

# ENVIRONMENTAL RIGHTS IN ALBERTA: ACCESS TO ENVIRONMENTAL JUSTICE

Module 6: Rights to a Hearing

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



Environmental Law Centre (Alberta)

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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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## Executive Summary

A right to a hearing process for decisions and activities that impact on the environment are necessary for ensuring the protection of environmental rights and environmental quality in Alberta. A right to a hearing ensures that environmental, property and individual harms may be ameliorated or avoided by testing of evidence and bringing relevant information and concerns before an adjudicative body.

This module of the Environmental Law Centre's (ELC) Environmental Rights series looks at the right to a hearing within Alberta's laws. A summary of approaches taken by various tribunals is set out and an introduction of judicial review opportunities is given.

The module also summarizes some of the concerns with existing appeal and judicial review options with the objective that these procedures should enable Albertans to engage in hearing processes where environmental risks exist. Specifically, the ELC concludes that more substantive review and hearing mechanisms are required to deal with situations where no one is deemed "directly and adversely affected", such as where impacts on public resources or public land are likely to occur, and expanding the ability to hold hearings to deal with cumulative effects or other acute environmental effects that are not covered by current legislation (i.e. where activities do not require approvals or otherwise trigger a hearing process).

Law reform recommendations related to these issues are set out in the companion ELC document [\*A Road Map to Environmental Rights in Alberta: Rights for a Sustainable Future.\*](#)

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## INTRODUCTION

Access to justice includes “the ability within a society to use courts and other legal institutions effectively to protect one’s right and pursue claims”.<sup>1</sup> For the purposes of this report, access to justice in the environmental context extends beyond the courts to include regulatory tribunals that adjudicate over environmental and resource related decisions.

Currently, a person can pursue legal action involving environmental harms (or impacts) through the courts via common law rights of actions (i.e. civil suits), private prosecutions, judicial reviews, appeals or through appeals to tribunals, boards, and other quasi-judicial bodies. Each course of action presents different benefits and limitations (both in legislation and at common law). To ensure protection of one’s environmental rights, it is important that barriers to accessing the justice system are removed or minimized.

The typical barriers to accessing the justice system – through the courts, quasi-judicial bodies, or administrative decision-makers- include:

- the costs of the process;
- the availability of a hearing;
- fairness in hearing processes;
- adequate access to information; and
- access to expertise and representation.

The focus of this report is on availability of having a hearing or similar review process before an independent or quasi-independent decision-maker such as the court, a tribunal or a board.

In relation to some of the other barriers to access to justice, the ELC has published modules focused on environmental rights as they relate to costs and access to information. In addition, the ELC has written on the issues of standing and private enforcement mechanisms.

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<sup>1</sup> *Black’s Law Dictionary*, 9<sup>th</sup> ed., (St. Paul: Thomson Reuters, 2009) at 16.

It should be noted that laws and government policies are subject to change. You should not rely on this document as legal advice.

## Access to justice and the environment

The phrase **environmental justice** may be used in a narrow, legalistic sense to describe how certain demographics of a population are subjected to increased exposure to environmental harms or a disproportionate burden as a result of industrial developments.<sup>2</sup> However, in this report, when we refer to environmental justice, we use it in a broader sense to refer to access to justice in relation to decisions and actions that impact the environment.

Access to justice is relevant across most fields of law where there are impacts on human interests, whether they are liberty interests, financial interests or environmental interests. David Boyd observes that in the context of environmental policy and decision-making, access to justice is designed to serve four primary purposes/functions:<sup>3</sup>

- (1) It strengthens the right to information, allowing civil society to press governments for information they were otherwise denied.
- (2) It allows citizens to ensure that they are appropriately included and able to participate meaningfully in decision-making on environmental matters.
- (3) It levels the playing field by empowering groups that may not otherwise have influence on the government to seek redress from courts and tribunals.

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<sup>2</sup> See for example Dayna Nadine Scott "What is Environmental Justice?" (2014). *Osgoode Legal Studies Research Paper Series 4*, online: <http://digitalcommons.osgoode.yorku.ca/olsrps/4>. <<http://digitalcommons.osgoode.yorku.ca/olsrps/4>>. Also see Gross, Elizabeth & Paul B. Stretesky, Environmental Justice in the Courts, in David M. Konisky (Ed.), *Failed Promises: Evaluating the Federal Government's Response to Environmental Justice*. (Cambridge MA: MIT Press, 2015) online: Northumbria University Newcastle [http://nrl.northumbria.ac.uk/21473/1/environmental\\_justice\\_in\\_the\\_courts.pdf](http://nrl.northumbria.ac.uk/21473/1/environmental_justice_in_the_courts.pdf).

<sup>3</sup> David Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27(3) JELP 201 at 236-237.



(4) It increases the public's ability to prevent environmental harm.

Access to justice in dealing with environmental matters helps ensure there is a level of accountability to the environment and to our laws. It also helps set precedents that:<sup>4</sup>

- guide public officials in the course of future environmental decision-making;
- reduce arbitrary decision-making;
- increase consistency and predictability in outcomes; and
- ensure that officials are responsive to stakeholder concerns and input.

Access to justice ensures that those impacted by decisions or activities have the ability to effectively seek a remedy to the harm they have suffered or may suffer. Access to justice therefore means different things depending on the nature of the decision or activity, and the potential and grievousness of harm. With this in mind some key procedural underpinnings exist that will establish access to the justice system when we talk of environmental decision-making. Procedural fairness is essential to access to justice in hearings. This includes, but is not limited to:

1. Notice of applications and decisions;
2. Right to a hearing;
3. Right to information about the subject matter under review;
4. Right to cross examination;
5. Right to appeal a decision;
6. Right to have some costs of participation covered;
7. Right to effective remedies; and
8. A requirement that the decision maker provide reasons for the decision.

The extent to which processes and procedural rights are necessary to ensure justice is served vary with the circumstances. In an environmental context many of these rights and duties (including a hearing) may not arise. The exception is the duty to provide notice of a pending decision that may harm

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<sup>4</sup> *Ibid.* at 237.

someone who may be directly affected by the decision (which is codified under various statutes in Alberta).

While this report focuses on the right to the hearing aspect of environmental justice, a brief overview of the right to notice, right to cross-examine, right to counsel and the duty to give reasons is provided. Because these particular rights are closely related to the right to hearing, they are worthy of some discussion here.

## Right to Notice

Any notion of fairness in a hearing process requires those who may be harmed by an activity are notified of that potential harm. If facing a criminal charge, section 11(a) of the *Charter of Rights and Freedom* provides that “[a]ny person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence.”<sup>5</sup> However, there are also situations where it not always possible to provide notice to everyone who might be potentially affected by a government action.<sup>6</sup> Many statutes that oversee government action (including environmental action) contain express provisions about how to give notice, who receives notice, and what should be contained within the notice.

In the environmental context notice (and the nature of notice) that will be required is governed by the various statutes and regulations. Typically this does not require direct notice to individuals and reliance for notifying parties who may be effected by an activity is through a general notice in a broadly available publication.<sup>7</sup> Notice may not be required in all instances, as often statutes allow for activities to occur if there is minimal risk of impacts to others or to deal with emergencies or threats to property or people.

