Human Rights and Resource Development Project

The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis

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Disclaimer

This paper is for informational purposes only. It reviews an area of the law that is novel and far from settled. The legal arguments and information set forth in this paper should not be relied upon as legal advice. In all cases a lawyer should be consulted to determine the best course of action for your particular case.

Foreword

This paper summarizes much of the work undertaken as part of the Human Rights and Resource Development Project from 2001 to the end of July 2006. It is the fifth publication to come from this project, the purpose of which is to explore the relationship between two important areas of law: human rights, as they are protected by law in Alberta, and the legal regime pursuant to which natural resources, such as oil and gas, are developed in the Province.

The two non-profit organizations which have undertaken this Project – the Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law – are dedicated to legal research, publication and education. Thus, we do not take positions regarding the factual controversies which lie behind some of the conflicts over resource development in Alberta. Nevertheless, our work on the Project proceeds from the assumption that those controversies are serious enough that it is crucial for the relevant law on these matters to be as clearly articulated and as widely understood as possible.

This paper was informed by many sources. These include the previous publications from the Project, as well as presentations made at several legal education workshops by the core working group on this Project, namely, Janet Keeping, Linda McKay-Panos, Monique Passelac-Ross, and Nickie Vlavianos. In addition, the insights and comments from other speakers and from the participants at these events were invaluable to the Project, and to this paper. We thank them all for their participation.

We also thank Nickie Vlavianos for drawing upon all of these sources to put this paper together. Nickie would like to thank Ibironke Odumosu and Janelle Brown for their research assistance in the preparation of this paper. She also thanks Janet Keeping, Monique Passelac-Ross, and Linda McKay-Panos for reviewing previous drafts and for their helpful comments.

Lastly, we want to express thanks to our own organizations for supporting our desire to undertake the Human Rights and Resource Development Project and to the Alberta Law Foundation for providing the funds to make it all possible.

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Chapter 1: Introduction

The development of oil and gas has brought, and undoubtedly continues to bring, significant benefits to the Alberta economy. Notwithstanding the benefits, there have always been concerns. For years Albertans faced with oil and gas development on their lands or in their communities have worried about the actual or potential impacts of that development on their health and on their ability to maintain their culture or way of life. Increasingly, these Albertans are starting to express their concerns in new ways. In particular, the language of human rights is sometimes being used. For example, there are claims being made that, in certain circumstances, oil and gas development may infringe upon fundamental human rights – rights, for example, to a clean environment, to breathe clean air, to not be exposed to toxic substances or rights to maintain a culture or way of life.[1]

This paper explores whether human rights law has anything to say about oil and gas development in Alberta. It considers some of the arguments that might be made if some of the actual or potential impacts from oil and gas development to health and ways of life (or culture) were looked at from a human rights perspective. The goal is to explore the possible relationship between two areas of law – human rights law and the law through which oil and gas is developed in Alberta. It is also to show how arguments made on the basis of human rights law might impact the province's oil and gas development process.

The focus throughout this paper is on two particular types of impacts, those affecting human health, and those affecting one's culture or way of life. The latter should not be understood as including only impacts experienced by recognized minority groups (aboriginal peoples, for example), but could capture the ways of life of a farmer or a rancher for instance. This paper asks whether human rights law might be relevant in any way to oil and gas development in Alberta.

The paper is organized as follows. Chapter 2 provides some background on human rights law in Canada and delineates which human rights might be relevant in the context of the protection of health and way of life. Chapter 3 considers whether this law might have any relevance to the first stage in the oil and gas development process in Alberta, the rights disposition stage. Chapter 4 carries out a similar analysis with respect to the environmental impact assessment process for oil and gas operations in the province. In

[1]For examples of human rights arguments being made in the oil and gas context in Alberta, see: EUB Decision 2001-48, *Gulf Canada Resources Limited Applications for Well Licences and Pipelines Vulcan Field* (5 June 2001); *Re: Application Nos. 1070380 & 1071058 Well Licence and Pipelines, Shell Canada Ltd. et al. – Waterton 13-35-5-3 (Carbondale Area)*, Request for a Hearing under s. 29 of the *Energy Resources Conservation Act*, Brief of the Applicants, December 4, 2000; W. Thompson, "Province demands Imperial Oil replace soil", *Calgary Herald* (July 25, 2002); and Transcript of Proceedings before the EUB, *Application by Bonterra Energy Corp. Application No. 1259219* (6 & 7 November 2002).

Chapter 5, a number of issues regarding the approval process are reviewed from a human rights perspective. These include the powers, constitution and independence of Alberta's energy regulator (the Energy and Utilities Board), the tests for standing, for intervener costs, and the public interest test applied by the Board in particular applications. The paper concludes with an appendix that outlines some basic information about the processes through which human rights arguments might arise in the context of oil and gas development in Alberta.

It should be noted that this paper's focus is primarily on traditional human rights law (discussed further in Chapter 2). The word "rights", however, can be used more generally to refer to all claims and remedies that might be available through non-human rights legislation and at common law. In the context of oil and gas development in Alberta, an excellent resource in terms of what Albertans can and cannot do within the current oil and gas development process is the following publication: M. Griffiths *et al*., *When the Oilpatch Comes to Your Backyard, A Citizens' Guide*, 2d ed. (Drayton Valley, AB: Pembina Institute for Appropriate Development, 2004). Alberta's Energy and Utilities Board (the "EUB") also publishes a number of guides and information sheets that describe the current process and available avenues through which affected citizens can express their concerns. These are available through the EUB's website at <http://www.eub.gov.ab.ca>.

It should be highlighted that this paper is not comprehensive. It does not survey all of the possible ways human rights law might impact upon the way oil and gas is currently developed in the province. Rather, the goal is to cover some key points in the current process and to illustrate how human rights law might be relevant to those. Furthermore, even with respect to those points in the process, the paper sets out the possible arguments in brief form only. Further research, analysis, and legal advice would always be required prior to attempting to make such arguments in actual cases.

A final word of caution. As will be evident throughout this paper, the idea of looking at the impacts from resource development on our health and our ways of life from a human rights perspective is very novel. It represents a significant departure from the traditional and current regulatory model where government is given broad discretion to approve projects, and environmental, health and social impacts are mitigated through regulations and conditions of approval. A truly rights-based regime would be one that would recognize clear substantive rights and more extensive procedural rights that would have to be balanced against other legally-recognized interests (property rights, for example). Such a system does not yet exist in Alberta, nor anywhere else in Canada for that matter. Courts and regulators have yet to embrace fully the notion of looking at environmental impacts from a human rights perspective. Moving in this direction is not inevitable, nor will it happen quickly and easily. There are many issues that would have to be overcome before human rights law could inform oil and gas development in a significant way.

Bibliography/Suggested Reading

Alberta Energy and Utilities Board website: <http://www.eub.gov.ab.ca>.

M. Griffiths *et al*., *When the Oilpatch Comes to Your Backyard: A Citizens' Guide*, 2d ed. (Drayton Valley, AB: Pembina Institute for Appropriate Development, 2004).

T. Marr-Laing & C. Severson-Baker, *Beyond Eco-Terrorism: The Deeper Issues Affecting Alberta's Oilpatch* (Drayton Valley, AB: The Pembina Institute for Appropriate Development, 1999).

J. Sax, Defending the Environment: A Strategy for Citizen Action (New York: A. Knopf, 1970).

Chapter 2: What is Human Rights Law?

2.1 Introduction

People use the language of human rights when they believe something is critically important. It is reserved for the most fundamental of issues that somehow speak to the intrinsic worth and dignity of every human being. It is often a statement of what should be – a goal, an ideal to strive for.

As stated by M. Cranston:

> "A human right by definition is a universal moral right, something which all men [*sic*] everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he [*sic*] is human."[2]

But moral rights are not always legal rights. Often it takes time for the law to evolve so as to protect what may be understood to be a moral right held by all human beings. Consequently, whenever it is asserted that a situation or an action infringes on a fundamental human right, a preliminary question must be whether this is a right that is protected in law. If it is recognized in law, then a legal remedy may be available. If it is not, then perhaps it can be used to apply political pressure (for example, to change the law), but no legal remedy will be available.

Once enshrined in law, human rights need to be balanced alongside competing interests. Typically, no right is ever absolute. Nonetheless, in some cases, the existence of a human right may shift an existing balance towards protection of the right involved. There are circumstances where the existence of a right may preclude any balancing of interests. In other words, there are situations where a fundamental human right will prevent the will of the majority from overriding the interests of a particular individual (or minority group) even where this would serve a broad public interest or provide some general public benefit.

There is, as well, the possibility that in arguing successfully for recognition of a human right, an individual or minority group might bring about a benefit for the entire community. In arguing for a right to be free from noxious substances and thus for a higher standard for emissions, for example, a minority group (say, the farmers and ranchers of one region of the province) would be bringing about a benefit to the health and safety of all Albertans. Throughout history, human rights activists have often brought about advances that have benefited all of us.

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[2] M. Cranston, *What are Human Rights?* (London: Bodley Head, 1973) at 36.

Bibliography/Suggested Reading

M. Cranston, *What are Human Rights?* (London: Bodley Head, 1973).

R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard Univ. Press, 1978).

B. Orend, *Human Rights: Concept and Context* (Peterborough, ON: Broadview Press, 2002).

2.2 Types of Human Rights Law in Canada

Human rights law in Canada is found in a number of different sources. It includes both domestic and international law. First, there are provincial and federal human rights statutes that, for the most part, protect against discrimination on certain grounds in a number of specific areas (for example, employment, tenancy, and the provision of public services). In Alberta, the relevant statute is the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14. In the context of health or cultural impacts from oil and gas development, however, these statutes have little, if any, application.

By far the most significant domestic source of human rights law in Canada is the *Canadian Charter of Rights and Freedoms* (the *Charter*), passed in 1982. As part of the Constitution of Canada, the *Charter* invalidates any law that is inconsistent with its terms. According to the *Charter*, actions and decisions taken by government must not violate the rights and freedoms it guarantees.

Another main source of human rights law is international human rights law. International human rights law consists of both conventional international law (conventions, treaties, etc.) as well as customary international law (principles or rules that the majority of countries have accepted as law through long-term practice). Along with these sources of legally-binding principles, there is another category of international law, called "soft" law, that is becoming increasingly important, especially in the human rights and environment areas. Soft law is "soft" because it is not (yet) intended by states to be legally binding, but it can over time solidify through practice and acceptance into legally-binding international law. Primary sources of soft law include declarations and guidelines of the United Nations and other international organizations, such as the U.N. Human Rights Committee.

International human rights law may apply in Canada in its own right. Or, perhaps more importantly, it may be used by Canadian courts to assist them in interpreting the rights and freedoms guaranteed by the *Charter*. Furthermore, even when a principle has not yet reached the status of international law *per se*, courts may find it persuasive or look to it for guidance in their interpretation of Canadian law, including the *Charter*. Lastly, when faced with novel situations and arguments, Canadian courts often consider

approaches taken by other countries, or other regions of the world, even if these approaches have not yet been enshrined in international law.

Bibliography/Suggested Reading

Alberta Civil Liberties Research Centre, *Volume III: Background to International Human Rights Law* (Calgary: Alberta Civil Liberties Research Centre, University of Calgary, 1997).

A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992).

H. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000).

L. McKay-Panos, *How Human Rights Laws Work in Alberta and Canada*, Human Rights Paper No. 2 (Calgary: Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law, 2005).

W. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Toronto: Carswell, 1996).

2.3 Relevant Human Rights in Relation to Health and Cultural Impacts

People around the world are becoming increasingly aware that the environmental effects of industrial development can impact human health. Some of the concerns include health impacts due to air pollution, water pollution, and soil contamination. Given the prominence of oil and gas development in Alberta, it is logical that Albertans would be concerned about the possible and actual health effects of this development.

A number of scholars have looked at health effects due to environmental pollution from a human rights perspective. They have argued for the development and recognition of a number of different rights that might provide some legal redress. First, there are positive rights such as a right to health, a right to clean air, a right to clean water, or a right to a safe or healthy environment. Second, such rights could be stated more negatively, such as a right to be free from exposure to toxic or harmful substances, or a right not to breathe contaminated air.

Along with health concerns, there is evidence that Albertans are worried that the increasing pace and intensity of oil and gas development in the province will prevent them from maintaining their ways of life as, for example, ranchers or farmers. Such a situation could arise because of health impacts, or it could result from intensive development that disturbs the land to such an extent thereby impeding activities, such as farming and ranching, that depend on the land. Some of the possible human rights being advocated in this regard include rights to maintain a way of life, or a culture, or a right to a livelihood.

This part of the paper will consider what Canadian human rights law has to say about health and cultural impacts from industrial activities that affect the environment. In short, does Canadian human rights law, as it currently stands, provide any protection for people who feel that their health or way of life is in jeopardy because of the environmental impacts of industrial development?

