

ENVIRONMENTAL RIGHTS IN ALBERTA:

Module 1: Substantive Environmental Rights

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



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Executive Summary

Legal rights related to environmental matters are typically focused on providing procedural rights to those potentially affected by government or third party decisions that have resulting impacts on the environment. In contrast, a substantive environmental right refers to a legally entrenched right to a specific environmental condition. Typically this environmental condition is characterized as “healthy”, “healthful” or “clean”. Defining these terms may be done in our statutes and regulations or it may be left for the courts to decide.

Substantive environmental rights are not overly common and there are no rights to environmental quality in Alberta or Canada for that matter. This environmental rights module canvasses some of key questions related to substantive environmental rights and identifies some approaches taken elsewhere.

Some of the central questions for defining a substantive right include:

1. Who defines it and what is the process for reaching a definition?
2. Who has the ability to uphold the right? Is it limited to individuals or is there a broader public right to environmental quality?
3. Does the right protect nature? If so who speaks for nature’s rights?
4. Who decides if the right has been infringed?
5. What process should be used to determine who has infringed a right?
6. What remedies are available for an infringement?

This report is intended to frame future discussion about how Alberta might adopt a substantive environmental right.

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SUBSTANTIVE ENVIRONMENTAL RIGHTS

What is a substantive environmental right?

When we talk about environmental rights we are generally talking about procedural rights you have under the law. These procedural rights may include the right to appeal a decision that may impact on the environment, the right to access information about the activity, and the right to access a tribunal or the courts. Whether a given procedural right exists varies in the circumstances and, in Alberta, depends on the nature of the activity (and its governing laws and regulations). Procedural rights may be codified, in laws and regulations, or they may arise through the common law.

Substantive environment rights on the other hand relate to right to a specific environmental condition. Typically this environmental condition is characterized as “healthy”, “healthful” or “clean”. Defining these terms may be done in our statutes and regulations or it may be left for the courts to decide.

Why express a substantive right?

The purpose of expressing a substantive environmental right is to ensure human health and quality of life by creating rights which preserve the integrity of the environment. Practically speaking a substantive right is aimed at limiting decisions of government and other polluters that will cause environmental degradation.

There are various reasons to express a substantive environmental right. David Boyd, a leading scholar on environmental rights, enumerates various poignant reasons to express a substantive environmental right in *The Right to a Healthy Environment: Revitalizing Canada’s Constitution*, including: ¹

- Impetus for stronger environmental laws;
- Providing a safety net;
- Preventing environmental rollbacks;
- Fostering accountability; and
- Fostering environmental justice.

¹ David Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012). See also David Boyd, *Cleaner, Greener, Healthier: a Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC press, 2015).

A substantive environment right may be viewed as both positive and negative in nature.² An environmental right may be used to prohibit decisions that degrade the environment or it may be used to demand action by government or a third party to address activities or decisions which may result in harm. Typically our laws create an environmental regulatory system where high risk activities receive more oversight, with the aim of mitigating negative environmental impacts, and, theoretically at least, refusing to permit activities with “unacceptable” impacts on the environment.

It is important to be aware that a substantive environmental right acts as a counter weight to arguments of the economic and social necessity to undertake activities that degrade the environment. In this way environmental rights may have direct implications for social and economic outcomes. It is also important to be aware that substantive environmental outcomes may be, at times, conflicting.³ Environmental benefits will be viewed differently from different perspectives. An example of this potential conflict is the variable environmental impacts of how we generate energy, whether it is nuclear, coal, natural gas, or wind.

What is a “clean” or “healthy” environment?

What is meant by the terms “clean”, “healthy” or “healthful” when discussing environmental quality and environmental rights? The process of defining what is clean or healthy is fraught with difficulty due to a variety of issues including:

- Variable dilution capacity or carrying capacity of the environment through time and medium;
- Complexity and uncertain epidemiological evidence of health impairment and linkages with environmental impairment; and
- Uncertainty and inefficiency in establishing causative links between specific activities and environmental degradation (relative to natural and cumulative impacts).