If there is no statutory provision to give notice, “the general rule of procedural fairness is that administrators must give adequate notice to permit the affected persons to know how they might be

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<sup>5</sup> *Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3 (U.K.)*, reprinted in RSC 1985, App. II, No. 5. At s. 11(a).

<sup>6</sup> David Philip Jones & Anne S. de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2009) at 263 citing *Conception Bay South (Town) et al. v. Board of Commissioners of Public Utilities (Nfld.) et al.*, 1991 CanLII 6983 (NL SCTD).

<sup>7</sup> For example, see s.72 of the *Environmental Protection and Enhancement Act*, *infra* note 37.

affected and to prepare themselves adequately to make representations.”<sup>8</sup> Generally, no notice is considered inadequate notice.<sup>9</sup> Ultimately, it all depends on the statutes that oversee the specific issue/action, and if the statute is silent on notice, then the requirements are based on the context of the case.<sup>10</sup>

## Right to Cross Examine

During an oral hearing, the right to call witnesses and to cross-examine them (i.e. to question the opposing party, or a witness of the opposing party), is a right protected by the duty of fairness.<sup>11</sup> The right to cross-examine is an important part of procedural fairness where there are issues of credibility, and as a “means of refuting the allegations or arguments of the other side.”<sup>12</sup> However the right to cross-examine depends on a number of circumstances. For instance, it may be required and regulated by statute. Or, if the statute is silent on this matter the head of the board, tribunal, etc. will govern its own procedure, including technical rules of evidence, which could limit ones right to cross-examine.<sup>13</sup> For environmental matters in Alberta, tribunals typically have the discretion to allow or disallow cross-examination.

## Right to Counsel

Section 10(b) of the *Charter of Rights and Freedoms*<sup>14</sup> provides a constitutional right to counsel (i.e. legal representation by a lawyer) when facing criminal charges (i.e. arrest and detention). This right to counsel does not extend to hearings before administrative tribunals.<sup>15</sup> The Supreme Court of Canada

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<sup>8</sup> *Supra* note 6 at 264.

<sup>9</sup> *Sitler v. Alberta (Workers Compensation Board)*, 2003 ABQB 277 (CanLII.)

<sup>10</sup> See *Commission d'aménagement de la péninsule acadienne c. Dugas*, 1999 CanLII 9450 (NB CA).

<sup>11</sup> *Supra* note 6 at 301.

<sup>12</sup> *Ibid.* at 302.

<sup>13</sup> *Ibid.* at 301.

<sup>14</sup> *Charter of Rights and Freedoms* at s 10(b.)

<sup>15</sup> *Supra* note 6 at 318.

has observed that extent of the right to counsel will depend on “the characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result”.<sup>16</sup>

There are circumstances where courts have quashed decisions made by adjudicative tribunals where a party was denied the opportunity to be represented by counsel.<sup>17</sup> The courts have held that at common law persons appearing before tribunals possesses the right to be represented by an agent of their choosing, and where the tribunals have the power to hinder this right, but must provide justification for why they would hinder it (e.g. by statute, etc.).<sup>18</sup> Ultimately, regardless of how, when, where a person is engaging the legal system, it is recommended (where able) that they consult with, and be represented by, legal counsel.<sup>19</sup>

### Duty to Give Reasons

This is a duty resulting from courts consistently holding that “a fair hearing can only be had if the parties affected...know the case to be made against them.”<sup>20</sup> Only by knowing the case against you can a person properly rebut it. Generally, the level of disclosure required in tribunal proceedings is contextual and subject to the relevant statutes that regulate a specific matter. However, the duty of fairness generally requires that all information relied upon by a tribunal when making its decision must be disclosed to the affected individual(s). Courts have found that failure to do so “deprives the tribunal of jurisdiction and renders the decision void.”<sup>21</sup>

An Alberta example of access to environmental justice is provided in *Kelly v. Alberta (Energy Resources Conservation Board)*<sup>22</sup> decided in 2011 by the Alberta Court of Appeal (“Kelly”). In this case, Daylight

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<sup>16</sup> *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181, 1987 CanLII 81 (SCC), <http://canlii.ca/t/1ftq9>.

<sup>17</sup> *Ibid.* at 318.

<sup>18</sup> *Thomas v. Assn. of New Brunswick Registered Nursing Assistants*, 2003 NBCA 58 (CanLII) at para 25.

<sup>19</sup> The availability of legal aid for environmental hearings does not exist. The ELC has proposed expanding legal aid funding for participation in regulatory hearings. See *A Road Map to Environmental Rights in Alberta: Rights for a Sustainable Future*.

<sup>20</sup> *Supra* note 6 at 266.

<sup>21</sup> *Ibid.* at 266 citing *Volkswagen Northern Ltd. v. Alberta (Industrial Relations Board)* (1964), 49 W.W.R. 574 (Alta. T.D.).

<sup>22</sup> *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325.

Energy Ltd. (formerly West Energy) had applied to the Environmental Resources Conservation Board (now the Alberta Energy Regulator) for approval to drill a sour gas well. The Appellants (i.e. Kelly) resided in a zone of potential impact from a sour gas leak according to the ERCB's own Directive.<sup>23</sup> They had written to the Board objecting to the application. The Board denied their right to be heard on the grounds they lacked standing to oppose the gas well application.<sup>24</sup> The Appellants then applied for a review of the Board's decision, which was dismissed, because the Board found that the applicants were not directly and adversely affected.<sup>25</sup> The Appellants then filed an appeal with the Alberta Court of Appeal.

The Court held that stakeholders residing in the "tertiary" zone surrounding the proposed sour gas well, while not having an absolute right to standing in all cases, did have "a strong *prima facie* case."<sup>26</sup> The Court held that a "perceived risk" of adverse effect may be sufficient to be viewed as directly affected and confirmed its prior ruling that applicants need not demonstrate that the risk of harm is a certainty, or even likely, nor must they prove that the "adverse effect" is greater than that suffered by the general public.<sup>27</sup>

This case illustrates the importance of the right to a hearing and, in particular, having an avenue to challenge administrative and quasi-judicial decisions. The ability to challenge the ERCB decision before a court was fundamental to the rights of the parties to be heard in the regulatory process.

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<sup>23</sup> The ERCB recognizes three risk zones surrounding sour gas wells: (1) the Protective Action Zone (the area where, in the event of a release, pollutant concentrations, including hydrogen sulphide, may result in significant, life-threatening or serious and potentially irreversible health effects); (2) the Emergency Planning Zone (the area where, in the event of a release, hydrogen sulphide concentrations may exceed 100 parts per million requiring evacuation of the area or "sheltering in place"); and (3) an unnamed third or "tertiary" zone (an area where, in the event of a release, hydrogen sulphide concentrations exceed more than 10 parts per million on average over a three minute period and evacuation or "sheltering in place" may be required depending on the operator's assessment of local conditions).

<sup>24</sup> *Ibid.* at para 10. See the ELC's publication: [\*Standing in Environmental Matters\*](#) for more information.

<sup>25</sup> *Ibid.* at para 10.

<sup>26</sup> *Ibid.* at para 26.

<sup>27</sup> *Ibid.* at para 26.