Bibliography/Suggested Reading

T. Marr-Laing & C. Severson-Baker, *Beyond Eco-Terrorism: The Deeper Issues Affecting Alberta's Oilpatch* (Drayton Valley, AB: The Pembina Institute for Appropriate Development, 1999).

A. Nikiforuk, "High on Grass" (November 2003) *Avenue Magazine*.

N. Vlavianos, *Albertans' Concerns about Health Impacts and Oil and Gas Development: A Summary* (Calgary: Alberta Civil Liberties Research Centre and Canadian Institute of Resources Law, 2006).

2.3.1 Health Impacts and Human Rights Law

The most likely place to look for health protection from environmental impacts in Canadian human rights law is the *Charter*. Although some provinces have enacted legislation that grants certain rights in relation to the environment, numerous scholars have criticized such legislation for failing to guarantee effective substantive environmental rights. Moreover, a number of provinces, including Alberta, do not have such legislation, commonly-referred to as environmental bills of rights.[3]

The *Canadian Charter of Rights and Freedoms* guarantees certain rights and freedoms to all Canadians and protects individuals from laws and actions or decisions of the government that infringe upon those rights. On its face, the *Charter* does not explicitly grant any rights that directly address human health concerns arising from environmental impacts. There are, for instance, no explicit rights to health, clean air, clean water, or, more broadly, a clean or healthy environment in the Canadian constitution; nor is there any type of more negative right such as a right not to be exposed to toxic or harmful substances.

[3]For examples of statutory "environmental bills of rights", see: Ontario's *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, and the Yukon's *Environment Act*, R.S.Y. 2002, c. 76. For critiques of these statutes, see: E. Hughes & D. Iyalomhe, "Substantive Environmental Rights in Canada" (1998-99) 30:2 Ottawa L. Rev. 229; M. Winfield, G. Ford & G. Crann, *Achieving the Holy Grail? A Legal and Political Analysis of Ontario's Environmental Bill of Rights* (Toronto: C.I.E.L.A.P. 1995); and S. Levy-Diener, *The Environmental Bill of Rights Approach under the Ontario Environmental Bill of Rights: Survey, Critique, and Proposals for Reform* (LL.M. Thesis, University of Toronto, 1997).

The absence of any such explicit right does not, however, mean that it does not exist within the provisions of the *Charter*. Such rights could be there implicitly. In particular, the language of and case law on section 7 of the *Charter* suggest that a right protecting human health from adverse environmental conditions may be implicit within that provision. To a lesser extent, section 15 may have some relevance as well. Both are considered below.

Unlike the *Charter*, the constitutions of a number of other countries contain rights that directly address environmental impacts. For example, the Constitution of France guarantees everyone a "right to live in a balanced, healthy environment". Although the effectiveness of such constitutional guarantees may be in doubt in some countries, in others they have given rise to enforceable legal remedies. For example, in 2004, the Costa Rican Supreme Court used the country's constitutional guarantee of a "healthy and ecologically balanced environment" to hold customs officials responsible for not acting against fishing vessels that were using local ports to ship shark fins. Fishers slice off the fins to make shark-fin soup, a practice that is damaging the predator's populations and endangering the balance of aquatic ecosystems.[4]

Bibliography/Suggested Reading

A. Boyle & M. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996).

T. Shorn, "Drinkable Water and Breathable Air: A Livable Environment as a Human Right" (2000) Great Plains Nat. Res. J. 121.

J. Swaigen & R. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981).

2.3.1.1 The Canadian Charter of Rights and Freedoms – General

The *Charter* does not apply to the actions of private entities, such as privately-owned oil and gas companies. A law, action or decision of the government (which includes regulatory agencies such as Alberta's Energy and Utilities Board) must be involved before a claim based on the *Charter* can be made.

According to section 52 of the Constitution of Canada, any law that is inconsistent with the *Charter* is invalid and of no force or effect. Subsection 24(1) of the *Charter* also allows a court to grant any remedy it considers appropriate in circumstances where there

[4]As cited in M.G. Diaz, "High Court Rules on Shark Finning Case" [Costa Rica] *Tico Times* (17 February 2006), online: <http://www.flmnh.ufl.edu/fish/sharks/innews/court2006.html>.

has been a breach of a *Charter* right. These remedies can include a declaration that the governmental order or decision is invalid, or an award of damages.

Moreover, it is possible to obtain a remedy in anticipation of a *Charter* violation under subsection 24(1). An applicant requesting a remedy for a prospective breach must at least be able to establish a threat of violation, if not an actual violation, of a right under the *Charter*. The standard is proof of "probable future harm".[5]

Bibliography/Suggested Reading

P.W. Hogg, *Constitutional Law of Canada*, 2004 Student Ed. (Peterborough: Thomson Carswell, 2004).

J. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials* (Toronto: Juriliber, 2001).

R.J. Sharpe, K. Swinton & K. Roach, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2002).

2.3.1.2 The Canadian Charter of Rights and Freedoms – Section 7

Section 7 of the *Charter* states that:

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

Like all *Charter* rights, section 7 comes into play when a law, or governmental action or decision interferes with the rights it guarantees.

Although the language of section 7 of the *Charter* is broad, its scope is not unlimited. For example, courts have held that property rights and economic interests are not protected by section 7. As for environmental rights, numerous scholars have argued that because clean air, water and a clean environment are so fundamental to life, liberty and security of the person, such rights must necessarily be implied within section 7. The same could certainly be said about health.

To date, Canadian courts have not yet definitively decided whether (and what) substantive environmental rights are protected by section 7. A number of cases have hinted that human health impacts from environmental causes might be covered by this provision. In *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*,[6]

[5]See: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; and *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441.

[6](1993) 108 D.L.R. (4th) 145 (N.S.C.A.), leave to appeal to S.C.C. denied: [1999] 1 S.C.R. vii.

for example, the court said it was prepared to take seriously a claim that a threat to human health posed by the operation of a waste incinerator could be treated as a violation of section 7. The circumstances of the case were not, however, quite right for the court to decide the *Charter* issue. In its view, because an environmental impact assessment on the incinerator had yet to been completed, the *Charter* claim was not yet ripe for hearing and the claim was dismissed.

Similarly, in *Manicom v. Oxford*,[7] one member of the court (in dissent) concluded that the complainants'claim that a government decision to locate a waste disposal near their properties violated section 7 of the *Charter* was an important legal issue that should have been left to the trial judge. Had this happened, the plaintiffs might have been able to demonstrate adverse health effects and to show a link between those health effects and approval of the landfill.[8]

More recently, a section 7 argument in the context of environmental health impacts from industrial activities was made in *Wier v. British Columbia (Environmental Appeal Board)*.[9] This was a review by a court of a governmental decision to issue a permit allowing for the use of pesticides to a forestry company. The petitioner argued that the use of the pesticides would violate certain rights to life, liberty and security of the person guaranteed under section 7. Although the case was ultimately decided on other grounds, the court did not minimize the possibility of the application of the *Charter* in this context. To the contrary, the court stated that the answers to such a constitutional question would be of significance to the community at large, and that therefore a decision on such a question should properly await another case where the factual evidence made the argument more compelling.

And lastly, in another recent case out of British Columbia, the argument that exposure to certain substances in the environment may infringe the rights protected by section 7 was made in *Millership v. Kamloops (City)*.[10] The plaintiff challenged provincial legislation that authorized the fluoridation of drinking water on a number of grounds, including that his right to life, liberty and security of the person was violated because of adverse health effects he alleged to have suffered from the fluoridation. Given the level of fluoridation at issue in the case, the court held that any intrusion into the plaintiff's rights to liberty or security of the person was "minimal" and therefore could not amount to a breach of section 7 rights. However, the court did pay close attention to the case law on section 7 of the *Charter* and to its application to the evidence of the particular health

[7](1985), 52 O.R. (2d) 137 (Div. Ct.).

[8]The majority of the court dismissed the claim on other grounds.

[9][2003] B.C.J. No. 2221 (S.C.).

[10][2003] B.C.J. No. 109 (S.C.), aff'd (2004), 23 B.C.L.R. (4th) 198 (C.A.), leave to appeal to the S.C.C. dismissed: [2004] S.C.C.A. No. 73.

risk before it. Thus, the court appears to have accepted that a health risk from environmental causes could trigger human rights claims and, in particular, could trigger questions concerning the applicability of section 7 of the *Charter*.

Beyond these environmental cases, case law on section 7 in other contexts also signals that risks to human health might be covered by this provision. Each aspect of section 7 is considered below.

Bibliography/Suggested Reading

A. Gage, "Public Health Hazards and Section 7 of the *Charter*" (2004) 13 J. Envtl. L. & Prac. 1.

M. Hatherly, "Constitutional Amendment" in *Environmental Protection and the Canadian Constitution*, Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment (Edmonton: Environmental Law Centre, 1986).

C. Stevenson, "A New Perspective on Environmental Rights After the *Charter*" (1983) 21 Osgoode Hall L.J. 390.

Right to Life

The opening words of section 7 of the *Charter* are that everyone has the "right to life, liberty and security of the person". If in a particular case it could be established on a balance of probabilities (the standard of proof required in all *Charter* cases) that environmental risks or environmental degradation interfered with life itself, section 7 might have some application. Such environmental impacts could include those that directly threaten loss of life, but they could also include risks that affect quality of life.

Although no cases have been decided in Canada, there are cases from around the world that have considered life and quality of life in the context of environmental impacts. In those cases, the right to life has been interpreted as providing protection from the threats of environmental pollution and degradation. Canadian courts may be persuaded by this line of thinking when interpreting the right to life in section 7 of the *Charter*.

In Europe, for example, a growing body of case law by the European Court of Human Rights has exposed the links between the right to life and environmental pollution. These cases have generally been brought under Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[11] which grants everyone the right to respect for his "private and family life". Sometimes the general right to life protected by the *European Convention* has also been argued.

[11]November 4, 1950, 213 U.N.T.S. 222 (the "*European Convention*").

In one case, *Lopez Ostra v. Spain*,[12] the plaintiff and her family had been exposed to significant toxic emissions (including hydrogen sulfide) from a waste treatment plant located only 12 meters from their home. She brought a complaint to the European Court of Human Rights alleging that they had suffered serious health effects from the exposure which included nausea, vomiting, and allergies. She argued that the state of Spain had breached her right to respect for her family life under Article 8 of the *European Convention* by allowing the plant to operate.

The court agreed with Mrs. Lopez-Ostra, and concluded that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life. According to the court, this is so even if the pollution does not seriously endanger human health. Although, as with all rights, the court held that a balance must be struck between the competing interests of the individual and the community as a whole, the evidence in this case was that the state had failed to do anything significant to protect the people exposed. Consequently, the court found a violation of the right to family life under the *European Convention* and ordered damages to be paid by the government of Spain.

Also brought under Article 8 of the *European Convention* is the case of *Guerra & Others v. Italy*.[13] In that case, a group of Italians complained to the European Court of Human Rights about a chemical factory located approximately 1 kilometer from their homes. During operations, the evidence was that the factory released large amounts of highly toxic substances. According to the Court, the critical issue was whether the government of Italy had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life under the *Convention*. The Court held that the government had not done so.

In the court's view, the Italian government violated Article 8 of the *European Convention* by failing to adequately protect people from these dangerous emissions. Moreover, Article 8 was also violated by the government's failure to provide these people with information about all the risks they faced, if they continued to live in the area. In addition to Article 8, a number of judges also found that Article 2 of the *European Convention* (which guarantees the right to life generally) had been violated in these circumstances. In their view, the protection of health and physical integrity is as closely associated with the "right to life" as with the right to "respect for private and family life". One judge specifically stated that it was time for the court to start evolving its case law on the right to life to expose the environmental dimensions of that right.

Along with this case law from a regional human rights body, the approach taken by other countries may also be relevant as Canadian law on human rights and environmental

[12]App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994) (Eur. Ct. H.R.).

[13]App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998) (Eur. Ct. H.R.).

pollution develops. The courts of India, for example, have repeatedly stated that the right to life in that state's constitution includes a right to live in a safe and pollution-free environment. Citing the right to life, Indian courts have closed down industries causing harm to health and safety in that country. The courts have stated that the right to life includes "the right to live with human dignity and all that goes along with it" including the right to live in a "healthy environment with minimal disturbance of the ecological balance".[14]

Most recently, the courts in Nigeria have exposed the environmental dimensions of the right to life in the context of oil and gas operations. In November 2005, the Federal High Court of Nigeria concluded that the right to life and dignity of the person guaranteed by Nigeria's constitution "inevitably" includes rights to a "clean, poison-free, healthy environment".[15] As a result, the court held that regulations which allowed for the practice of the flaring of gas in the applicant's community violated constitutionally-protected rights. The regulations were struck down as null and void. The court ordered the respondents to take immediate steps to stop all flaring in the applicant's community.