In describing the minimum content of a substantive environmental right Elaine Hughes and David Iyalomhe note that, at a minimum “environmental rights must include...the right to a level of environmental quality which will ensure the survival of humanity”.⁴ Hughes and Iyalomhe further note

² *Ibid.*

³ See for instance, Brucy Pardy, “A Right to Clean Air: Constitutional protection for the environment may leave people out of luck”, *Literary Review of Canada*, online: *Literary Review of Canada* <<http://reviewcanada.ca/magazine/2012/03/a-right-to-clean-air/>>.

⁴ “Substantive Environmental Rights in Canada” (1998/99) *Ottawa Law Review* 30:2 at 235.

that this in turn requires resources of a quantity and quality to ensure survival at relevant temporal scales.⁵

It is perhaps easier to first define what a “healthy” or “clean” environment is not. It is not a pristine environment nor is it a fully benign one, which would be premised on the notion that we can extract humans and their impacts fully from the environment or that we could eliminate all natural and anthropogenic causes of environmental harm and degradation.

On an international scale, David Boyd observes that ninety four countries include a substantive right to a healthy environment in their constitutions.⁶ Boyd notes sixty four of these countries identify a right to a healthy environment or an environment that doesn’t cause harm to human health.⁷ Twenty three also recognize some level of right to a broader “ecologically balanced environment”⁸ while others use a variety of terminology related to the nature of the environmental quality (including, “clean”, “safe”, “sustainable”, “good”, “unpolluted” and others).⁹

The importance of precaution in determining a “healthy environment”

In defining what is a healthy environment it is important to use a precautionary approach. This is due to the fact that there is often significant uncertainty in what air quality or water quality remains “healthy”. This means that in defining a “healthy environment” we must strive to protect the environmental quality of the most vulnerable of our society (e.g., infants, pregnant women, elderly) and that the right be equitably applied.

How should the right be defined and by whom?

Another aspect of substantive environmental rights is the process, forum and people involved in formulating what is to be deemed “clean” or “healthy”. Clearly science and scientists will always contribute to the definition but otherwise the mechanism for articulating environmental standards has implications for a substantive environmental right.

⁵ *Ibid.*

⁶ *Supra* note 1 *The Right to a Healthy Environment*.

⁷ *Ibid.* at p.76.

⁸ *Ibid.*

⁹ *Ibid.*

The ELC's standing assumption is that substantive environmental rights must be grounded in science. From there the process for defining a "healthy environment" may take various paths, including:

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

Alternatively, a hybrid of these approaches could be used to determine the appropriate standard of environment quality. In any event the approach to the determination of a substantive right is relevant to what the right will end up protecting (and conversely which polluting activities will be allowed). Typically balancing a scientific approach with economic and social needs will guide such a determination. Unfortunately this can lead to environmental justice concerns for marginalized communities.

Relying on a court or judge's determination of the level of environmental quality allows for greater flexibility in how we approach environmental quality and the balance of other rights that may arise as part of the determination. This approach is favorable as it depoliticizes the definition process but it burdens the court with often complex scientific determinations that it may be ill equipped to undertake and are often mired in competing experts' views. Courts may also feel that the issues of environmental protection should be dealt with through policy rather than law.¹⁰

¹⁰ See David Boyd, *supra* note 1, discussion critiques of the right for concept being non-justiciable at pages 29-31. See also Dinah L. Shelton, "Developing Substantive Environmental Rights" (2010) *Journal of Human Rights and the Environment* 1:1, online: the George Washington University Law School Scholarly Commons <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2049&context=faculty_publications>. See also Mary Ellen Cusack "Judicial Interpretation of State Constitutional Rights to a Healthful Environment" *Boston College Env. Affairs Law Review* (1993) 20-1, online: Digital Commons @ Boston College Law School <<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1421&context=ealr>> where it is noted that the hesitance to define discretely what a "healthful" environment in some State Constitutions has undermined the notion of the right as courts are deferential and have neglected to fill in gaps or provide a more evident standard (at p. 200-201).