## Right to a Hearing and the Environment

In terms of access to environmental justice, the right to be heard can be particularly important as most information on which government bases its decisions on whether to let environmentally harmful activities to proceed comes from a single source, the proponent of the activity. In considering the right to a hearing, it is necessary to distinguish between the venue (court versus quasi-judicial body) and the nature of the hearing (initial hearing, statutory appeals, judicial reviews). The matters that can be considered within a hearing and who can be heard varies with both the venue and the nature of the hearing. The following sections of this report canvas issues associated with standing, statutory appeals and judicial review in Alberta.

### A preliminary hurdle to the right to be heard: standing

‘Standing’ is the legal status (i.e. legal right, interest, or entitlement) necessary for a party to receive a hearing from a court, administrative board, or tribunal that holds hearings.<sup>28</sup> Standing is required to bring any action against an individual, corporation, or government (or one of its agencies), be it a civil or criminal action, a judicial review, an appeal, a constitutional challenge, or an application for any number of legal remedies (e.g. injunction, damages, etc.). Ultimately, standing serves a gatekeeper function by determining whether a hearing should be held and who should be heard. Standing “controls the issues that are decided and the interests that are represented in those decisions.”<sup>29</sup>

Determining a person’s standing is dependent on the matter they seek to address. The matter might be regulated by a particular statute, common law, or policy, and therefore the test for standing could also be contained in that particular statute, common law, or policy.

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<sup>28</sup> Environmental Law Centre, *Standing in Environmental Matters*, (Edmonton: Environmental Law Centre, 2014), online: Environmental Law Centre <http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf> at p. 7.

<sup>29</sup> *Ibid.*

The ELC report *Standing in Environmental Matters* provides details regarding standing in Alberta.<sup>30</sup>

### Standing in judicial review versus standing in administrative decisions and appeals

Standing to be heard can be differentiated between judicial review and administrative actions and appeals. Standing to be heard by decision maker or tribunal is typically dictated by their enabling statute. The general approach in Alberta is that a government decision maker will accept comments or objections from those they deem directly and adversely affected. Similarly, appeals of those decisions to regulatory tribunals are based on whether someone is recognized as “directly and adversely affected”. Details of this are set out in Table 1 *infra*.

The determination of what is “directly and adversely affected” is based on an assessment of the circumstances in a given case however, over time, it has become clear that a potential impact on one’s health, one’s property, or one’s financial interests are needed to be granted standing. That said, tribunals are not bound by “precedent” in the same sense that courts are so there is some flexibility in the determination of who is directly affected. In the context of environmental matters, the people or groups who advocate on behalf of the environment often lack the legal rights that support the standing of other parties like industry or property owners, i.e. they are not viewed as directly affected.

Courts on the other hand have broad inherent jurisdiction to determine standing under the common law unless the common law is altered by legislation. The Canadian courts have recognized that sometimes groups who aim to uphold the public interest may be the primary mechanism to get important issues to be heard. Public interest standing is meant to enable individuals, groups, and corporations to challenge government action or law (e.g. environmental related action or law) in court, despite not being directly linked to the decision or action in question. Ultimately, public interest standing increases access to justice for Canadians, and it provides a “practical and effective way to challenge the legality of state action.”<sup>31</sup>

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 at para 31.

The Supreme Court of Canada has set out the test for public interest standing in relation to bringing matters before the court.<sup>32</sup> The three questions to be considered are:<sup>33</sup>

- (1) Is the issue raised a serious one?
- (2) Does the party bringing the case have a personal stake in the matter, or have a genuine interest in the validity of the legislation? and
- (3) Whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court?

The public interest standing test facilitates a hearing before a court which may not otherwise take place. This will typically involve questions of law and how a decision maker is administering legislation.

## The right to a hearing

The rights to a hearing take three primary forms: 1) regulatory hearings, 2) statutory appeals that allow for the appeal of a decision of government to a tribunal and/or court; and 3) judicial review that allow for decisions and actions of government and its delegates (including tribunals) to be reviewed by the courts.

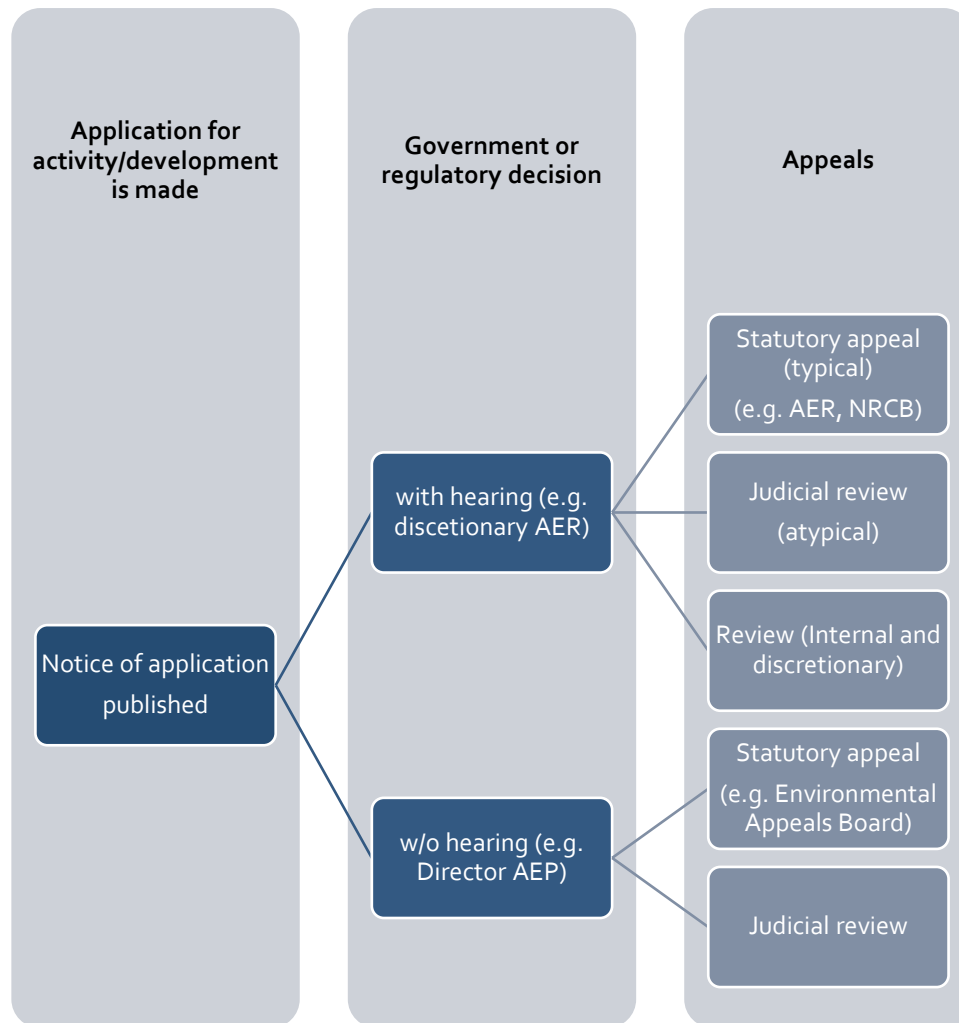
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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at para 53-71. The court noted that determining whether a suit is a “reasonable and effective means” to bring the matter before the court requires a flexible and purposive approach to ensuring public interest questions are not excluded from court review. This includes the plaintiff’s capacity to bring the suit, the need to recognize plaintiffs who represent disadvantaged parties, and whether there is realistic alternative means of adjudicating issues. (See para 51).