Although there has yet to be a definite ruling in Canada, the Supreme Court of Canada has, on at least two occasions, suggested that Canadians also have some sort of constitutionally-protected right to a clean, safe environment implicit within our Constitution. According to the court, the notion of a right to a safe environment is a fundamental value shared by all Canadians. It has stated as follows:

> "It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. […] Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*, *supra*, which concluded at p. 8 that:
>
> > … a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
>
> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as quality of life, and stewardship of the natural environment."[16]

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[14]See: *Mullin v. Union Territory of Delhi,* A.I.R. 1986 S.C. 746; and *Vellore Citizens Welfare Forum v. Union of India,* [1996] Supp. 5 S.C.R. 241.

[15]*Gbemre v. Shell Petroleum Development Co. Nigeria Ltd. et al.*, Order of the Federal High Court of Nigeria in the Benin Judicial Division Holden at Court Benin City, November 14, 2005.

[16]*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 55.

The Supreme Court of Canada has approved of this statement in a subsequent case.[17] It remains to be seen whether and how this fundamental "value" or "right" to a safe environment will translate into a legally-protected human right in Canada.

Bibliography/Suggested Reading

M. Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (2000) N.Y.U. Envtl. L.J. 437.

I. Odumosu, *Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement* (Calgary: Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law, 2006).

B.G. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1985).

I. Scott, "The Inter-American System of Human Rights: An Effective Means of Environmental Protection?" (2002) Va. Envtl. L.J. 197.

N. Vlavianos, *Health, Human Rights and Resource Development in Alberta: Current and Emerging Law* (Calgary: Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law, 2003).

Right to Liberty

Some aspects of the right to liberty in section 7 of the *Charter* are fairly well-established. For example, the right clearly includes freedom from state-imposed physical restraint. Thus, any law that imposes the penalty of imprisonment is covered; so are statutory duties to submit to fingerprinting, to give oral testimony and not to loiter in or near school grounds, playgrounds, etc.

What is not as clear, however, is whether (and to what extent) liberty extends beyond freedom from physical restraint. Although the Supreme Court of Canada has been cautious about significantly enlarging the liberty component of section 7, it has indicated that in an appropriate case, "liberty" in section 7 may include more than freedom from physical restraint.

According to a majority of Supreme Court justices, "liberty" in section 7 applies whenever a law or governmental action prevents a person from making "fundamental personal choices".[18] In a number of minority decisions, Supreme Court justices have suggested that certain circumstances will attract a broader interpretation of the right to liberty in section 7. For example, a broad definition of liberty has been found to include

[17] *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

[18] *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307.

the right to terminate a pregnancy,[19] the right to choose medical treatment for one's children,[20] the right to bring up children,[21] and the right to privacy.[22] Most notably for our purposes, a minority of the Supreme Court of Canada has also held that the right to liberty in section 7 includes the right to choose where to establish one's place of residence.[23]

Based on this case and a broad interpretation of liberty, it is at least arguable that a decision by, for example, Albertans to live in a particular location without being forced to move because of adverse health effects from oil and gas development might be protected by section 7. It remains to be seen, however, whether more cases with majority support from the Supreme Court of Canada will expose the various circumstances in which the right to liberty will apply outside the traditional context of physical restraint.

Security of the Person

Unlike the concept of "liberty" in section 7, Canadian courts have unquestionably given a broad interpretation to the "security of the person" aspect of that provision. In terms of some type of human rights protection in the context of adverse human health impacts from environmental causes, it is therefore likely the most relevant part of section 7.

In *R. v. Morgentaler*, a majority of the Supreme Court of Canada held that the right to security of the person in section 7 encompasses a right to bodily integrity and a right to be free from harm and from threats to that integrity, including risks to health.[24] In that case, the evidence demonstrated that a statutory requirement of approval by a therapeutic abortion committee restricted access to abortion and caused delays in treatment. This increased the risk to the health of pregnant women. A majority of the court agreed that the risk to health caused by the law was a deprivation of security of the person in section 7 of the *Charter*. Further, in *Rodriguez v. B.C. (A.G.)*, the Supreme Court of Canada concluded that "security of the person" encompasses control over one's bodily integrity, including the decision to commit suicide.[25]

Along with physical integrity, courts have found that "security of the person" also grants a right to be free from significant psychological stress. In *New Brunswick v.*

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[19] *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30.

[20] *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315.

[21] *New Brunswick v. G. (J.)*, [1999] 3 S.C.R. 46.

[22] *R. v. O'Connor*, [1995] 4 S.C.R. 411.

[23] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

[24] *Supra* note 19.

[25] *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519.

G. (J.), the Supreme Court of Canada held that an application by the state to remove children from a parent and place them under the wardship of the state affected the security of the person of the parent. Security of the person was affected because the government action would constitute "a serious interference with the psychological integrity of the parent".[26]

Similarly, in *Blencoe v. British Columbia*, the Supreme Court held that serious state-induced psychological stress could be a breach of security of the person.[27] This need not, however, reach the level of nervous shock or psychiatric illness, but it must be greater than "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action."[28]

From these cases, it is arguable that "security of the person" in section 7 may include a right to be free from the adverse health consequences, including serious psychological stress, flowing from the environmental impacts of oil and gas development in Alberta. The cases are clear that section 7 of the *Charter* protects both the physical and psychological integrity of the individual.[29]

It was noted earlier that interpretations given to the right to life by other countries and by regional human rights bodies may be relevant to the way Canadian courts interpret the right to life protected in section 7 of the *Charter*. Similarly, any decisions relating to the the right to life, liberty and security of the person as that right exists in international law will also be of relevance to section 7.

The right to "life, liberty and security of the person" is a human right that is well-established in international law. Two early expressions of this right can be found in the 1949 *Universal Declaration of Human Rights* (the "*UDHR*") and in the *International Covenant of Civil and Political Rights* (the "*ICCPR*").[30] Although the *UDHR* is a soft law document, the general view is that it sets standards that are now considered to be customary international law and thus binding on all nations. Article 3 sets outs the basic right in the following terms: "[e]veryone has the right to life, liberty and security of person".

As for the *ICCPR*, an international convention which Canada ratified in 1976, Article 6 states that:

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[26]*New Brunswick (Minister of Health and Community Services) v. G. (J.), supra* note 5.

[27]*Supra* note 18.

[28]*New Brunswick (Minister of Health and Community Services) v. G. (J.), supra* note 5 at 77.

[29]See also the recent case of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

[30]G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966).

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

With respect to liberty and security, Article 9 declares that:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

As in section 7 of the *Charter*, the language of limitation in these fundamental rights highlights that they are not absolute. There is recognition that they may have to yield to other concerns in some circumstances.

There has yet to be an express statement in a specific case from an international legal body that says unequivocally that this right provides protection in the case of possible or actual health effects from environmental harm. There are, however, indications that the law may move in that direction. In the early 1990s, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities undertook an extensive study of human rights and the environment. After surveying national and international human rights law and international environmental law, the Final Report of this Sub-Commission concluded that the right to life, liberty and security of the person in international law has environmental dimensions which are capable of "immediate" implementation by existing human rights bodies.[31]

Subsequently, in 1997, in a General Comment issued by the main international human rights body, the United Nations Human Rights Committee, the Committee stated that the right to life, liberty and security in international law has often been interpreted too narrowly. In its view, this right has a broader meaning and does, for example, include state obligations to protect from threats (including environmental ones) to survival or to quality of life.[32] Indeed, in the earlier case of *EHP v. Canada*,[33] the United Nations Human Rights Committee concluded that the storage of radioactive waste near homes raised "serious issues" with respect to state obligations to protect human life.

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[31]U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment, Final Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994).

[32]"General Comment on Article 6 of the Civil and Political Covenant issued by the United Nations Human Rights Committee" in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997).

[33]*Communication No. 67/1980*, 2 Selected Decisions of the Human Rights Committee (1990).

Principles of Fundamental Justice

Even if it can be shown that there has been a violation of the right to life, liberty and security of the person in section 7 of the *Charter*, it must be remembered that this provision has a built-in limitation. There is no infringement of section 7 if the infringement occurred in accordance with the principles of fundamental justice. Among other things, these principles include a right to reasonable notice, to a fair hearing, and to reasons for a decision before the government is justified in depriving someone's right to life, liberty or security of the person.

For example, the government clearly curtails a person's freedom (liberty) when he or she is jailed for having committed an offence. But incarceration is permitted, even though section 7 protects the right to liberty, because through the rules of criminal procedure the government has violated personal liberty in a manner that satisfies the principles of fundamental justice.

Given this limitation in section 7, as long as the requisite procedural guarantees are provided for, a violation of a right to life, liberty and security of the person will usually be tolerated. But not always, for Canadian courts have indicated that the principles of fundamental justice in section 7 of the *Charter* contain substantive elements as well as procedural guarantees.[34] According to the Supreme Court of Canada, this has meant that if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally.

Thus, while the courts have recognized that sometimes individual rights may have to give way to collective interests, this will only be so where the interests or purposes sought to be advanced are substantial and compelling. Examples would be cases where public safety is engaged, or there is a need to maintain social or commercial order. For example, although a bylaw requiring all city workers to live within city limits violates personal liberty under section 7 of the *Charter* and cannot be justified by the principles of fundamental justice, a requirement that police officers, firefighters and ambulance personnel live within the city (so as to ensure that they are readily available during times of emergency) is likely not contrary to the principles of fundamental justice.

Moreover, in certain circumstances, an action taken by government may be so egregious that it will, no matter what procedure is used, be treated as a violation of section 7. In cases involving the unconditional extradition of prisoners to countries where they face the death penalty, for example, the Supreme Court of Canada has held that a

[34] *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486.

decision that "shocks the conscience" in depriving life, liberty or security of the person can be considered a violation of the principles of fundamental justice.[35]

According to A. Gage, this notion of "shocking the conscience" raises important questions of policy in the context of risks to human health from environmental impacts. He queries as follows:

> "Consider … the scenario in which it can be shown, on a balance of probabilities, that at least one person will die as a result of the introduction of toxins into the environment. Is that sufficiently serious to "shock the conscience" no matter what procedural assurances are in place? As we have seen a major purpose of the principles of fundamental justice is respect for human life."[36]

It remains to be seen whether (and which) actual or potential health impacts from adverse environmental conditions will be seen as unacceptable because of conflict with the *Charter*. As *Charter*-based litigation continues in the environmental context, courts will find themselves being asked to draw some very difficult lines.

Bibliography/Suggested Reading

A. Gage, "Public Health Hazards and Section 7 of the *Charter*" (2004) 13 J. Envtl. L. & Prac. 1.

P.W. Hogg, *Constitutional Law of Canada*, 2004 Student Ed. (Peterborough: Thomson Carswell, 2004).

2.3.1.3 The Canadian Charter of Rights and Freedoms – Subsection 15(1)

Along with section 7, the other right in the *Charter* that may be relevant in the context of health impacts from the environmental conditions is that found in subsection 15(1).

Subsection 15(1) provides as follows:

> "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The cases decided on subsection 15(1) tell us that to be successful the complainant must establish three things. First, the claimant must experience differential treatment from a law or governmental action that results in the loss of a benefit or the imposition of a burden. Second, the differential treatment must be based either on one of the grounds set out in subsection 15(1) or an analogous one. For example, the Supreme Court of Canada

[35] *United States v. Burns*, [2001] 1 S.C.R. 283.

[36] A. Gage, "Public Health Hazards and Section 7 of the *Charter*" (2003) 13 J. Envtl. L. & Prac. 1 at 32.

has said that discrimination on the basis of sexual orientation is analogous to the other forms of discrimination and therefore subsection 15(1) applies to it as well.[37] Third, the differential treatment must result in discrimination. Thus, section 15 embodies a comparative concept – an individual must experience differential treatment that amounts to discrimination.[38]

When initially enacted, it was thought that subsection 15(1) might apply to a claim made on the basis that certain people were differentially impacted by environmental conditions based on where they lived. People living near a toxic waste dump, for example, would face different exposure than those who did not. Subsequent judicial interpretation has, however, restricted the scope of subsection 15(1) by insisting upon reference to either the enumerated grounds set out in that provision or to analogous ones. The courts have held that, except in very limited circumstances, differences in treatment based on territory or geography are not covered by section 15.[39]

Still, subsection 15(1) may have a role to play, albeit a more limited one, in the context of health impacts from environmental degradation. It is at least arguable that persons who suffer from certain physical disabilities (asthma, for example) are differentially affected by exposure to certain environmental agents such that the government must act to protect their health interests. This could also be the case for children or the elderly, if the evidence demonstrates that such persons are differentially impacted. Since there is no case law to date in this area, the success of such claims remains to be seen.

What is clear, however, is that subsection 15(1) is not a means through which to assert a general right to, for example, health, a clean environment, or to not be exposed to environmental toxins. Subsection 15(1) has a built-in comparative component and, even if it were applicable in the context of health effects from environmental degradation, it would play a limited role.

2.3.1.4 The Canadian Charter of Rights and Freedoms – Section 1

As noted above, human rights are rarely absolute. Section 7 has its own limitation by referring to the "principles of fundamental justice". In addition, all *Charter* rights, including sections 7 and 15(1), are subject to a general limitation found in section 1. Section 1 of the *Charter* states that the rights and freedoms it sets out are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified

[37] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[38] *Law v. Canada*, [1999] 1 S.C.R. 497.