Does a right to a healthy environment include other species?

Often a substantive right to a healthy environment is framed around pollution and its impact on humans. The framing of a healthy environment from this anthropocentric view is inappropriately narrow. As we continue to learn more of the interactions of flora and fauna and functions they serve in the environment it is clear that aspects of biodiversity and ecological integrity may form an important part of environmental rights (not to mention social and economic outcomes as well).

If we do extend environmental rights to other species or biodiversity we must also decide how those rights will be defended and by whom. We often have legislation protecting non-human species, whether through animal welfare legislation (including the Criminal Code) or species at risk legislation. This legislation does not convey rights to other species per se, rather it focuses on regulating human activity which may be found to be contrary to other social and environmental goals of a society.

The rights that may be granted to other species basically encompass the rights we grant to humans, the major difference being they can't represent themselves/itself. To paraphrase the oft cited Christopher Stone article, we could grant trees legal standing to participate in legal processes.¹¹ Some states have begun to do so.¹²

Indeed, it seems like not a far stretch to overlay environmental rights to nature, we need only decide what it should look like. We have "friends of the court" (*amicus curiae*) and some states have considered standing attorneys for animals (we might call it an *amicus animalia et curiae*).¹³ We may consider having standing attorneys for the environment (*amicus environment et curiae*).

Similarly, some legal doctrines, like the public trust doctrine in the United States, may be applied in such a way that allows for the protection of other species or natural spaces.¹⁴

¹¹ Christopher D. Stone "Should Trees have Standing?—toward legal rights for natural objects" (1972) 45 Southern California Law Review 450, online: <http://isites.harvard.edu/fs/docs/icb.topic498371.files/Stone.Trees_Standing.pdf>.

¹² See Dinah Shelton "Nature as a Legal Person", Strasbourg, May 2014, Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme), online: United Nations Environment Program, <http://www.unep.org/delc/Portals/119/documents/montevideo/nature-legal-person.pdf>. See also Boyd at 281-282 (*Cleaner Healthier*) for a brief summary.

¹³ *Ibid.* in Switzerland at 21-22.

¹⁴ See discussion *infra*.

How might a substantive right be legally protected?

For the purposes of this discussion the substantive environmental right would appear in provincial legislation and be supported by relevant procedural rights (as opposed to the right being constitutionally entrenched).¹⁵ Upholding the substantive environmental right would occur through statutory administrative remedies or through court ordered remedies. Court ordered remedies, in the absence of novel common law principles like the public trust doctrine being adopted, will still be statute based.

Who can protect an environmental right?

Substantive environmental rights infringement may be pursued from the perspective of an individual who has suffered harm or as a public right to environmental quality. Asserting that one's substantive environmental rights have been violated typically takes the form of enabling procedures or causes of action against government or third party polluters.

Currently, enforcement of environmental standards relies almost exclusively on state action. Upcoming modules on environmental rights will deal specifically with the ability to pursue actions against government and polluters and the ability to enforce environmental standards as a private citizen. The potential scope of public rights and remedies to address decreases in environmental quality will also be reviewed.

What activities might be subjected to a remedy?

A substantive right, to garner appropriate protection, should approach the environment as it is found and will not discern whether pollution is lawfully permitted or is contrary to statute. As we will see, this is not typically the case as most environmental statutes, including those establishing rights to a healthy environment, typically limit remedies in relation to unlawful (i.e. unauthorized) pollution. That is to say, if the government chooses to make its environment unhealthy that is their prerogative and is a political issue for election day.

This approach unfortunately fails to address environmental justice issues and disenfranchisement of the most environmentally vulnerable populations. It also relies on a level of democratic accountability

¹⁵ The value of putting a substantive environmental right in the Constitution is discussed in Boyd, *supra* note 1.

at a scale that is often at odds with more local environmental degradation. Indeed, this is the reason why a right to a healthy environment in the Constitution holds such appeal as it provides the umbrella of rights that take precedent over environmental harms perpetuated by day to day decisions of the state.¹⁶

How would a substantive environmental right augment our regulation of the environment?