**Figure 1: Summary of general hearing and appeal rights in Alberta**



## Hearings in regulatory decision making

The initial regulatory decisions of government or regulators in the province typically do not involve a hearing. Generally, there is a “right to be heard” in so far as the public may issue “statements of concern” or object to applications for authorizations (under various environmental and natural resources statutes). This is typically a one-way street with information feeding into the decision maker and does not include the right to test evidence in a hearing process. If initial standing criteria are met, some quasi-independent regulators (i.e. the AER, AUC and NRCB) may hold hearings regarding the initial authorization decision.

## Statutory appeals of decision tribunals and courts

An appeal is “[a] proceeding undertaken to have a decision reconsidered by a higher authority...[specifically] the submission of a lower court’s or agency’s decision to a higher court [or other authority] for review and possible reversal.”<sup>34</sup> Statutory appeals are defined by the language that creates them. If there is no statutory right of appeal for a specific issue, decision, action, etc. then it cannot be appealed -- although it may be subject to judicial review (see below). A right to appeal is a fundamental component of access to justice because it allows for a hearing by an independent or quasi-independent adjudicator. This in turn, may create more accountability around environmental decisions and actions.

It is important to note that an appeal does not automatically stop, suspend, postpone, or ‘stay’ a decision being appealed. A decision can only be stayed by a separate application to the tribunal or court.

Statutory appeals may involve appeals to quasi-judicial boards or tribunals and/or appeals to the courts.

### Appeals to Quasi-Judicial Boards or Tribunals

The legislative branch (both provincially and federally) is authorized to delegate quasi-judicial powers through statute<sup>35</sup> to administrative tribunals. These tribunals are quasi-judicial, meaning that although they are not courts, they are empowered to adjudicate on issues that are often in an area of specialized knowledge, including the power to hold hearings on government decisions and issue orders and sanctions.

Once a tribunal has made a decision, a statute may allow for further appeals to a superior court or court of appeal. In contrast, statutes may also have privative clauses which aim to limit the intervention or review undertaken by a court.<sup>36</sup>

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<sup>34</sup> *Supra* note 1 at 41.

<sup>35</sup> David Philip Jones & Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2009) at 4.

<sup>36</sup> *Ibid.* at 534.

This report briefly canvasses the appeal provisions in the primary environmental laws in Alberta, including:

- *Environmental Protection and Enhancement Act*<sup>37</sup>
- *Water Act*<sup>38</sup>
- *Public Lands Act*<sup>39</sup>
- *Agricultural Operation Practices Act*<sup>40</sup>
- *Alberta Utilities Commission Act*<sup>41</sup>
- *Natural Resources Conservation Board Act*<sup>42</sup>
- *Alberta Land Stewardship Act*<sup>43</sup>
- *Responsible Energy Development Act*<sup>44</sup>

Table 1 below summarizes the nature of appeal, the right to bring the appeal and the ability to have a court review the decision of the administrative body.

Administrative hearings in Alberta may also be separated into two distinct processes, one, where the administrative body is responsible for the initial government decision, such as is the case with the Alberta Energy Regulator and the Alberta Utilities Commission, and the other, where the administrative body is a more separate and distinct entity, such as the Alberta Environmental Appeals Board.

Some other administrative boards also play a role in how resource development proceeds, including the Surface Rights Board and municipal appeal mechanisms, such as Subdivision and Development Appeal Boards. For municipal processes see the ELC's 2005 report *Municipal Powers, Land Use Planning, and the Environment: Understanding the Public's Role*.

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<sup>37</sup> R.S.A. 2000, c. E-12, online: Queen's Printer <http://www.qp.alberta.ca/documents/acts/e12.pdf>.

<sup>38</sup> R.S.A. 2000, c. W-03, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/wo3.pdf>.

<sup>39</sup> R.S.A. 2000, c. P-40, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/P40.pdf>.

<sup>40</sup> R.S.A. 2000, c. A-07, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/A07.pdf>.

<sup>41</sup> R.S.A. 2000, c. A-37.2, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/A37P2.pdf>.

<sup>42</sup> R.S.A. 2000, c. N-03, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/No3.pdf>.

<sup>43</sup> S.A. 2009, c. A-26.8, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/A26P8.pdf>.

<sup>44</sup> S.A. 2012, c. R-17.3, online: Queen's Printer <http://www.qp.alberta.ca/documents/Acts/r17p3.pdf>.

**Table 1: Hearings and appeals in environmental statutes in Alberta**

Statute	Board, Tribunal	When the public can trigger a hearing	Nature of Appeal	Nature of decision	Right to bring an appeal	Statutory appeal to court/ privative clause
<b>Environmental Protection and Enhancement Act</b>	Alberta Environmental Appeals Board	Approval decisions.	Hearing (oral or written) or mediation.	Report to Minister - Advisory (except in limited circumstances)	Directly Affected (and issued a statement of concern) s. 91(1) as of right.	No appeal with privative clause (s.102 privative clause).  Judicial Review  See also statutory injunction s.225.
<b>Water Act</b>	Alberta Environmental Appeals Board	Approval and Licence decisions.	Hearing (oral or written) or mediation	Report to Minister - Advisory (except in limited circumstances)	Directly Affected (and issued a statement of concern) s. 115(1) as of right.	No appeal.  Judicial Review
<b>Public Lands Act</b>	Public Lands Appeals Board	Disposition and enforcement related decisions.	Hearing (oral or written) or mediation	Report to Minister - Advisory	Parties impacted by dispositions and/or orders or directly and adversely person. <sup>45</sup>	No appeal with privative clause (s.126 of Public Lands Act).  Judicial Review
<b>Agricultural Operations Practices Act</b>	Natural Resource Conservation Board	Approval decisions.	Board review (via hearing)	Authorizing body (i.e. binding)	Review may be triggered by a	Court of Appeal on questions of law and jurisdiction s. 27(1)*

<sup>45</sup> See the matters that may be appealed under s.211 of the *Public Lands Administration Regulation*.

Statute	Board, Tribunal	When the public can trigger a hearing	Nature of Appeal	Nature of decision	Right to bring an appeal	Statutory appeal to court/ privative clause
					"directly affected" party. (s.25)	
<b>Alberta Utility Commission Act</b>	Alberta Utilities Commission	Decisions and Orders of the Commission. <sup>46</sup>	Board hearings (s.9(2)) and reviews (s.10)	Authorizing body (i.e. binding).	Directly and adversely affected (upon request). 72	Court of appeal on questions of jurisdiction or law* s. 29, and appeal administration fees
<b>Natural Resources Conservation Board Act</b>	Natural Resource Conservation Board	Applications re "reviewable projects"	Hearing (oral or writing) (s.8) and rehearing (s.25)	Authorizing body (i.e. binding) (with Cabinet approval s.9(1)(a)).	Directly affected who objects (unless vexations or of little merit) s. 31*	Court of Appeal on questions of law and jurisdiction (s.31)
<b>Alberta Land Stewardship Act</b>	Review for compliance with Regional Plan through existing appeal tribunals	Dependant on other regulatory hearing processes.  May seek an investigation where decisions that are not part of a regulatory process.	May or may not include a hearing. Dependant on tribunal.  <u>or</u> Investigation by Land Use Secretariat	Varies by tribunal.  Or investigation may result in a report to Commissioner with reference to provincial government department or local govt. (s.62)	Standing is governed by individual tribunal's statutes and regulations. (s.42)  Anyone may bring a complaint but investigation is discretionary. (s.62).	No appeal (except for compensation related issues) with privative clause.  Compensation appeals to Court of Appeal on questions of law, fact, or both

<sup>46</sup> The Commission has various decision making roles including decisions about authorizations under the *Electric Utilities Act*, the *Gas Utilities Act*, and the *Hydro and Electric Energy Act*.