[39] *R. v. Turpin*, [1989] 1 S.C.R. 1296.

in a free and democratic society". In other words, there are certain limits to the rights protected by the *Charter*. Section 1 allows for a balancing between those individual rights and freedoms, on the one hand, and societal goals and purposes, on the other.

In essence, section 1 provides the government with a defence where a law or government action or decision has been found to violate the *Charter*. After a claimant has successfully argued that a *Charter* right has been violated, the onus turns to the government to prove that the violation of the *Charter* right is justified by virtue of section 1. To determine this, Canadian courts apply what is commonly-referred to as the "*Oakes* test" from the name of the case in which the test was first articulated by the Supreme Court of Canada.[40] The test requires the weighing of four factors: whether the objective of the impugned legislation or governmental action is pressing and substantial; whether there is a rational connection between the objective and the means used to attain that objective; whether the means used to attain the objective impair the right as little as possible; and finally, whether there is proportionality between the positive and negative effects of the legislation.

If the court finds that the violation is not justifiable under this test, the law or governmental action in question will be found to be unconstitutional. But if the law or action can be justified under the *Oakes* test, no remedy is available as the law or government action has been "saved" by section 1 and the *Charter* has not been violated. The Supreme Court of Canada has stated that, since a balancing of interests is considered under the principles of fundamental justice, violations of section 7 rights will rarely be saved by section 1 of the *Charter*.[41]

Bibliography/Suggested Reading

P.W. Hogg, *Constitutional Law of Canada*, 2004 Student Ed. (Peterborough: Thomson Carswell, 2004).

J. Magnet, *Constitutional Law of Canada: Cases, notes and materials* (Toronto: Juriliber, 2001).

P. Monahan, *Constitutional Law* (Toronto: Irwin Law, 2002).

R.J. Sharpe, K. Swinton & K. Roach, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2002).

[40] *The Queen v. Oakes*, [1986] 1 S.C.R. 103.

[41] *Supra* note 34.

2.3.1.5 Conclusion

This brief look at domestic and international human rights law suggests that, as it stands today, human rights law does not unequivocally protect Albertans (or Canadians for that matter) from exposure to environmental pollution. It is difficult to find a right to health, to breathe clean air, to be free from exposure to toxic substances, or a more general right to a clean or healthy environment in current Canadian human rights law. At the international level, however, the use of human rights law to address the impacts of environmental degradation on human health is increasing. Over time, these developments could significantly impact the development of Canadian human rights law in this context.

Undoubtedly the most relevant provision is section 7 of the *Charter*. Although there is no definitive precedent that deals with health impacts from environmental degradation, there is case law under section 7 that suggests its potential applicability to this issue. In particular, the "security of the person" aspect of section 7 has been held to protect against health risks created by the state.

A number of issues will, however, need to be addressed if the right to life, liberty and security of the person is to be applicable in the context of environmental effects from industrial activities. One significant problem will be the question of scope. What should be protected and what should not be? For example, since the right covers life itself, do the environmental conditions at issue have to involve *direct* threats of *immediate* loss of life, or can they be something less, especially if the focus is on quality of life or security of the person?

Along with this problem of scope, there is the question of whether such health or environmental-type rights will impose positive obligations on governments to ensure the requisite conditions for the enjoyment of such rights. Traditionally, human rights have been interpreted more negatively, as prohibiting states from doing certain things either intentionally or negligently. For example, in the case of the right to life, it is unclear whether this right also involves "a positive obligation on the state to take steps which would prevent a reduction in, or promote, life expectancy."[42] The economic burden and political issues involved in the implementation of such a positive right might make its enforcement highly unlikely.

Another significant problem in this context will be that of establishing the requisite causal links between environmental degradation and alleged violations of the right to life, liberty and security of the person. As noted, typically in human rights cases, the complainant must prove a rights violation on a balance of probabilities. Thus, the complainant would have to introduce evidence that shows that it is more likely (or probable) than not that certain environmental conditions have affected his or her health.

[42]M. Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (2000) N.Y.U. Envtl. L.J. 437 at 456.

Proving causation on this standard is often extremely difficult in environmental cases where so many variables may have been at play over a number of years, and where the science about cause and effect is often uncertain.[43]

2.3.2 Culture/Way of Life and Human Rights Law

Stories are emerging from Alberta about people feeling like they are slowly being forced off their land and away from their way of life because of impacts from oil and gas development. This could result from actual or potential health impacts, or it could be because the pace and intensity of development in some areas may be overtaking other land uses, such as ranching and farming, and therefore interfering with the ability to earn a livelihood from that land.

The impact of the loss of a culture or way of life on one's personal identity has been subject to significant scholarly research. The ability of people to continue with a traditional way of life, especially one based on the land such as farming and ranching, has been seen as integral to one's sense of belonging and personal identity. If it is taken away, it can shatter one's sense of self and peace of mind.

What does Canadian human rights law have to say about the loss of a culture or a way of life? Are there any arguments based in human rights law that could be made if oil and gas development were such to impact significantly on a way of life?

As with health impacts, a likely starting point is section 7 of the *Charter*. As noted, this section provides Canadians with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. If there is evidence that establishes (on a balance of probabilities) that the type or intensity of industrial development has placed serious strain on someone's ability to continue to live on the land and to maintain their way of life (farming or ranching, for example), then perhaps a violation of the first part of section 7 of the *Charter* could be made out.

However, as with a right to health or to a healthy environment, we have seen that an examination of whether the principles of fundamental justice have been violated in a particular case would have to take place before a *Charter* breach has occurred. Even then, a court would further examine whether the law or governmental action could be "saved" under section 1 of the *Charter*. Only if it could not would a court provide a remedy to the complainant.

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[43]For the difficulties of proving causation in the environmental realm, see generally: B. Pardy, "Risk, Cause, and Toxic Torts: A Theory for Standard of Proof" (1989) 10 Advocates' Q. 277; and B.H. Powell, "Cause for Concern: An Overview of Approaches to the Causation Problem in Toxic Tort Litigation" (2000) 9 J.E.L.P. 227.

As noted above, the Supreme Court of Canada has held that the right to liberty in section 7 means more than freedom from physical constraint. The Court has said that, although "liberty" does not mean unconstrained freedom, in a free and democratic society, individuals must be left room for personal autonomy to live their lives and to make decisions that are of fundamental personal importance. According to the Court, the liberty interest protected in section 7 is rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the core of an individual's fundamental being. Furthermore, one aspect of the respect for human dignity on which the *Charter* is founded generally is the right to make fundamental personal decisions without interference from the state.[44]

Based on these principles, the Supreme Court of Canada has found that section 7 of the *Charter* includes a right to personal autonomy[45] and a right to privacy.[46] It has also, as noted earlier, held that liberty includes the right to choose where to establish one's home. In one case, a city had passed a bylaw prohibiting city workers from living outside of the city limits. While the majority decided the case on other grounds, a minority of the Supreme Court of Canada concluded that this bylaw violated the right to liberty under section 7 of the *Charter*. It was not in accordance with the principles of fundamental justice either. The violation occurred because choosing where to establish one's home is a "quintessentially private decision going to the very heart of personal or individual autonomy". Such decisions are protected by the right to liberty in section 7.[47]

The "security of the person" aspect of section 7 of the *Charter* may also be relevant to a claim for loss of culture or way of life. As noted above, along with physical integrity, section 7 protects the psychological integrity of the individual. The standard is that of "serious state-imposed psychological stress" (although it need not reach the level of nervous shock or psychiatric illness). Given how critical one's culture or way of life can be to one's identity and well-being, it is not inconceivable that someone facing serious threats to their culture or way of life from governmental action might experience this type of psychological stress.

To bolster these arguments under section 7 of the *Charter*, one could argue that Canadian courts should interpret section 7 by looking at relevant international developments. As noted above, Article 8 of the *European Convention for the Protection of Rights and Fundamental Freedoms* provides that "everyone has the right to respect for his private and family life, his home and his correspondence". The case law developing

[44]See, for example: *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, and *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

[45]*Blencoe v. B.C. (Human Rights Commission)*, [2002] 2 S.C.R. 307.

[46]*R. v. Beare*, [1988] 2 S.C.R. 387.

[47]*Supra* note 23.

under this provision shows that environmental impacts from industry activities can violate this right to private and family life. This case law could be used as an aid to interpret section 7 of our *Charter* not only to provide protection in the context of health impacts, but also in regard to cultural or way of life impacts from industry activities.

It is also conceivable that subsection 15(1) of the *Charter* might have some relevance to claims of loss of ways of life or culture. As outlined earlier, subsection 15(1) provides that every individual is equal before and under the law and has the right to equal benefit and protection of the law without discrimination on a number of enumerated and analogous grounds including race and ethnic origin. Although courts have held that residence is not a protected ground under subsection 15(1) of the *Charter*, the provision may still have some relevance to way of life or cultural concerns. For example, if some Albertans are better protected than others from disturbances to their way of life as a result of oil and gas development, those with less protection might be able to use subsection 15(1) to seek the same level of security.

There may be arguments based on international human rights law as well. Clearly, in the case of aboriginal peoples in Canada, there is protection for culture in international human rights law. Article 27 of the *ICCPR* states that:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Because it has ratified the *ICCPR*, Canada is bound by its terms. There is an enforcement mechanism, called the *Optional Protocol to the Covenant on Civil and Political Rights*, which allows individual Canadians to complain to the United Nations about violations of rights guaranteed in the *ICCPR*. In most circumstances, all domestic remedies must first be exhausted. This means that all available avenues for having your complaint addressed in Canada must first be pursued before going to the United Nations.

In 1990, the Lubicon Lake Cree, an Indian band living in northwest Alberta, were successful in bringing a claim to the United Nations Human Rights Committee pursuant to Article 27 of the *ICCPR*. The Band argued that their ability to enjoy their culture was under threat because of increasing oil and gas development in their area. The U.N. Human Rights Committee agreed and concluded that Canada was in violation of its international obligations under the *ICCPR*.[48] Despite the favorable decision, however, to date the situation of the Lubicon has not been addressed by the government of Canada. The case is a clear illustration of a significant problem with the enforcement of international law through international organizations – they yield political pressure only, which can sometimes be ignored by the government of the particular country involved.

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[48]*Chief Bernard Ominayak, and the Lubicon Lake Band v. Canada*, Communication No. 167/1984: Canada, 10/05/90. CCPR/C/38/D/167/1984.

This kind of outcome can lead to cynicism: what is the point of thinking about or referring to international law, if governments can refuse to implement that law? But, just because the process has failed to yield a satisfactory outcome in one case does not mean this will be the result in all cases. Moreover, as noted several times, perhaps the most useful role international law can play is to assist Canadian courts in interpreting Canadian law, including the *Charter*. In this way, international law can have direct impact in Canada through Canadian courts.

For non-aboriginal Albertans, the crucial question with respect to Article 27 of the *ICCPR* is this: can it be used to protect other groups, such as ranchers and farmers, that are not typically understood to be minority groups? As outlined, Article 27 refers to "ethnic, religious or linguistic minorities". Two arguments may be made here. First, it may be that Article 27 should not be limited to these three enumerated groups. Second, if a broad definition of the term "ethnic" is adopted, it may include groups that are not identified only through race.

In addition to Article 27, there are scholars who believe that the right to cultural integrity has already emerged as a norm of customary law.[49] If so, this might assist in arguing for a broader interpretation of Article 27 of the *ICCPR*. It would also mean that it applies automatically as part of the law of Canada unless it conflicts with legislation or a fundamental constitutional principle. Indeed, there are a number of references to culture in various international documents. For example, Article 1 of the *1966 UNESCO Declaration of the Principles of International Cultural Co-operation* states that:

> "1. Each culture has a dignity and value which must be respected and preserved.
>
> 2. Every people has the right and duty to develop in culture.
>
> 3. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind."[50]

Some scholars argue that such declarations evidence the general acceptance of a right to maintain one's culture amongst the majority of states so that such a right has attained the status of a norm of customary international law. If so, it would automatically form part of the law of Canada, and it might be broad enough to apply to peoples who have not traditionally been identified as part of a minority group. Without further decisions in this area, however, the accuracy of these conclusions for now remain in doubt.

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[49] See, for example, L.V. Prott, "Cultural Rights and Peoples' Rights in International Law" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

[50] *1966 UNESCO Declaration of the Principles of International Cultural Co-operation*, adopted by the General Conference at its fourteenth session, Paris, 4 November 1966, online: <http://unesdoc.unesco.org/images/0011/001140/114048e.pdf#page=82>.

Bibliography/Suggested Reading

P. Alston, ed., *Peoples' Rights* (New York: Oxford University Press, 2001).

J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

P. Fry, "A Social Biosphere: Environmental Impact Assessment, the Innu, and their Environment" (1998) 56:2 U.T. Fac. L. Rev. 177.

