exchange and access to process. As well, an EBR can guarantee procedural rights before provincial decision-makers. An EBR can

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<sup>58</sup> [Model EBR](#), ss. 10-11.

<sup>59</sup> [Model EBR](#), ss. 13-15.

<sup>60</sup> Government of Alberta, *Report of the Property Rights Task Force: Engagement with Albertans* (Edmonton: 2012, Government of Alberta).

create novel legal actions – such as environmental protection actions – which improve access to the courts to remedy negative impacts upon property.

In these ways, an EBR will benefit landowners and those with interests in land (as well as other Albertans without interests in land). The role of an EBR is not to impose regulatory regimes upon the use of land and other natural resources. Rather, it provides new tools designed to protect each individual's right to a healthy environment.