Statute	Board, Tribunal	When the public can trigger a hearing	Nature of Appeal	Nature of decision	Right to bring an appeal	Statutory appeal to court/ privative clause
<b>Responsible Energy Development Act (REDA)</b>	Alberta Energy Regulator	Application for approval under energy resource activity or a specified enactment.  or  "appealable" decisions under the Water Act, EPEA or the PLA or where no hearing took place under an energy resource enactment.	Commissioner hearings (discretionary), regulatory appeals and reconsideration	Authorizing body (i.e. binding).	Hearings and Regulatory Appeal- Directly and adversely affected party  Hearings are discretionary under REDA (augmented by Regulation.)  (Also See REDA General Regulation.)	Court of Appeal on questions of law and jurisdiction.

\*Leave for Appeal Required.<sup>47</sup>

<sup>47</sup> To appeal a tribunal decision to the Court of Appeal requires leave of the court. Leave is granted where a judge of the court of appeal where it fits within the statutory appeal provision (typically limited to a question of law or jurisdiction) and involves a "serious, arguable point".<sup>47</sup>

## Summary of statutory appeal mechanisms

A summary of statutory opportunities to trigger hearings by environmental and natural resource administrative tribunals and courts is set out below.

### (i) *Environmental Protection and Enhancement Act*

The *Environmental Protection and Enhancement Act* (“EPEA”) is Alberta’s primary environmental legislation that deals with pollution.<sup>48</sup> EPEA regulates a variety of activities which may impact the environment by requiring various authorizations, such as approvals, registrations and notification of government. The level of authorization required for prescribed activities is set out in the *Activities Designation Regulation*.<sup>49</sup> The ability for an impacted party to trigger a hearing is primarily limited to instances where approvals are required under the Act. An appellant who is deemed to be “directly affected” and to previously have submitted a “statement of concern” with the Director may file a notice of appeal with the Alberta Environmental Appeals Board.<sup>50</sup> The Board has some powers to make final decisions however most appeal board hearings result in a report and recommendations to the Minister.<sup>51</sup> The Minister then has the power to confirm, reverse or vary the decision appealed and make any decision that the Director (of Alberta Environment and Parks) could have made.

In addition, under s. 225, a person who has suffered, is suffering, or is about to suffer loss or damage as a result of conduct that is contrary to the EPEA may apply to the Court for an injunction ordering the person engaged in the conduct to either 1) refrain from doing any act that it appears to the Court causes or will cause the loss or damage, or 2) do any act or thing that it appears to the Court prevents or will prevent the loss or damage.<sup>52</sup>

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<sup>48</sup> *Supra* note 37.

<sup>49</sup> Alta Reg. 276/2003.

<sup>50</sup> *Ibid.* s. 91(a)(i).

<sup>51</sup> This is the case in relation to appeals of administrative penalties under the EPEA or the *Water Act*, confidentiality requests under the EPEA, or limited orders by the Minister under the *Water Act*.

<sup>52</sup> *Supra* note 37 at s. 225. The value of this provision is limited by a judicial interpretation that indicates that application for an injunction must meet the onerous test establishing irreparable harm and that an injunction is in the balance of convenience. See 304373 *Alberta Inc. v. Ensteel Properties Ltd.*, 2002 ABQB 814. Online: Canlii <<http://canlii.ca/t/5gxd>>.

Under *EPEA*, members of the public may also sue for damages where they have been personally affected. Specifically, “where a person is convicted of an offence under this Act, any person who suffers loss or damage as a result of the conduct that constituted the offence may sue for and recover from the convicted person an amount equal to the loss or damage proved to have been suffered.”<sup>53</sup> Any person who has suffered property damage or loss as a result of the commission of an offence under the *EPEA* can apply for compensation following a conviction, at the time the offender is being sentenced.<sup>54</sup> In this case, the court can order the offender to pay the person for the property loss they incurred.<sup>55</sup>

## (ii) *Water Act*

Alberta’s *Water Act* focuses on managing and protecting Alberta’s water with a focus on water diversions for use (licences) and activities that impact water and water bodies (approvals). Section 115(1) of the *Water Act*, lists the circumstances where a person may submit a notice of appeal to the Environmental Appeals Board, primarily focused on when the department has granted a licence or approval under the Act.<sup>56</sup> As with *EPEA*, the appellant must be directly affected by a director’s decision or action. Notable for an access to justice perspective, approvals granted under the *Water Act*, have a very short timeline in which a notice of appeal must be filed, at 7 days.<sup>57</sup> The Act is silent on statutory appeals to a court and any challenge of the appeal board decision or Minister’s decision would have to be by way application for judicial review.<sup>58</sup>

Similar to *EPEA*’s section 225, under section 155 of the *Water Act* any person who has suffered, is suffering, or is about to suffer loss or damage as a result of conduct that violates the *Water Act* also has recourse to the Court. In this case, a person may apply to the Court for an injunction (i.e. a court order to stop someone from continuing certain behaviour).<sup>59</sup> The Court can then issue an injunction ordering the person engaged in the conduct to either 1) stop doing any act that it appears to the Court causes or will cause the loss or damage; or 2) do any act or thing that it appears to the Court prevents or will

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<sup>53</sup> *Ibid.* s. 219.

<sup>54</sup> *Ibid.* s. 235.

<sup>55</sup> *Ibid.* s. 235.

<sup>56</sup> *Water Act* at s. 115(1).

<sup>57</sup> *Ibid.* at s. 109(2).

<sup>58</sup> The level of deference a court would give the EAB would be analogous to situations arising under *EPEA*.

<sup>59</sup> *Ibid.* at s.155.



prevent the loss or damage.

### **(iii) *Public Lands Act***

The *Public Lands Act* applies to Crown land within the province but does not include land in provincial parks, or land owned by the federal government. The Public Lands Appeal Board (PLAB) is an administrative body that hears appeals of certain decisions made under the *Public Lands Act* having to do with dispositions and other public land issues.<sup>60</sup> Standing to appeal a decision under the Act is granted to the person “to whom the decision was given” or a person who is directly and adversely affected by the decision.<sup>61</sup> A hearing is not-discretionary where the rules and regulations have been met and the PLAB may make a decision without a hearing if the parties agree.<sup>62</sup> A hearing may be oral or written.<sup>63</sup>

The PLAB provides recommendations to the Minister, who then has the discretion to alter the decision.<sup>64</sup> The *Public Lands Act* has a privative clause focused at limiting judicial review on decisions made by the Minister.<sup>65</sup>

### **(iv) *Agricultural Operation Practices Act***

The *Agricultural Operation Practices Act* (“AOPA”) sets out a framework for resolving conflicts between agricultural producers and the public relating to nuisance and disturbance caused by agricultural operations. Under section 25 of AOPA the Natural Resources Conservation Board (“NRCB”) is authorized to review certain decisions, and section 27(1) is the appeal provision that can allow an applicant to go before the Court of Appeal.<sup>66</sup> Standing to trigger a review is based on being a “directly

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<sup>60</sup> See *Public Lands Act*, *supra* note 27, at s. 120 and s.211 of the *Public Lands Administration Regulation*, Alta. Reg 187/2011. (PLAR)

<sup>61</sup> *Ibid.* at PLAR s.212.