J. Keeping, "Human rights law, cultural integrity, and oil & gas development" (October/November 2004) 29:2 *LawNow* 20.

A. Nikiforuk, "Flare-up" (October 2002) *National Post Business*.

2.3.3 Alberta Bill of Rights

Along with the *Charter*, it is possible that Alberta's *Bill of Rights*, R.S.A. 2000, c. A-14 might have some applicability in the context of health and way of life impacts from oil and gas development in Alberta. The *Bill of Rights* requires every law of Alberta to be construed and applied so as not to infringe, or authorize the infringement of, any of the rights or freedoms it guarantees. These rights and freedoms are similar to those listed in the *Charter*. For example, subsection 1(a) grants individuals a right to "liberty, security of the person … and the right not to be deprived thereof except by due process of law". This part of subsection 1(a) has been, and likely will continue to be, influenced by the interpretation of section 7 of the *Charter* and therefore perhaps adds nothing to a claim brought under that provision.

Unlike section 7, however, subsection 1(a) of the *Alberta Bill of Rights* also provides protection for the right to the "enjoyment of property" (and the right not be deprived thereof except by due process of law). Especially in regard to way of life concerns from oil and gas development, it may be that this provision might augment any claim brought under section 7 of the *Charter*.[51]

Like the *Charter*, though, there is a built-in limitation to subsection 1(a) of the *Bill of Rights*. The right to enjoyment of property can only be infringed if due process is not followed. For example, although land-use bylaws affect future uses of lands, and thus the right to enjoyment of property, there is no violation of subsection 1(a) if appropriate legal procedures for enacting the bylaw were followed. "Due process" has been defined as referring to fair processes recognized by Canadian legislatures and courts. It likely

[51]For discussions of the enjoyment of property in Alberta's *Bill of Rights*, see: *Kievit v. Lacombe (County) Subdivision & Development Appeal Board*, [1998] 216 A.R. 145 (Q.B.); *R. v. Such*, [1992] 132 A.R. 323 (Q.B.); *Churgin v. Calgary*, [1989] 90 A.R. 378 (C.A.); and *Trelenburg v. Alberta (Minister of the Environment)* (1980), 31 Alta. L.R. (3d) 353 (Q.B.).

consists of similar procedural guarantees as the “principles of fundamental justice” discussed above in the context of section 7 of the *Charter*.

2.4 Conclusion

From this brief review of human rights law as it might apply to health and way of life impacts from oil and gas development, it is clear that this is a novel area of the law that is in its infancy. Based on existing law, it is impossible to conclude that there are definite existing human rights that could provide a remedy in the context of provable health and way of life impacts. Nonetheless, as noted, there are arguments to be made, and there is evidence of movement, especially at the international level, towards viewing issues of environmental degradation from a human rights perspective. If this movement continues and finds its way into Canadian law, it will certainly affect the way all development that impacts the environment proceeds, including oil and gas development in Alberta. The following Chapters of this paper will consider what impact human rights law, if it were to develop as outlined above, might have upon certain stages in the process through which oil and gas is developed in Alberta.

Chapter 3: The Disposition of Oil and Gas Rights in Alberta and a Right to Public Participation

3.1 Introduction

Eighty-one percent of oil and gas resources in the province are owned by the provincial government (the "Province") for the benefit of Albertans. Many of these resources are located underneath land whose surface is owned by private individuals or is leased by private parties from the provincial government. This split ownership – with the surface belonging to one party and the subsurface to another – can be a source of conflict. Most notably, there are growing concerns about the lack of notice and public participation when oil and gas mineral rights are disposed.

This chapter considers whether there are any concerns with the way oil and gas rights are disposed of in Alberta without public participation. As with the rest of this paper, the focus is on whether human rights law has anything to say in this context. As well, there is some exploration of another related branch of the law – administrative law – which contains principles of fair process for individuals affected by government decisions. Some of these principles are so inextricably linked with some of the human rights arguments that it makes sense to consider them together. Moreover, as discussed further below, courts will insist that administrative law be looked to first for a possible remedy before looking to the *Charter*.

3.2 How are Oil and Gas Rights Disposed of in Alberta?

The Province disposes of its oil and gas interests pursuant to the *Mines and Minerals Act*, R.S.A. 2000, c. M-17 (the "Act") and associated regulations, which establish a tenure system for oil and gas rights to be leased and administered in the province. Companies are granted the right to explore for and develop the resources in exchange for royalties, bonus bid payments and rents payable to the Province.

Alberta's oil and gas rights are issued in the form of licences or leases through a competitive sealed bid public auction system. Companies or individuals wishing to acquire rights to produce oil and gas request Alberta Energy to make a public offering of these rights. The highest bidder is awarded the rights to drill for and recover oil and gas. Public offerings are held every two weeks. Notices of the parcels to be offered are published on Alberta Energy's website, and in paper copy, about eight weeks prior to the sale.

Prior to a public offering, Alberta Energy forwards a description of the lands for which rights have been requested to the Crown Mineral Disposition Review Committee (the "CMDRC"). The members of the CMDRC are representatives from the Ministries of Sustainable Resource Development, Environment, and Community Development, as well as from the EUB and the Municipal Affairs Special Areas Board. The CMDRC reviews the lands involved in the requested parcel and identifies potential surface access restrictions that may be required by law or policy. For example, seasonal access restrictions designed to protect wildlife habitats would be identified and referred back to Alberta Energy, who reviews the restrictions and determines whether the minerals are to be posted for sale and if so, under what conditions.

The Province attaches a number of conditions to licences and leases of oil and gas rights to ensure timely development of the resources. For example, in order to obtain legal rights to oil and gas, a company must drill a well within a specified period of time, produce oil and gas, or pay compensation instead of drilling or producing. The oil and gas tenure ends when an agreement holder can no longer prove that the agreement is capable of producing oil or gas in paying quantities or is lost through rental or royalty payment default or by voluntary surrender back to the Province. In practice, the disposition of oil and gas rights by the Province almost invariably results in the development of these resources provided it is economically feasible to do so.

There is no doubt that Alberta's tenure system is quick, efficient, confidential and competitive. The built-in incentives to drill and produce ensure that undeveloped rights quickly re-enter the system to be ready for the next available bidder. The timely development of oil and gas resources in the province has meant, and continues to mean, significant economic benefits for all Albertans.

3.3 What are the Concerns about the Lack of Public Participation?

Until recently, the Province's disposition of oil and gas rights to industry has, for the most part, gone unnoticed by the general public. Likely due in part to the increasing pace and intensity of oil and gas development in the province and a more engaged public, there are increasing calls for more effective public notice and for some type of public consultation prior to the disposition of oil and gas rights in the province.

As noted, when oil and gas rights are to be disposed of, a notice of the public offering is posted on Alberta Energy's website and in paper format prior to the sale. Commentators have questioned the efficacy of these notices for a non-industry audience, noting that they are highly technical and not user-friendly. There is also no direct notice to potentially affected surface landowners and/or occupiers when subsurface rights are posted and sold; nor is there any procedure for public comment or consultation prior to

the disposition. Moreover, it has been noted that the CMDRC lacks any public representation, and does not allow for concerns to be heard of landowners who may be adversely affected by a particular oil and gas disposition.

In terms of what is meant by the "public" in this context of the disposition of oil and gas rights, two groups are relevant. First, as noted, there are increasing calls for more direct notice to landowners and/or occupants who may be directly affected by the eventual development, and for an opportunity for them to be consulted prior to a disposition. The Final Draft Report of a working group reviewing Alberta's tenure system from the perspective of coalbed methane development summarized landowners' concerns as follows:

> "Landowners are concerned about the implications of oil and gas activity on their land. This includes issues of surface disturbance, environmental concerns, and quality of life concerns and implications on the economic capability of the land during and after development. They would like to be notified and consulted earlier in the process."[52]

In another context, the EUB has recently affirmed the importance of early dialogue with affected landowners and occupants, as well as the value of these stakeholders having insights into the development potential of their land.[53]

The second "public" at issue in this context is the public at large. Alberta's tenure system has been criticized for its lack of consultation of the general public, beyond potentially affected landowners and occupants. It has been suggested that this lack of broad public consultation is inconsistent with the public nature of Alberta's oil and gas resources. It has also been argued that the views of Albertans at large should be heard in the disposition process given the potential for industry activity to have significant cumulative and long-term impacts on Alberta's lands, water, wildlife, air quality and wilderness values.

In response to such arguments, issues of cost, feasibility and a possible loss of competitive advantage are raised. The tenure working group on coalbed methane development concluded that "… there was general consensus that notification [to landowners] prior to a land sale is not feasible or valuable."[54]

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[52]CBM/NGC Tenure Working Group, *Final Draft Report: Natural Gas in Coal/Coalbed Methane Mineral Tenure Recommendations* (October 25, 2004) at 20, online: <http://www.energy.gov.ab.ca/docs/naturalgas/pdfs/cbm/PF-TenurePaper.pdf>.

[53]The EUB recognized the importance of these two factors in the context of its decision to continue to require notice to landowners when a company applies for reduced well spacing: see *Bulletin 2006-05 – Changes to Reservoir-Related Well Spacing Regulations, Application Requirements, and Application Review Process* (February 1, 2006).

[54]*Supra* note 52 at 20.

Still, the law may require certain types of public participation in certain contexts. Human rights law as well as administrative law might provide such reasons. These are considered in the rest of this chapter.

Bibliography/Suggested Reading

A. Gardner, "Alberta's Coal Bed Methane Consultation" (September 2004) *Land Advocate*.

Government of Alberta, "CMDRC – Crown Mineral Disposition Review Committee", Alberta Sustainable Resource Development website at: <http://www3.gov.ab.ca/srd/land/u_oilgas_exp_cmdrc.html>.

Government of Alberta, "What is Tenure?", Department of Energy website at: <http://www.energy.gov.ab.ca/1016.asp>.

Government of Alberta, "Tenure Statistics", Department of Energy website at: <http://www.energy.gov.ab.ca/1014.asp>.

S. Kennett & M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts – But Should the EUB Be Taking the Heat?" (Summer 2005) 91 *Resources*.

M. Wenig, "Who Really Owns Alberta's Natural Resources?" (December 2003/January 2004) 28 *LawNow* 39.

M. Wenig & M. Quinn, "Integrating the Alberta Oil and Gas Tenure Regime with Landscape Objectives – One Step Toward Managing Cumulative Effects" in H. Epp, ed., *Access Management: Policy to Practice – Proceedings of the Conference Presented by the Alberta Society of Professional Biologists in Calgary, March 18-19, 2003* (Calgary: Alberta Society of Professional Biologists, 1994).

R. Williams, "The Conflict Between the Oil and Gas Industry and Agricultural Landowners – the Major Issues and Some Legal Recommendations to Resolve It" (2002) 17:2 *News Brief* (Edmonton: Environmental Law Centre).

3.4 Administrative Law Principles

As noted above, the province disposes of its oil and gas rights under authority granted by the Act. Specifically, sections 16 and 18 grant the Minister of Energy wide discretion as follows:

> "16 Subject to this Act and the regulations, the Minister may issue an agreement in respect of a mineral
>
> (a) on application, if the Minister considers the issuance of the agreement warranted in the circumstances,
>
> (b) by way of sale by public tender, conducted in a manner determined by the Minister, or
>
> (c) pursuant to any other procedure determined by the Minister.

> 17(1) The Minister may, in respect of any specified area and in any manner that the Minister considers warranted,
>
> (a) restrict the issuance of agreements granting rights to minerals;
>
> (b) withdraw any or all minerals from disposition.
>
> 18(1) The Minister may refuse to issue or may withhold the issuance of an agreement […]."

Clearly these provisions grant the Minister of Energy wide discretion in disposing of oil and gas rights owned by the Province. The Act does not set out any factors that the Minister must consider when exercising his or her discretion, nor does the Act provide any right to appeal Ministerial decisions made under it.

Two legal options may be available for taking issue with a particular disposition by the Minister under the Act. First, a court could review a decision by the Minister to dispose of oil and gas rights under the Act on the basis of both administrative law and the *Charter*. This would occur through an application for judicial review. Second, where a *Charter* right is involved, there is the possibility of a court striking down legislation authorizing a *Charter* breach as unconstitutional. This would occur through a court action to directly challenge the validity of legislation.[55]

3.4.1 Judicial Review of a Disposition of Oil and Gas Rights

3.4.1.1 Political or Non-Justiciable Question

When a government decision is involved, an issue sometimes arises about whether the decision is a political one that should not be reviewed by the courts. When a decision involves matters of general policy and public convenience, it may not be appropriate for the courts to review or question the economic, social or political decisions of elected officials. It is said that the issue is "non-justiciable".[56]

A decision by the Minister of Energy to dispose of oil and gas rights in Alberta is, however, likely not one of general policy or broad public convenience. It is, after all, a decision which leads to a specific agreement between the Province and a particular oil and gas company. In a number of cases, courts have found that Ministerial decisions

[55]Appendix A of this Guide outlines the basic procedural steps for both of these types of actions in Alberta.