The repercussions of having a substantive environmental right are numerous. It opens a legal avenue to deal with environmental quality as the rights holder finds it (or perhaps more accurately, as it is imposed on the rights holder). As a result of this type of approach a right to environmental rights may impact both currently regulated activities and unregulated activities which result in an infringement of a right.

This in turn means environmental rights may be an appropriate mechanism to address cumulative environmental effects that result from multiple sectors and activities. A substantive environmental right may direct the attention of government and those impacting the environment may be directed (in terms of management and expenditures) to recognize not only their individual impact but themselves as part of the whole.

Table 1 below sets out some potential remedies or responses that would aid in protecting a substantive environmental right.

TABLE 1: REGULATORY RESPONSES TO IMPINGING SUBSTANTIVE ENVIRONMENTAL RIGHTS

TYPE OF ACTIVITY RESULTING IN INFRINGEMENT	POSSIBLE RESPONSES TO MEET SUBSTANTIVE ENVIRONMENTAL QUALITY
Unregulated activities	<ul style="list-style-type: none"> • Regulate the activity directly • Develop policy and programs that mitigate the activities' impacts • Rely on private litigation and court remedies to regulate the

¹⁶ A prime example of the relevance of placing a constitutional right to environmental quality can be found in the case of *Mendoza Beatriz Silva v. National Government of Argentina*, online: Environmental Rights Database https://www.escri-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf. Also see Boyd, *supra* note 1 and John H. Knox *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment*, Human Rights Council, 25th session, online: UN official document system <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/132/62/PDF/G1413262.pdf?OpenElement> > .

	environmental degradation (at common law this requires proof of harm).
Regulated activities (Administration discretion degrades environment)	<ul style="list-style-type: none"> • Codify limits thereby limiting discretion • Enable private initiatives for review of decisions (based on “healthy environment”) • Enable court orders to alter decisions and/or authorizations (mandamus +)
Regulated activities (Standards too low)	<ul style="list-style-type: none"> • Allow private action to confront activities that are authorized • Allow for regular amendments to approve conditions to meet environmental outcomes • Use policy and programs to promote mitigation
Regulated activities (Standards open to amendment or repeal)	<ul style="list-style-type: none"> • Seek adoption of “non-regression” of environmental laws in common law or paramount legislation (constitution)

Does Alberta need substantive environmental rights?

There are numerous environmental standards at play in Alberta law. Alberta’s laws and regulations focus more on targeting higher risk activities and setting conditions on emissions, monitoring and reporting. Some standards do exist for potable water quality and others are being developed through environmental management frameworks (under the regional planning system in the province). None of these regulatory approaches provide current legally enforceable codified rights for prescribed environmental quality.

Further, the standards that do exist are typically derived through a risk based system of managing and mitigating impacts through regulatory conditions (and/or prohibitions). Some activities that carry significant environmental risks may elude regulation all together. Activities are, for the most part, assessed in isolation (or with marginal consideration of cumulative effects). Activities are not currently regulated based on their contribution to meeting or undermining of environmental quality.

The common law does provide some rights to pursue recourse against approved activities where there is proven harm resulting from an activity. These rights of action include claims under various tort actions, including nuisance, trespass and strict liability torts. The effectiveness of the common law to protect environmental quality is undermined by a requirement of proof of harm directly to individuals,

evidentiary barriers related to proof of causation, and a narrow approach to discerning viable plaintiffs.¹⁷

An additional area for consideration is how to engage government for substantive environmental quality where individual harm cannot be proven or where there are issues with legal standing to challenge decisions. A public right to uphold environmental quality is often included in laws which grant environmental rights.

How should Alberta describe a substantive environmental right?

David Boyd proposes that a constitutional right to a healthy environment take the following form:¹⁸

Everyone has the right to live in a healthy and ecologically balanced environment, including clean air, safe water, fertile soil, nutritious food, a stable climate and flourishing biodiversity.