<sup>62</sup> *Supra* note 39 at s. 122.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at s.124.

<sup>65</sup> *Ibid.* at s. 70.3.

<sup>66</sup> *Supra* note 40 at ss. 25 and 27(1).

affected party”.<sup>67</sup> When conducting a review, the NRCB is required to give the directly affected parties a reasonable opportunity to review information relevant to the review, and to provide their own evidence and written submissions.<sup>68</sup> The NRCB may also arrange mediation between the applicant and the directly affected parties, as well as hold hearings.<sup>69</sup>

Ultimately, after holding the review, the Board may grant or refuse to grant an approval, registration or authorization or an amendment of an approval, registration or authorization. The NRCB can also make any other disposition of the application that the Board considers to be appropriate.<sup>70</sup>

Appeals to the Alberta Court of Appeal are enabled by the Act for questions of law and jurisdiction.<sup>71</sup>

#### **(v) *Alberta Utilities Commission Act***

*Alberta Utilities Commission Act* is a piece of legislation that established the Alberta Utilities Commission (“AUC”), and acts as an umbrella for many other acts and regulations. The AUC regulates the province’s utilities sector, natural gas, and electricity markets. Sections 29 and 72 address the circumstances where an appeal of AUC decisions can be made. With respect to access to justice, the *Alberta Utilities Commission Act* is unique as being the only environmentally related legislation that contains a clause excluding the right to judicial review. Section 30, “Exclusion of judicial review” states that every order, ruling, or decision by the Commission cannot be questioned or reviewed by the court, including the prohibition of any order seeking an injunction, declaratory judgment, prohibition, warrant, or otherwise, to question, review, prohibit or restrain the Commission or the Chair or any of the Commission’s proceedings.<sup>72</sup> Ultimately, for legal matters related to utilities, natural gas, and electricity, this section presents a major barrier to access to justice for Albertans, as judicial review is an important feature of the legal system to keep administrative bodies accountable to private citizens.

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<sup>67</sup> *Ibid.* at ss. 25 & 20.

<sup>68</sup> *Ibid.* at s. 20(4).

<sup>69</sup> *Ibid.* at s. 8(1).

<sup>70</sup> *Ibid.* at s. 25(7)(c).

<sup>71</sup> *Ibid.* at s. 27.

<sup>72</sup> *Supra* note 41 at s. 30.

#### **(vi) *Natural Resources Conservation Board Act***

The *Natural Resources Conservation Board Act* (“NRCBA”) established the Natural Resources Conservation Board (“NRCB”) that conducts reviews under the *NRCBA* and appeals under the *AOPA* (as set out above). For non-*AOPA* projects within the NRCB’s jurisdiction (set out in section 4 of the Act and including forestry projects, recreational and tourism projects and water management projects among others), the NRCB is the decision-making body (with a prequalified of approvals going through Cabinet).

Hearings are required where an application is received by it and a directly affected party objects to the application.<sup>73</sup> Board decisions can be appealed to the Court of Appeal on a “question of jurisdiction or on a question of law.”<sup>74</sup>

#### **(vii) *Alberta Land Stewardship Act***

The *Alberta Land Stewardship Act* (“*ALSA*”) enables regional land-use planning in Alberta. These regional plans, once approved, are binding on everyone (and every government) within a region. Where a decision is made by government it must be made in compliance with the regional plan.

The approach taken in *ALSA* is to limit the creation of new appeal mechanisms in relation to determining compliance with regional plans. Testing compliance with regional plans relies on existing hearing mechanisms and as such has the concurrent limitations of standing and statutory appeals. Where no appeal mechanism exists there is the ability to complain to the land use secretariat.<sup>75</sup>

In addition, *ALSA* includes a comprehensive and thorough privative clause that aims to limit a court’s review of decisions and compliance with *ALSA* and the regional plan.<sup>76</sup>

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<sup>73</sup> *Supra* note 42 at s.8(3).

<sup>74</sup> *Ibid.* at s.31.

<sup>75</sup> *Supra* note 43 at s.62.

<sup>76</sup> *Ibid.* at s.15(3).

A separate system of review and consideration is provided in the Act where compensation is deemed payable pursuant to the regional plan.<sup>77</sup> A title holder seeking compensation may use the Land Compensation Board or elect to go directly to the Alberta Court of Queen’s Bench to resolve disputes.<sup>78</sup> Statutory appeals of Compensation Board decision can only be appealed to the Alberta Court of Appeal on questions of law or fact, or both.<sup>79</sup>

### **(viii) Responsible Energy Development Act**

The *Responsible Energy Development Act* (“REDA”) established the Alberta Energy Regulator (“AER”) as the province’s single regulator of “energy resource activity” (excluding hydro), whether that is coal, gas, or oil.<sup>80</sup> The AER is responsible for regulating energy resource developments, from initial application approval to reclamation, including enforcing environmental and water laws as they relate to permits for energy developments. For energy resource activities the AER administers the majority of the provisions under the *Public Lands Act*, *EPEA*, *Water Act*, and Part 8 of the *Mines and Minerals Act* (referred to as “specified enactments”).

*REDA* sets out two types of statutory review mechanisms that may lead to hearings: energy resource applications and regulatory appeals.<sup>81</sup> The statute itself indicates that hearings are discretionary, although this is altered by regulation for instances where regulatory appeals are not otherwise resolved.<sup>82</sup> Hearings are conducted by hearing commissions.<sup>83</sup>

Where there is an application before the Regulator, the Regulator may decide to conduct a hearing where there is a statement of concern received from a directly and adversely affected party. In

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<sup>77</sup> *Ibid.* at ss. 19 & 19.1. It should be noted that where an application for compensation must be made within 1 year of the approval of the regional plan.

<sup>78</sup> *Ibid.* at s.41.

<sup>79</sup> *Ibid.* at s.42(2).

<sup>80</sup> *Supra* note 44 at s.1(j)

<sup>81</sup> *Ibid.* at part 2 of *REDA*.

<sup>82</sup> See the *Responsible Energy Development Act General Regulation*, Alta Reg. 90/2013 at s. 4.

<sup>83</sup> *Ibid.* at s.12.

addition, directly and adversely affected parties may request a regulatory appeal to be conducted by the Regulator.<sup>84</sup> A regulatory appeal may or may not lead to a hearing.<sup>85</sup>

## Judicial Review

Judicial review is the way in which courts supervise the actions of government and their agencies, including anyone who exercises public authority (e.g. boards, tribunals, directors, etc.). A court will hear a judicial review application where it is satisfied that the applicant has standing.<sup>86</sup>

A judicial review is an inherent power and function of Canadian superior courts as a mechanism to ensure that Canada's government, agencies, and other delegates do not overstep their legal authority.<sup>87</sup> Ultimately, judicial review is done to "ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."<sup>88</sup> Even if it's found that a decision-maker made an error (i.e. you are legally correct), the court has the discretion to refuse or grant a remedy you seek in various circumstances.<sup>89</sup>

Ultimately, although judicial reviews in Canada are used to resolve a large number of diverse issues, they can be categorized into two broad groups: (1) judicial review of administrative acts and (2) judicial review of the constitutionality of legislation.