[56]See, for example: *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106; *MacMillan Bloedel Ltd. v. British Columbia (Minister of Forests)* (1984), 8 D.L.R. (4th) 33 [leave to appeal to S.C.C. refused, (1984) 8 D.L.R. (4th) 33n]; and *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

involving the disposition of natural resources were properly subject to review by the courts. For example, in one case, the court held that a Ministerial decision regarding the terms of renewal of a tree-farm licence was one that was appropriate for judicial review.[57]

Moreover, section 52 of the Constitution of Canada affirms the power and obligation of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution. Under subsection 24(1) of the *Charter*, courts may also order whatever remedy is "appropriate and just" in cases where a law or governmental action violate a *Charter* right. Consequently, even though political or policy-type questions may be involved, where the Constitution (including the *Charter*) is alleged to be violated, such questions are properly justiciable by the courts.[58]

3.4.1.2 Unlimited Discretion to Set Procedure?

Decision-makers operating under a statute obtain all their powers from that statute. If they stray from their statutory powers, their actions and decisions are subject to review by a court. A court may quash the unauthorized decision, send it back to the tribunal for re-consideration, or order a number of other remedies.[59]

In the context of challenging a disposition of oil and gas rights under Alberta's *Mines and Minerals Act* (the "Act"), the relevant question is as follows: does the Act authorize the Minister to sell to the highest bidder, without giving notice to affected surface rights landowners or users, and without any meaningful public participation into how a publicly-owned resource is to be developed?

The doctrine of parliamentary sovereignty allows legislation to delegate very broad discretionary powers to administrative bodies. The Act does not specify any details of the procedure to be adopted by the Minister in disposing of oil and gas rights. The only mention of procedure is in subsection 16(b) which states that an issuance can occur by "way of sale by public tender". But the provision goes on to state that the sale shall be "conducted in a manner determined by the Minister". Clearly, this grants the Minister wide discretion in terms of setting the exact procedure to be followed.

Further, as noted, subsection 16(a) authorizes the Minister to issue an agreement in respect of oil and gas "on application" if the Minister considers the issuance of the agreement warranted in the circumstances, and subsection (c) grants a general power to issue an agreement "pursuant to any other procedure determined by the Minister".

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[57] *Islands Protection Society v. British Columbia* (1979), 98 D.L.R. (3d) 504 (B.C.S.C.).

[58] See, for example: *Operation Dismantle v. R., supra* note 5 and *supra* note 29.

[59] There remedies are discussed in Appendix A to this Guide.

The Legislature has thus given the Minister of Energy wide discretion to determine the procedure through which publicly-owned oil and gas rights will be disposed of by the Province. The use of the terms "considers" and "determined by the Minister" highlight the subjective nature of this discretion. Such language makes it difficult to determine objectively the limits of the delegated power granted to the Minister under the Act. Both phrases imply a subjective determination, to be made by the Minister and not the courts. Such subjective grants of power often make it difficult to obtain judicial review on the basis that the delegate has acted outside of the ambit of its power.[60]

On the other hand, in a system guided by the rule of law, unlimited discretion never exists. There are grounds, although limited, upon which courts will review discretionary decisions made by statutory delegates. Canadian courts have held that discretionary decisions will generally be given considerable respect, but that discretion must be exercised in accordance with the boundaries imposed in the relevant statute, as well as in accordance with the principles of administrative law and the principles of the *Charter*.[61]

3.4.1.3 Principles of Administrative Law

Two general doctrines from administrative law might be applicable in the context of a disposition of oil and gas rights by the Minister of Energy under the Act. These are: (a) the principles that amount to an "abuse of discretion" by a statutory delegate; and (b) the law regarding procedural fairness.

Abuse of Discretion

Even where a statute grants broad discretion, courts will review and possibly overrule a delegate's exercise of discretion for a wide range of abuses. The standard of review imposed by the court for such errors is correctness so that a court will grant no leeway to a delegate in these circumstances. The court will in fact substitute its own opinion for what should have been done in the circumstances.[62]

Two types of abuses of discretion might have some relevance to the way the Province disposes of oil and gas rights without any effective public notice or consultation. The first is this: courts have said that an abuse of discretion can occur where a delegate (in our context, the Minister of Energy) acts on inadequate material, including where there is no evidence or without considering relevant matters. Secondly, it is also an abuse of

[60]See, for example, *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into the Donald Marshall Jr. Prosecution)*, [1989] 2 S.C.R. 788.

[61]*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[62]See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

discretion for a delegate to refuse to exercise its discretion by adopting a policy which "fetters" (or limits) its ability to consider individual cases with an open mind.

Based on the first principle, it may be possible to argue that, by selling to the highest bidder without considering other relevant matters that might be raised through public consultation, the Minister of Energy is not properly exercising his or her discretion under the Act. There are a host of other considerations (including the conservation of resources, and impacts on health, the environmental, the community, etc.) that perhaps should be taken into account.

One difficulty with such an argument is that inferring which factors are relevant or not typically comes from the general purposes and intention of the particular legislation under review.[63] In our context, the *Mines and Minerals Act* does not incorporate any conservation, environmental or health purposes or intentions. These are reserved for other statutes that are more specific to particular resources like the *Oil and Gas Conservation Act*,[64] or environmental legislation of broader application such as the *Environmental Protection and Enhancement Act*.[65]

Another response to the argument that the Province only considers price in its disposition decisions is the CMRDC review described above. The Province would likely point to this Committee to state that it does take environmental considerations into account when making a disposition decision. But, as noted, the mandate of the CMRDC appears limited to surface access restrictions identified in current law or policy; it does not consider health or way of life impacts for example. It is also doubtful that the Committee has the requisite environmental data upon which to base its environmental recommendations.

As to the second ground of "fettering", or limiting, discretion, it is at least arguable that the Minister's approach of selling to the highest bidder in all cases reflects a blanket application of policy every time discretion must be exercised under the Act. The law is clear that a delegate exercising statutory discretion must do so without being fettered by any particular policy, and must make a decision by considering the circumstances of every particular case.

One response to this argument, however, could be that the phrase "by way of sale by public tender" in subsection 16(b) of the Act could be interpreted to mean a sale to the highest bidder. On the other hand, this may be an overly-restrictive understanding of the word "tender". Although it may be the case in most situations, price is not always the

[63]See, for example, *Sheehan v. Ontario (Criminal Injuries Compensation Board)* (1974), 5 O.R. (2) 781 (C.A.), leave to appeal to S.C.C. refused.

[64]R.S.A. 2000, c. O-6.

[65]R.S.A. 2000, c. E-12.

only consideration in all types of tenders. Sometimes timing, how a project will proceed, what kind of technology will be used, etc., are relevant considerations when awarding tender.

Bibliography/Suggested Reading

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

D. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003)

Procedural Fairness

The second doctrine from administrative law that might be relevant in the context of the disposition of oil and gas rights without public consultation is the law regarding procedural fairness, or the duty to be fair. This doctrine applies to the way statutory delegates exercise their discretion when making administrative or executive decisions. Failure to reach a decision in a procedurally fair manner renders the decision void.

Courts typically require decision-makers to be correct in their choice of procedurally fair processes, meaning that they will allow no room for legal error and will impose their own view of what is procedurally fair in the circumstances. Sometimes, though, courts will only intervene if the exercise of procedural discretion is patently unreasonable in the sense that no decision-maker, acting reasonably, would have adopted such a procedure. This is especially so in cases where legislation grants the statutory delegate discretion over the form of procedures it adopts or over a particular aspect of that procedure.[66] For example, it has been noted that section 16 of Alberta's *Mines and Minerals Act* grants the Minister of Energy authority to issue oil and gas agreements through public tender "conducted in a manner determined by the Minister" or "pursuant to any other procedure determined by the Minister". Thus, the Minister is given wide discretion in terms of setting the procedure to be followed. Nonetheless, disposing of oil and gas rights without giving *any* opportunity whatsoever to be heard to those whose direct interests might be affected may be patently unreasonable. If so, a court might review the exercise of such a disposition.

Courts have said that a duty of procedural fairness lies upon every public authority making an administrative decision that affects the "rights, privileges or interests of an individual".[67] The precise content of procedural fairness varies and depends on the circumstances of each case. The factors that determine whether a procedure was fair in

[66]See, for example, *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176.

[67]*Supra* note 61.

any given case include: the nature of the decision and the process followed in making it; the nature of the statutory scheme; and the importance of the decision to the individual affected.[68]

Courts have said that these factors are intended to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker. Ultimately, the court must ask itself whether, on the facts of the particular case, the statutory delegate acted fairly toward the person claiming to be aggrieved.

In the context of a disposition of oil and gas rights in Alberta, the relevant question is who might be a person "aggrieved"? Arguably, the surface landowner and/or occupant of the land under which the mineral rights are to be sold might be a person whose "rights, privileges or interests" might be affected by the Minister's exercise of discretion under the Act. The impacts of oil and gas development on the surface of the land involved (including noise, disturbance, inconvenience, possible air and water emissions, etc.) could be sufficient to affect the interests of the surface landowner. In addition, studies have shown that the mere presence of oil and gas operations on land has the effect of lowering property values.[69] This is also the case for neighboring properties.[70]

Since the rights and interests of surface landowners and occupants (and possibly neighboring landowners and occupiers) might be directly affected by a decision of the Minister of Energy to dispose of oil and gas rights, it may be that the Minister has a duty of fairness *vis-à-vis* these parties. At a minimum, this duty typically requires effective notice and some type of opportunity to be heard. The general rule is that an administrator must give adequate notice to permit affected persons to know how they might be affected and to prepare themselves adequately to make representations.

But what about someone who does not have an interest in land directly affected, but who may want to challenge the Minister's decision on the ground that it could affect his or her health or way of life, or the environment of Alberta generally? Although the

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[68]See, for example: *Nicholson v. Haldimand-Norfolk Regional Police Commrs. Bd.*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602; *Cardinal v. Kent Institution* (1985), 16 Admin. L.R. 233 (S.C.C.); *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; and *supra* note 61.

[69]See, for example: T. Molik *et al.*, *Impact of Oil and Gas Activity on Rural Residential Property Values* (Calgary, 16 December 2003), online: The Land Advocate <http://www.landadvocate.org/issues/Property_Value_Study.pdf>.

[70]A recent study by P. Boxall of the University of Alberta concluded that values of properties within four kilometres of a sour gas well drop by four to eight percent depending on the number of wells: see P. Boxall, W. Chan & M. McMillan, *The Impact of Oil and Natural Gas Facilities on Rural Residential Property Values: A Spatial Hedonic Analysis*, Working Paper Series, Paper Number 2005-03 (Edmonton: Department of Economics, University of Alberta, 2005).

language of "rights, interests and privileges" from the case law on procedural fairness appears broad, courts have limited its scope to people having a particular right or interest that is *directly* impacted. For example, in one case dealing with the issuance of a forest license, the court held that judicial review on grounds of procedural unfairness would likely only be available to someone for whom a substantive right was engaged. Where the concerns of the applicant are simply the "common good", the court said that this would likely not be enough to trigger judicial review.[71]

Contrary Statutory Intention?

It should be noted that the duty to be fair is something that courts will infer into legislative intention where the legislation does not deal with procedure. The doctrine essentially amounts to a presumption that legislation does not permit administrative action without procedural fairness. This presumption must, however, yield in the face of a specific statutory provision to the contrary in all cases.

It might be argued that section 16 of the *Mines and Minerals Act* provides this contrary intention. As noted, subection 16(b) authorizes the Minister to sell oil and gas rights by way of "public tender". Does this mean simply sell to the highest bidder without any requirements of procedural fairness to others? This is doubtful. Even with this language, there are likely at least certain procedural fairness requirements owing to all those parties that have submitted tenders to the government.

In any event, if the usual rules of procedural fairness are not available, there is another ground upon which courts might review a Ministerial decision to dispose of oil and gas rights under the *Mines and Minerals Act*. This ground is based on the *Canadian Charter of Rights and Freedoms* (the *Charter*). As discussed further below, the *Charter* may provide the basis for a judicial review application of a particular disposition decision, or it may be relevant to a direct challenge to the legislation itself.

Bibliography/Suggested Reading

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

D. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

[71] *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)*, [1997] B.C.J. No. 1645 (S.C.).

3.5 Canadian Charter of Rights and Freedoms

As noted above, although courts typically grant discretionary decisions considerable deference, statutory discretion must be exercised in accordance with the principles of administrative law and the principles of the *Canadian Charter of Rights and Freedoms*.