Boyd further proposes framing the right around key environmental law principles such as the precautionary principle, polluter pays, and intergenerational equity.¹⁹

Some examples of currently codified rights and past proposed approaches in Canada are set out below in Table 2. As will be noted many of the rights that are codified are not overly prescriptive in the definition of what is “healthful” or “clean”.

TABLE 2: EXAMPLES OF APPROACHES TO ENVIRONMENTAL RIGHTS

JURISDICTION	SCOPE AND REMEDY REGARDING SUBSTANTIVE ENVIRONMENTAL RIGHTS
Ontario <i>EBR</i> , 1993, ²⁰	<ul style="list-style-type: none"> • Preamble “People of Ontario have a right to a healthful environment”. • Purpose “To protect the right to a healthful environment by the means provided in this Act.” S.2(1)(c) • Focus on vetting decisions of government regarding “proposals” that may have “significant effect” on environment and public participation (s.15) • Provides a right of action in response to a contravention of the act or other regulation that caused or will cause significant harm to a public resource (or to the environment).

¹⁷ Common law tort actions such as nuisance also entail a balancing of considerations (such as the public utility of an activity that causes a nuisance) which may conflict with a given approach of discerning the health of the environment.

¹⁸ *Supra* note 1 at *Cleaner, Green, Healthier* at p. 278.

¹⁹ *Ibid.* at 279.

²⁰ S.O 1993, c. 28, online: Government of Ontario, e-Laws, <https://www.ontario.ca/laws/statute/93e28>

JURISDICTION	SCOPE AND REMEDY REGARDING SUBSTANTIVE ENVIRONMENTAL RIGHTS
	<ul style="list-style-type: none"> No orders against farms & no damages. Enables the review of Acts, regulations and instruments by the Environment Commissioner. (Part IV)
Quebec <i>Environmental Quality Act</i> , CQLR c. Q-2 ²¹	<ul style="list-style-type: none"> “Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided by the Act” and related regulations/authorization. (s.19.1) A judge may grant an injunction against operation which interferes with rights. (s.19.2) A remedy is not available where the interference is from an authorized activity (s.19.7)
NWT and Nunavut <i>Environmental Rights Act</i> ²²	<ul style="list-style-type: none"> Preamble - “the people of the Northwest Territories have the right to a healthy environment and the right to protect the integrity, biological diversity and productivity of ecosystems...” Right to protect the environment and the public interest from the release of contaminants by commencing an action against person responsible for the release (s.6) Authorizations can impact rights. (s.2(2) and s.6(5)(b). Limited where contaminant release is contained to property owned by the defendant or where owner consents to release and where the release does not or will not “materially impair the quality of the environment” Court may grant interim or permanent injunction, order a defendant to remedy any damage caused, or order to pay compensation for loss or damage to a person with an interest in property adversely affected, and the Minister.(s.6(3))
Yukon <i>Environment Act</i> RSY 2002, c.76.	<ul style="list-style-type: none"> Preamble “every individual in the Yukon has the right to a healthful environment” and (s.6. 6) The people of the Yukon have the right to a healthful natural environment. Declaration – public interest to provide every person resident in the Yukon with a remedy adequate to protect the natural environment and the public trusts (s.7) Where reasonable grounds that a “person has impaired or likely to impair the natural environment or the government has failed to meet its responsibility as trustee of the public trust to protect the natural environmental from actual or likely impairment” can comment an action. Right to action (s.8) Defences include authorization, not a “material impairment”, no feasible and

²¹ *Environmental Quality Act*, CQLR c. Q-2, online: Canlii.org <<http://www.canlii.org/en/qc/laws/stat/rsq-c-q-2/latest/rsq-c-q-2.html>>.

²² RSNWT(NU) 1988, c. 83, online: Canlii.org <<http://www.canlii.org/en/nt/laws/stat/rsnwt-1988-c-83-supp/latest/rsnwt-1988-c-83-supp.html>>.