Judicial review of administrative acts involves a court's review of actions or decisions made by government, its employees and agents, pursuant to an enabling statute. If a person or entity believes that a certain governmental/public authority (i.e. an administrative body, tribunal, etc.) has exercised its power in a way that was not enabled by the overarching statute or where the decision or action appears to be arbitrary, discriminatory, or otherwise unreasonable, they can file an application at the

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<sup>84</sup> *Ibid* at ss. 36-38.

<sup>85</sup> *Ibid* at s. 40.

<sup>86</sup> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 1992 CanLII 116 (SCC).

<sup>87</sup> *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII), at para 28.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Supra* note 6 at pg 596.

Alberta Court of Queen's Bench for judicial review of that administrative decision. If the judicial review finds in favour of the applicant, the court can issue a variety of remedies, but will typically nullify that administrative decision (i.e. issue an order of certiorari) and send the matter back to the decision maker.

When a public authority (e.g. Alberta's Environmental Appeals Board) exceeds its jurisdiction, it is said to act *ultra vires* (beyond its scope of power).<sup>90</sup> Once a decision is found to be *ultra vires*, it is declared null and void and has no legal weight or effect.<sup>91</sup>

When a court reviews a decision, it applies a "standard of review", which will determine how much the court will defer to the decision made by the administrative decision maker. For questions of how a law is interpreted the courts will generally defer to the decision-maker less than on other questions. The determination and consequence of the "standard of review" is a complicated area of the law but it is important to note that, for environmental matters, courts have been very deferential about tribunal decisions, perhaps excessively so.<sup>92</sup> While specialized environmental tribunals are well placed to apply facts and deserve deference in coming to substantive decisions judicial oversight remains relevant to ensure that legislative purposes and administration of our laws is reflective of legislative intent.

Judicial review may also be used to determine the constitutionality of legislation. This allows courts to ensure legislative branches of government are complying with the Canadian *Constitution* in the laws that they pass.<sup>93</sup> Both the provincial and federal governments can only pass legislation dealing with the subjects for which they are granted jurisdiction under sections 91 and 92 of the *Constitution*. While sometimes this is clear whether laws are "constitutional" it is often not, as jurisdiction in some areas, the environment being a prime example, are not set out in the *Constitution*. Laws may also be found

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<sup>90</sup> *Ibid.* at 6.

<sup>91</sup> *Ibid.* at 7-8.

<sup>92</sup> See for example Martin Olszynski and Meinhard Doelle, "Ontario Power Generation Inc. v Greenpeace Canada: Form over Substance Leads to a "Low Threshold" for Federal Environmental Assessment", September 22, 2015, online: ABLawg.ca <https://ablawg.ca/2015/09/22/ontario-power-generation-inc-v-greenpeace-canada-form-over-substance-leads-to-a-low-threshold-for-federal-environmental-assessment>.

<sup>93</sup> *Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3 (U.K.)*, reprinted in RSC 1985, App. II, No. 5. online: Government of Canada <http://laws-lois.justice.gc.ca/eng/const/FullText.html>.

unconstitutional if they violate other aspects of the *Constitution*, such as the *Canadian Charter of Rights and Freedoms*.

## Remedies available through appeals and judicial review

A legal 'remedy' is the means by which the violation of a statutory right is redressed or compensated (or in rare cases prevented). The remedies available to an appellant following a successful appeal, and the remedies available following a successful judicial review, are different.

Remedies on appeal to a tribunal are codified in statute, typically the statute that authorized the right of appeal itself.<sup>94</sup> Therefore, if a remedy for appeal is not specifically listed then it is not available. For appeals before environmental tribunals in Alberta the focus is generally on altering or cancelling an authorization or advising the Minister to do the same.

A subsequent appeal to the courts on questions of law and jurisdiction will give rise to a more limited number of remedies (set out below). These remedies are typically codified (either in the enabling statute or in the *Alberta Rules of Court*). If the court finds that the tribunal was correct (or reasonable) in its interpretation of law and acted within its jurisdiction then the tribunal decision will not be changed.<sup>95</sup>

The remedies that can be granted are typically at the discretion of the court conducting the judicial review, both under appeal and judicial review.

Remedies on a statutory appeal are typically outlined in a given statute. For example, the *Responsible Energy Development Act* states that the Court of Appeal "shall proceed to confirm, vacate or give

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<sup>94</sup> *Ibid.* at 595.

<sup>95</sup> The determination of whether a decision maker, such as a tribunal, needs to be correct in their interpretation of the law, or simply reasonable in their interpretation, is referred to as the standard of review. The determination of a given standard that will be applied in given circumstances involves a court analyzing a variety of factors. Generally, environmental tribunals are granted significant deference and the standard of review is typically that of "reasonableness".

direction to vary the decision that is being appealed” and the matter is sent back to the Regulator for reconsideration.<sup>96</sup>

The remedies granted in judicial review are referred to as ‘Prerogative Remedies’ and are codified in the Alberta *Rules of Court*. These remedies include orders in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeus corpus* (i.e. the prerogative remedies or remedies arising from the inherent powers of the superior court), and declarations or injunctions.<sup>97</sup> The most relevant remedies in the environmental law context are described below, including the most likely remedy of *certiorari*.

(i) ***Certiorari***: A remedy used by a superior court to quash an order or decision of a lower court (or administrative body/tribunal) when a decision made outside proper jurisdiction.<sup>98</sup> A writ of *certiorari* is reactive because it can only be ordered after the original decision or order is made. Similarly, a preliminary decision by a board, tribunal and so forth is generally not reviewable by a court, and thus a writ of *certiorari* could not be issued -- only a final decision is reviewable and subject to this remedy.<sup>99</sup> A writ of *certiorari* and a writ of prohibition are used exclusively to control the exercise of statutory authority, and thus are confined to public law and public bodies (e.g. judicial and administrative decisions). They play no part in private law (e.g. contractual rights). Therefore, they cannot be used to compel compliance with a private right.<sup>100</sup>

(ii) ***Mandamus***: Latin for “we command,”<sup>101</sup> is an order issued by a court to compel a public officer, lower court, decision maker, board, tribunal, etc. to perform a specific public legal duty (i.e. a duty that is expressed in statute and owed to an applicant).<sup>102</sup> A court may first issue a writ of *certiorari* to quash a decision, and then issue a writ of *mandamus* to compel that same body to once again conduct the decision, but to do it legally. *Mandamus* is sought as a remedy because

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<sup>96</sup> See *REDA*, *supra* note 44 at s.45(7).

<sup>97</sup> Alberta *Rules of Court*, AR 124/2010 as amended at s.3.15.

<sup>98</sup> *Supra* note 6 at 638.

<sup>99</sup> *Ibid* at 640.

<sup>100</sup> *Ibid* at 640-61.

<sup>101</sup> *Supra* note 1 at 1049.