Where a *Charter* right is involved, the *Charter* might be relevant in two ways. First, as noted, any exercise of statutory discretion must accord with the principles of the *Charter*. Thus the *Charter* can be used to challenge a particular decision of a statutory delegate. This is so even where the decision in question is one of policy or legislative in nature. Second, the *Charter* can be used to strike down – that is, declare invalid – legislation that has the effect of violating a right or freedom it guarantees. Here the challenge is to the legislation itself, rather than to a particular decision. If, for example, section 16 of the *Mines and Minerals Act* does have the effect of ousting the common law, or usual, requirements of procedural fairness (which were discussed above), it may be that the legislation violates the *Charter* where the effect of a Minister's decision is to infringe upon a *Charter* right.

In the context of a disposition of oil and gas rights by the Province, section 7 of the *Charter* is likely most relevant. As noted, it is likely the only place in the *Charter* where direct protection against health and cultural impacts from oil and gas development might be found. Section 7 is also a potential source of procedural protections. Its requirement that the "principles of fundamental justice" be followed whenever the "right to life, liberty and security of the person" is in jeopardy allows for decisions and legislation to be stuck down for procedural inadequacy. When the rights protected by section 7 are at stake, the "principles of fundamental justice" could require procedural entitlements where none exist at common law (for example, when a legislative function is being exercised), or they could augment the procedures required by the common law.

The Supreme Court of Canada has held that a complainant must first look to the common law of procedural fairness to see if it provides for the procedural protection claimed, and if not, then resort can be had to section 7 of the *Charter*.[72] In order to trigger any procedural guarantees under that section, the exercise of statutory authority in question must at least have the *potential* to deprive someone of their right to life, liberty and security of the person. Chapter 2 of this paper has already explained that significant uncertainty still exists about whether section 7 is applicable to cases of health and cultural impacts from oil and gas development.

Another significant hurdle in making a *Charter* argument in the context of a disposition of oil and gas rights under Alberta's *Mines and Minerals Act* will be proving the potential violation (if it has not already occurred). Although the courts have said that a remedy is available for an anticipatory breach of *Charter* rights (*i.e.*, to prevent a

[72]See *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

violation from occurring), establishing causation in such cases is difficult. In one case, for example, the Supreme Court of Canada dismissed an application that alleged that a Cabinet decision to allow the testing of cruise missiles in Canada violated the right to life, liberty and security of Canadians because it increased the risk of nuclear war. The court concluded that the applicants would never be able to establish the requisite causal link to ground such an action. According to the majority, the causal link between the actions of the government and the alleged violation of the appellant's section 7 rights was "simply too uncertain, speculative and hypothetical to sustain a cause of action."[73]

Although perhaps not to the same extent, the idea that *Charter* rights might be violated by a disposition of oil and gas rights in Alberta is somewhat "uncertain, speculative and hypothetical". The argument certainly will be that, although disposed of, the rights may ultimately not be developed at all, or that it is difficult to say exactly how they will be developed and what the impacts must be. Since impacts are often contingent on the technology used, it may be that we cannot know for sure what the impacts will be until we know which technology will be used by the company developing the oil and gas. On the other hand, given the built-incentives to develop in Alberta's current tenure system, it may be that, in the right case, we can be fairly certain what at least some of the impacts will be.

Even if the challenge to the disposition is brought *after* a particular disposition has been made, the difficulties of establishing the cause of a *Charter* breach will remain. Because of the evolving and uncertain nature of the science establishing the exact links between environmental impacts and human health, proving causation on a balance of probabilities (as required in *Charter* cases) could be difficult in many cases. The same is true for establishing that the Minister's disposition of oil and gas rights has significantly impacted a way of life. Additionally, even where impacts can be proven, it might be argued that it is not the Minister's decision, but rather licences and approvals granted by other agencies later on in the process, that have led to this result.

Assuming the causation difficulties could be overcome, what would the principles of fundamental justice require? Courts have held that they are similar to the principles of procedural fairness in administrative law and, at a minimum, include a fair and impartial tribunal, acting in good faith, and an opportunity to state one's case before the tribunal, although an oral hearing is not always required.[74] As with the rules of procedural fairness at common law, the requirements of fundamental justice under section 7 of the *Charter* vary with the particular context. Certain procedural protections might be constitutionally mandated in one context, but not in another.[75]

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[73] *Operation Dismantle v. R.*, *supra* note 5 at 447.

[74] *Supra* note 72.

[75] *R. v. Lyons*, [1987] 2 S.C.R. 309.

Courts have also recognized that a practical balance must be achieved between fairness and efficiency. In regard to provincial statutory delegates such as Alberta's Minister of Energy, courts have said that provinces must be given room to make choices regarding the type of administrative structure that will suit their needs, unless the use of such a structure is in itself so manifestly unfair (having regard to the decisions that it is called upon to make) as to violate the principles of fundamental justice.[76] Courts have also said that administrative convenience will not generally provide a full answer to a violation under the *Charter*.

What does all of this mean for a disposition of oil and gas rights by Alberta's Minister of Energy? Courts have said that the closer one is to a judicial or quasi-judicial-type of decision, the higher the standard of procedural fundamental justice. As one moves closer to the other end of the spectrum, that of legislative or policy decisions, a lower standard will be required, with administrative decisions landing somewhere in between.

The disposition of minerals by the Minister of Energy under the *Mines and Minerals Act* is more likely an administrative decision than a legislative or quasi-judicial one. Thus, the procedural requirements mandated by section 7 of the *Charter* would fall somewhere in between very strict and very lax requirements. Since there are currently *no* requirements for any kind of direct notice (let alone an opportunity to make representations) for anyone whose life, liberty or security might be jeopardized by a disposition of oil and gas rights, it is arguable that the current procedure would not accord with the principles of fundamental justice in section 7 of the *Charter*, and thus would constitute a violation of section 7.

As noted above, however, that would not end the matter. Although not common, it is possible that a court might find a violation of section 7 saved by section 1 of the *Charter*. The arguments the Province would likely advance to justify its process of selling to the highest bidder without effective public notice or consultation are based on notions of efficiency. As noted, selling as quickly as possible to the highest bidder accords with market economics and is good for the industry (and thus for government revenue). Further, the idea of giving detailed notice to all people potentially impacted (perhaps in unforeseen ways) and allowing them to make representations is arguably impractical, costly and time-consuming.

On the other hand, there are numerous examples where public notice is easily achieved through publication in local newspapers. And, there are jurisdictions in Canada and elsewhere where this kind of consultation goes on, at least at a regional level.[77] Furthermore, giving notice to the people most directly impacted would require a simple

[76] *R. v. Jones*, [1986] 2 S.C.R. 284.

[77] In Alberta an example of a more consultative process for oil and gas rights disposition is that of the Métis Co-Management Process, which applies to minerals situated beneath Métis Settlements.

land titles search to identify the owners and occupants of the land under which the minerals are to be sold. Ultimately, a court would have to balance the concerns with efficiency with those of fairness to determine whether the current process is demonstrably justified in a free and democratic society as required by section 1 of the *Charter*.

Bibliography/Suggested Reading

D. Jones and A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

D. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001).

3.6 Alberta Bill of Rights

Briefly, it should be noted that the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, might also have some relevance to the process of disposing of oil and gas rights in the province without public consultation. As noted earlier, section 2 of the *Alberta Bill of Rights* states that every law of Alberta shall (unless it expressly states otherwise) be construed so as not to infringe or authorize an infringement of any of the rights or freedoms the *Bill of Rights* recognizes. Along with an individual right to liberty and security of the person similar to that in the *Charter*, the Act includes the right to the "enjoyment of property" and the "right not to be deprived thereof except by due process of law", which as noted, likely means the same thing as the "principles of fundamental justice".[78]

It is at least arguable that this right to "enjoyment of property" under the *Alberta Bill of Rights* might bolster an argument by the surface landowner or occupant (and his or her neighbors) that they are entitled to "due process" before the Province makes a mineral rights disposition decision that will ultimately negatively impact the use to which they can put their lands, and the value of those lands. At a minimum, "due process" must include a right to effective notice and some type of opportunity to be heard.

[78]See *supra* note 51.

Chapter 4: Environmental Impact Assessment

This chapter will consider whether human rights law has anything to say about the way environmental impact assessment (EIA) is carried out with respect to oil and gas development in Alberta. Where applicable, environmental impact assessment is intended to assess the health and cultural (or way of life) impacts of industrial development. Consequently, it makes sense to examine whether the current process would stand up to constitutional scrutiny if health and way of life were rights protected by the *Charter*.

4.1 Alberta's Environmental Impact Assessment Process

Part 2 of Alberta's *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "EPEA") sets out the EIA process for the province. One of the purposes of this process is "to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity." This language is of course broad enough to include health and way of life impacts.

Certain activities are designated as mandatory so that an EIA is required for these. For example, the construction and operation of an oil sands mine, an oil refinery and a sour gas processing plant that emits more than 2.8 tonnes of sulphur per day are all subject to the EIA process under EPEA. Other activities may be subject to the EIA process if the Director is of the opinion that one should be conducted. Still others are specifically exempted from the EIA process. Most notably, the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93 expressly exempts the "drilling, construction, operation or reclamation of an oil or gas well" from the EIA process. Also excluded are sweet gas processing plants that emit less than 384 kilograms of oxides of nitrogen per day and pipelines of a certain size. Given these exemptions, it is clear that the majority of oil and gas activities in the province are exempt from an EIA review. Such exempt activities could in theory be subject to an EIA if the Minister of the Environment so directs (pursuant to s. 47(b) of EPEA), but this is rarely done in practice.

In the case of non-exempt and non-mandatory activities, the Director must determine whether an EIA should be ordered for a particular project. Notice must be given to anyone who is "directly affected by the proposed activity". Those persons may submit a written statement of concern to the Director setting out their concerns about the proposed activity and the Director must take these concerns into account when deciding whether to order the preparation of an EIA report.

It will be immediately apparent that this test does not require adverse affect. The only requirement is that the party submitting a statement of concern be "directly affected" by the proposed activity. Although potentially broad, "directly affected" is not without limits. Courts have held that the use of the word "directly" in legislation means that a person has to show a personal (rather than community) interest in the matter. For example, a long history of environmental advocacy does not entitle someone to special status as a person directly affected.[79] Rather, it has been held that the word "directly" in EPEA requires proving, on a balance of probabilities, that a "direct personal or private interest (economic, environmental, or otherwise) will be impacted or proximately caused"[80] by the activity in question. Arguably, if a human right to health or way of life existed in Canadian human rights law, these rights could be relied upon to demonstrate the interests that might be affected by the proposed project. The argument would be that constitutional rights are included in the type of interests that would be "directly" affected.

Where an environmental impact assessment is required under EPEA, the party proposing to undertake the activity must file a report that includes information on a number of matters. Some of the items that must be covered in the EIA report are listed in section 47 of EPEA and include the following: (i) a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations; (ii) the plans that have been or will be developed to mitigate these potential negative impacts; and (iii) an identification of issues related to human health that should be considered. Also included is "any other information that the Director considers necessary to assess the proposed activity".

The fact that a human right protected by the *Charter* might be impacted by the proposed activity could be raised as part of this latter category. As noted earlier, however, just because a human right might be involved does not mean that this right will automatically trump over other interests in all cases. There is always a balancing of factors and interests involved. Nonetheless, it is likely that where a human right might potentially be implicated, this should result in greater emphasis being placed upon the concerns the right is meant to protect than would otherwise be the case.

Once completed, the proponent of the proposed activity must submit the EIA report to the Director for review. The Director can require any additional information he or she considers necessary for the review of the proposed activity. The report must then be published and made available pursuant to the regulations. This includes publication through a register that is maintained by Alberta Environment and covers the documents and information that were submitted as part of the EIA process.

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[79]See, for example, *Kostuch (Re)*, [1996] A.J. No. 311 (Q.B.).

[80]*Kostuch (Re)*, [1995] A.E.A.B.D. No. 9 (E.A.B.).

Where oil and gas activities are involved, subsection 51(a) of EPEA requires the Director to advise Alberta's Energy and Utilities Board ("EUB") that the EIA report is complete (once the Director is of the opinion that the report is so complete). EPEA does not require the Director to assess the validity of the information provided in the EIA report; nor does it require the Director to make recommendations to the EUB. Ultimately, it is the EUB that will determine how the environmental impacts of a project are to be mitigated and whether an oil and gas project should proceed or not. The Director's role is limited to ensuring that the EIA report is complete and to referring it to the EUB. By way of contrast, when the EIA report is submitted to the Minister, the Director can make recommendations to the Minister pursuant to subsection 51(c) of EPEA.

From this brief review, it is clear that the EIA process under EPEA is not a central feature of the oil and gas development process in the province. First, as noted, the vast majority of oil and gas activities in the province (most of which consist of oil and gas wells) are excluded entirely from the EIA process. Second, as noted, the EIA process under EPEA is intended only to ensure that the information provided by the proponent of the project is complete. The Director advises the EUB when the EIA report is complete. The report simply provides the EUB with environmental information it can use to make its decision about whether or not to approve the particular project. In the context of oil and gas activities, it is the EUB (and not Alberta Environment) who will make the final determination about whether a project is in the public interest or not, and environmental impacts are only one consideration in the EUB's decision.[81]

Are there any arguments to be made that these two features of the current EIA process violate fundamental human rights under the *Charter*? This paper has considered whether health and way of life impacts from oil and gas development might be protected by section 7 of the *Charter*. In a case with clear evidence of such impacts (and assuming that section 7 provides the requisite human rights protection), is the fact that oil and gas wells are exempt from the EIA process under EPEA a violation of section 7 of the *Charter*?