JURISDICTION	SCOPE AND REMEDY REGARDING SUBSTANTIVE ENVIRONMENTAL RIGHTS
	<p>prudent alternative; or remains onsite (residential property) (and is caused or authorized by the person using the property) (s.9)</p> <ul style="list-style-type: none"> • Actions can be commenced for public nuisance and where to pecuniary right exists. (s.10)
<p>Federal tabled bill <i>Canadian Environmental Bill of Rights</i> Bill C-634²³</p>	<ul style="list-style-type: none"> • Every resident of Canada has a right to a healthy and ecologically balanced environment. (s.9) • The Government of Canada has an obligation, within its jurisdiction, to protect the right of every resident of Canada to a healthy and ecologically balanced environment. (s.9(2)) • “healthy and ecologically balanced environment” means an environment of a quality that protects human and cultural dignity, health and well-being and in which essential ecological processes are preserved for their own sake, as well as for the benefit of present and future generations. • Enables “environmental protection action” against Government of Canada for failure to fulfil its duties as trustee of the environment, enforcement failures or violating the right to healthy and ecologically balanced environment (s.17) • Enables civil actions relation to violations of law that result or are likely to result in “significant environmental harm”. (s.18) • Remedies – a variety of remedial orders are enabled to restore, monitor and prevent harms (s.22)
<p>Alberta Bill 1978</p>	<ul style="list-style-type: none"> • Preamble “it is recognized in Alberta as a fundamental principle and as a matter of public policy that the residents of the Province have the right to enjoy a clean environment the loss or impairment of which is a loss or impairment of an interest that should have legal recognition.” • Provides rights to engage the courts for violations of acts and for releases that “destroy” or “significantly decrease the quality of the environment”.
<p>Alberta Bill 1992</p>	<ul style="list-style-type: none"> • The Purpose of this Act is to ensure the health and sustainability of the environment of Alberta and, in particular: ... (b) to recognize the right of the people of Alberta to an environment that is adequate for their health and well-being and sustainable in the future; ... (d) to ensure that the people of Alberta have a right to a healthy and sustainable environment, including clean air, and water, to the conservation of the natural, scenic, historic and aesthetic values of the environment, and the protection of ecosystems and biological diversity. • Right of action exits for activities that have contaminated or degraded (or are likely to) the environment. (s.5). (establishing that an approval or licence has been violated is not required) • “Degradation” means any destruction or significant decrease in the quality of the environment or the public trust therein other than a change resulting from

²³ Bill C-634, 2nd sess., 41st Parliament, 62-63 Elizabeth II, 2013-2014, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6746697>>.

JURISDICTION	SCOPE AND REMEDY REGARDING SUBSTANTIVE ENVIRONMENTAL RIGHTS
	contamination.

In the United States, several states have adopted environmental rights in their state constitutions.²⁴ In a 2011 review of these environmental rights provisions concludes that several trends are evident:

- that courts have “construed rights to the adjectival “quality”, “clean”, or “adequate” environment as inuring to human beings” but does not extend to other species;
- a split in courts as to whether the rights are contingent on legislative implementation;
- standing in state environmental rights cases is easier when compared to federal law; and
- courts generally defer to reasonable state action that may impinge on rights.

CONCLUSION

A substantive environmental right for Alberta is appealing in many regards. Where most legal rights relate to process this right would be outcome oriented. Nevertheless, many questions remain about how a province may choose to implement and protect a substantive right. Some of the key questions include:

1. Defining a “healthy” environment: who defines it and what is the process for reaching a definition?
2. Who has the ability to uphold the right? Is it limited to individuals or is there a broader public right to environmental quality?
3. Does the right protect nature? If so who speaks for nature’s rights?
4. Who decides if the right has been infringed?
5. What process should be used to determine who has infringed a right?
6. What remedies are available for an infringement?

Various approaches have been taken in relation to defining substantive environmental rights. The ELC recommends that the Government of Alberta pursue a process by which these rights may be clearly articulated and integrated into the province’s laws.

²⁴ See James R. May and William Romanowicz “Environmental Rights in State Constitutions” (2011) *Principles of Constitutional Environmental Law* Widener Law School Legal Studies Research Paper No. 11-47.