<sup>102</sup> *Supra* note 6 at 642-643.



the government/decision maker is refusing to do something, and failure to obey a writ of *mandamus* may result in contempt of court.<sup>103</sup> Like with *certiorari* and prohibition, *mandamus* is a discretionary remedy.<sup>104</sup> To get an order of *mandamus* an applicant must satisfy certain conditions. This test for *mandamus* is set out in in the 1993 Federal Court of Appeal decision *Apotex Inc. v. Canada (Attorney General)*.<sup>105</sup>

**(iii) Declaration:** Also known as a 'Declaratory Judgment', is a "judgment of a court of law which determines the legal position of the parties [involved in a proceeding] or the law applicable to them."<sup>106</sup> Unlike the other remedies listed in this module, a declaration neither prohibits nor compels, and so there is "no penalty or sanction to be imposed on a [party] for failing to act on the declaration."<sup>107</sup>

Instead, a declaration has two general purposes. First, a declaration is recognition by a court that a public body has acted beyond the scope of their empowering statutes. Second, it is used to declare the rights of a plaintiff within a proceeding.<sup>108</sup> Ultimately, declarations are used as a "supervisory remedy in administrative law to challenge the legality of legislative or administrative action."<sup>109</sup> However, on its own a declaration is not generally enough to get anything done. A person usually applies for a declaration along with an application for *certiorari* or prohibition to bolster their case.<sup>110</sup>

**(iv) Injunction:** An injunction can be defined as "a court order commanding or preventing an action."<sup>111</sup> Injunctions are an established discretionary remedy in public law proceedings.<sup>112</sup> In

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<sup>103</sup> *Ibid.* at 643.

<sup>104</sup> *Ibid.* at 596.

<sup>105</sup> *Apotex Inc. v. Canada (Attorney General)*, 1993 CanLII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

<sup>106</sup> *Supra* note 6 at 755.

<sup>107</sup> *Ibid.* at 755.

<sup>108</sup> *Ibid.* at 756.

<sup>109</sup> *Ibid.* at 757.

<sup>110</sup> *Ibid.* at 757.

<sup>111</sup> *Supra* note 1 at 855.

<sup>112</sup> *Supra* note 6 at 728.

public law settings injunctions have been established as a useful remedy against “*ultra vires* acts or omissions of public authorities.”<sup>113</sup> *Ultra vires* means “beyond the powers of,” so an injunction is used to remedy acts or omissions of public law authorities that go beyond what they are legally permitted to do.<sup>114</sup> For example, a person might seek an injunction to directly challenge the legality of an order or regulation issued by a public body that infringes on their rights.<sup>115</sup>

An application for an injunction can be included in an application for judicial review as well in a combination with prerogative remedies.

**(v) Stay of Proceedings:** Also known as a ‘Stay’, this is the postponement or halting of a proceeding, judgement, or the like.<sup>116</sup> It is an order made by an adjudicating body (e.g. judge, tribunal, appeals board, etc.) to suspend all or part of a judicial proceeding, or a judgement resulting from that proceeding (e.g. an environmental enforcement order), pending the outcome of further judicial review or an appeal. In the context of a stay application, an ‘interim’ or ‘temporary’ stay is granted and only exists until the original stay application is either formally granted or rejected by the court after they have considered all the submissions provided by all parties involved.

If requesting a stay in court, section 752.15(1) of Alberta’s *Rules of Court* states that “[u]nless otherwise provided by statute, the court may, if in its opinion it is necessary for the purpose of preserving the position of the applicant, stay the operation of the decision sought to be set aside pending final determination of the application for judicial review.”<sup>117</sup>

However, while the granting of a stay in court is discretionary, administrative bodies like the Environmental Appeals Board (“EAB”) are empowered by specific statutes and sometimes have

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<sup>113</sup> *Ibid.* at 728.

<sup>114</sup> *Supra* note 1 at 1662.

<sup>115</sup> *Supra* note 6 at 728.

<sup>116</sup> *Supra* note 1 at 1548.

<sup>117</sup> *Supra* note 86 at s. 752.15(1).

differing tests for if or when a stay can be granted. Therefore, before applying for a stay it is important to know what requirements a board or tribunal may have.

**(vi) Damages and monetary awards against government:** Where governmental action (by a public authority or official) is not lawfully authorized, or has resulted in a tortious act or omission (e.g. trespass, negligence, etc.) causing loss or injury, the acting public authority/body can be found liable for damages.<sup>118</sup> Although public authorities can be held responsible in much the same way as a private citizen or entity would be, a “public officer or authority may [also] be held liable in damages in situations where a private citizen could not” (e.g. abuse of power, violating an individual’s rights and freedoms, etc.).<sup>119</sup>

The ability to obtain damages is often limited by the statutes themselves, as they provide government officials, agents and officers with broadly framed immunity. For example, section 27 of the REDA states that:

No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment.

Someone seeking damages against a public body needs to file a private lawsuit asserting an actionable harm. Damages are not available through judicial review.<sup>120</sup> When pursuing a claim against a public body, regardless of what remedy (or remedies) a person or entity is seeking, if they also seek compensation in the form of damages, they must do so separately from any applications for judicial review.

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<sup>118</sup> *Supra* note 6 at 669.

<sup>119</sup> *Ibid.* at 669.

<sup>120</sup> *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 SCR 585, 2010 SCC 62 (CanLII), at headnote.

## The right to hearing (or be heard) in Alberta evaluated

Alberta has a relatively robust system of access to justice and independent adjudicators in relation to environmental matters so long as one has standing to bring an appeal or to participate in the original authorization decision. The standing limitations for participation are significant with a tendency to only grant standing where there is an economic impact or the potential for direct impacts on human health. Where one has standing to bring an appeal, a hearing may be discretionary in some cases, whereas in others, there is a more clearly defined right to a hearing, such as with the Natural Resources Conservation Board. In addition, barriers exist to holding hearings for environmental outcomes in instances where:

1. Few if any parties are “directly effected” due to location and nature of the impacts, as they may occur on public land or relate to more general impacts on public resources, such as wildlife or water; and
2. Decisions that do not meet the “threshold” of risk to trigger a hearing resulting in the potential from harm of lesser regulated activities (e.g. registration activities under the *Environmental Protection and Enhancement Act*) or impacts resulting from cumulative effects.

In addition, while judicial review provides an option for having decisions on public land or public resources reviewed by the courts, this process is unlikely to lead to a substantive review of government decisions and alignment with legislative and policy objectives as the courts remain deferential to environmental and resource related boards and tribunals.

The ELC has highlighted some of these areas and recommended reforms in the report: [A Road Map to Environmental Rights in Alberta: Rights for a Sustainable Future](#).

## CONCLUSION

Ultimately, access to justice is about how Canadians interact with the laws and legal systems that oversee their everyday life. A part of Canada's federal and provincial laws, as well as legal systems, are the significant rights, rules, and regulations that deal with our natural environment. If someone is damaging the environment or infringing on any of your rights, be it the government, private companies or other citizens, it is important to know how you might best legally respond. Every Canadian should have a basic understanding of how access to justice functions, including how to obtain standing, how to appeal a decision, how judicial reviews are conducted, what remedies are available, the financial costs of pursuing legal action, as well as the procedural rights that are afforded to you.