This is doubtful. Although not part of the EIA process under EPEA, the EUB is mandated by its own legislation to consider the environmental effects of all oil and gas wells prior to approving them. These effects include health and way of life impacts. Consequently, it would seem that any *Charter* arguments in regard to health and way of life would best be made at the EUB stage, rather than in the context of the EIA process under EPEA.

As for whether a violation of a *Charter* right might be made out because EPEA refers the EIA report to the EUB for ultimate project approval, again this is doubtful. The doctrine of parliamentary sovereignty allows provincial legislatures to delegate ultimate

[81]The public interest test applied by the EUB is considered further in Chapter 5 below.

decision-making authority to whatever administrative body it chooses. As long as the process utilized by the EUB, and the EUB's final decision, do not violate the *Charter*, there are likely no rights violated. Again, any challenge based on human rights law in regard to the environmental assessment of oil and gas activities would likely be more appropriate *vis-à-vis* the EUB's mandate rather than the EIA process set out in EPEA.

4.2 The Federal Environmental Impact Assessment Process

Along with the provincial EIA process under EPEA, the environmental impact assessment process set out in federal legislation may apply to certain oil and gas operations in Alberta. Under section 5 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), a federal EIA is required whenever a federal agent or department proposes a project, funds a project or sells, leases or transfers control of federal lands required to carry out a project. In addition, a federal EIA is required whenever a federal department has authority to issue a permit, licence or grant an approval in a number of circumstances. These include the following: (i) permits and approvals under the *Fisheries Act*, R.S.C. 1985, c. F-14, for activities that may harmfully alter, disrupt or destroy fish habitat, or for depositing harmful substances in waters frequented by fish; (ii) authorizations granted under the *Migratory Birds Regulations*, C.R.C., c. 1035, to carry out activities harmful to migratory birds; and (iii) federal approvals under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, for projects that affect navigation.[82] Thus, whenever such approvals are required for a particular oil and gas operation, federal EIA jurisdiction is triggered.

Some of the purposes of the federal EIA process include ensuring that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them so that they do not cause significant adverse environmental effects. CEAA also requires that all bodies subject to its provisions exercise their powers in a manner that protects the environment and human health, and that they apply the precautionary principle, which holds that caution should prevail whenever the science on actual effects is uncertain.

The federal EIA process under CEAA differs in a number of ways from the provincial EIA process under EPEA. Under CEAA, for example, the public at large can participate in the process (from the initial screening of a project to the making of representations at a public hearing if one is held). The Act talks about "public" concerns, consultation and participation. This is in contrast to Alberta's EPEA which restricts the submission of statements of concern to those "directly affected" by the proposed project.

[82]See *Law List Regulations*, SOR/94-636.

Moreover, the process under CEAA is designed to lead to a more substantive decision on whether a project will proceed than is the case under Alberta's EPEA. As noted above, in the case of oil and gas operations, the Director's decision after an EIA has been completed under EPEA is an administrative one in the sense that once the Director is satisfied that the EIA is complete, the matter is referred to the EUB who determines whether the project is in the public interest. By contrast, under CEAA, where the project is likely to cause significant adverse environmental effects that cannot be justified (even after mitigation measures are considered), the responsible federal authority is not entitled to exercise any power that would permit the project to be carried out in whole or in part. Thus, the federal EIA process can directly impact upon whether a project will proceed or not.

Despite its potential strengths, in practice the federal EIA process has not had much direct application in the context of oil and gas activities in Alberta. Federal involvement is, generally-speaking, minimal since there is significant reliance by federal authorities on the provincial regulatory process. Subsection 20(1.1) of CEAA specifically allows federal authorities to rely upon mitigation measures that will be implemented by other persons or bodies (including provincial ones) in considering whether or not to issue approvals for a project.

Moreover, both CEAA and EPEA contemplate and allow for agreements to be entered into between the federal and Alberta governments to cooperate with each other in the context of environmental assessments where both jurisdictions are engaged. Subsection 22(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, also allows the EUB, with the approval of Cabinet, to enter into agreements with the federal government with respect to matters relating to oil and gas development in the province. These provisions have resulted in the *Canada-Alberta Agreement on Environmental Assessment Cooperation* (2005) which provides a framework for cooperative environmental assessments under a lead party. Appendix 2 to this agreement contemplates project-specific agreements for the creation of joint review panels between the federal Minister of the Environment and Alberta's EUB when public hearings are to be held to assess the environmental impacts of an oil and gas project. Typically, the EUB will serve as the lead party, represented by two members on the joint panel, and the federal government will be represented by one member. The joint panel process is conducted in accordance with the lead party's established process.

To date, examples of such joint review panels in the oil and gas context relate to oil sands projects in northern Alberta. These include those established to review Canadian Natural Resources Ltd.'s Horizon Oil Sands project in 2001 and Shell Canada Ltd.'s Jackpine project in 2004. Such reviews result in a decision by the EUB as to whether the project is in the public interest, and recommendations to the federal government with respect to federal approvals required for the project.

As far as the application of human rights law to this process is concerned, any decision by the joint panel must comply with the principles of the Charter. If there are human rights involved, the effect of the decision must be such that it does not violate these rights. Of course, as noted throughout this paper, proof of such violations will require strong evidence.

In regard to the actual federal/EUB cooperative process, any arguments based in human rights law would likely come back to the EUB process itself. As noted, joint panels are conducted in accordance with the lead party's process, which, in the case of most, if not all, oil and gas operations in Alberta, will be the EUB. Thus, as with the provincial environmental assessment process, any arguments based on human rights law would best be directed at the process of the EUB itself. Some of these possibilities (for example, arguments in relation to the test for standing before the Board) are examined in Chapter 5 below.

Bibliography/Suggested Reading

A. Green, "Discretion, judicial review, and the Canadian Environmental Assessment Act" (2002) 27:2 Queen's L.J. 785.

R. Nothey & W.A. Tilleman, "Environmental Assessment" in E. Hughes, A. Lucas & W.A. Tilleman, eds., *Environmental Law and Policy*, 3d ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

S. Penney**, "**Assessing CEAA: Environmental Assessment Theory and the Canadian Environmental Assessment Act" (1994) 4:2 J.E.L.P. 243.

Chapter 5: EUB Approval Process

This Chapter explores whether human rights law might have anything to say about certain aspects of the Energy and Utility Board's role in Alberta's current oil and gas regulatory process. In particular, the following topics are considered:

- the manner in which the EUB is constituted and funded;
- the broad powers the EUB has been given by legislation;
- the legislative test for standing for a hearing before the EUB;
- the test for intervener costs; and
- the public interest test that the Board applies when deciding whether or not to approve a particular project.

5.1 A Preliminary Note on the Charter and the EUB

Before looking at the specific topics listed above, it is necessary to comment upon the application of the *Charter* to Alberta's Energy and Utilities Board (the "EUB"), and to administrative tribunals generally. There are essentially three different ways *Charter* issues could arise before an administrative tribunal such as the EUB. **First**, an argument could be made that a particular statutory provision, under which the EUB makes its decisions, violates a section of the *Charter*. For example, if there is health protection under section 7 of the *Charter*, it is not inconceivable that a particular regulation administered and enforced by the EUB that allows for certain levels of pollution, and does not provide adequate protection, might contravene certain aspects of section 7.

A **second** way the *Charter* could arise before an administrative tribunal like the EUB is where the tribunal is required to determine a legal issue (a question of law) or an issue of mixed fact and law in making a particular decision – for example, when it is determining whether someone meets the legislative test for standing for a hearing before it.

At common law, where a tribunal has been given the power to determine questions of law by its legislation, it has impliedly been given the power to decide constitutional and *Charter* questions.[83] In Alberta, however, very recent legislation has altered the common

[83]See: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; and *Paul v. British Columbia (Forest Appeal Commission)*, [2003] 2 S.C.R. 585. See also N. Vlavianos, "Alberta's Energy and Utilities Board and the Constitution of Canada" (2005) 43 Alta. L. Rev. 369.

law by stating that administrative tribunals do *not* have jurisdiction to determine questions of constitutional law unless a regulation is passed that specifically gives the tribunal such jurisdiction.[84] In the case of the EUB, it has in fact been granted such constitutional jurisdiction by way of regulation.[85]

Whether the EUB *has to* do determine a constitutional issue in any given case is, however, another matter. Certainly where the constitutional question is fundamental to the matter before it – for example, where a legislative provision is being challenged as contrary to the *Charter* – the Board could not decide the matter without making a ruling on the constitutional question. But, where the *Charter* issue is something more incidental and the matter could be decided on other grounds, courts typically do not like to force tribunals to determine every single issue that is raised before them. Courts themselves often do not do this. In short, for tribunals to have to address them, *Charter* issues will have to be raised directly and in cases where there is strong evidence to support them.

Along with possibly having to determine questions of constitutional law, the *Charter* is also relevant to administrative tribunals in a **third** way. The law is clear that whenever a board exercises a statutory discretion, it must do so without violating *Charter* and other constitutional rights.[86] In other words, the effect of *all* EUB decisions and actions must be to comply with the principles of the *Charter*. Any time the Board exercises its statutory discretion, its orders and decisions must not violate the rights and freedoms protected by the *Charter*.

5.2 Powers and Constitution of the EUB

Two concerns about the nature of Alberta's EUB are sometimes raised by affected stakeholders. First, concern is sometimes expressed about the fact that legislation grants the EUB what seem to be unlimited powers of discretion in regard to oil and gas development in the province. In most cases, the EUB is the final arbiter of whether or not a particular oil and gas project will proceed. Given this important mandate, a second concern relates to the Board's independence, and in particular the way it is constituted and funded. The fact that members of the Board are often recruited from the oil and gas industry, and that part of its funding comes from the very industry it regulates, have raised questions about fairness and possible bias. Do these aspects of the Board's nature violate fundamental human rights in any way?

If, as discussed earlier, a case could be made out in the oil and gas context that engaged the application of section 7 of the *Charter*, the principles of fundamental justice

[84] *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

[85] *Designation of Constitutional Decision Makers Regulation*, A.R. 69/2006.

[86] See: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; and *supra* note 61.

would require a decision by a fair and impartial tribunal before a violation of a right to life, liberty or security of the person could be justified. As well, as discussed above, another body of law – administrative law – ensures that administrative tribunals provide fair and impartial processes in all contexts, even where life, liberty and security of the person is not at stake. Administrative law principles can, however, typically be overridden by express (or necessarily implicit) statutory language to the contrary.

5.2.1 Powers of the EUB

In principle, there is nothing problematic with the fact that the Alberta Legislature has chosen to give very wide powers over oil and gas development in the province to the EUB. The doctrine of parliamentary sovereignty allows legislatures to pass laws as they see fit within their spheres of jurisdiction (which, for the provinces, includes natural resources). Provincial legislatures are entitled to delegate broad legislative and administrative powers on subordinates – for example, on a body such as the EUB. A limit on this is that they are not allowed to legislate in ways that violate the Constitution, including the *Charter*.[87]

Thus, in the case of the EUB, it is the elected members of Alberta's Legislature that have made the ultimate decision in terms of the powers that have been given to the EUB. As noted earlier, however, courts will monitor a tribunal's exercise of discretion through the application of general principles of administrative law (that are aimed at curbing abuses of discretion), and through the application of the *Charter* (to ensure that the exercise of discretion does not violate any of its principles). But the mere fact that the EUB has been granted sweeping powers in the oil and gas context would be difficult to challenge on the basis of either administrative law or the *Charter*.

5.2.2 Independence and Impartiality of the EUB

The concerns about how the EUB is constituted and funded raise questions about the Board's independence and impartiality. Both independence and impartiality are relevant to an overriding legal principle called the "rule against bias" which is intended to protect the administration of justice from disrepute and to instill public confidence in the system.

As regards independence, courts have sometimes found that the rule against bias may be violated where an administrative board is under too much governmental control. This could arise, for example, in cases where members of a board can be hired and fired at the

[87] *Reference re Regulations in Relation to Chemicals*, [1943] 1 D.L.R. 248 (S.C.C.), and *O.E.C.T.A. v. Ontario (Attorney General)* (1998), 162 D.L.R. (4th) 257 (Ont. S.C.), rev'd on other grounds (1999) 172 D.L.R. (4th) 193 (Ont. C.A.).

will of the executive branch of government. Courts will consider what kinds of independence guarantees are necessary to convince a reasonable person that the members of the tribunal are independent and not subject to improper influences. To do so, courts typically look at the actual practice of a board involved to determine the true level of independence.[88] In the case of the EUB, even though the members of the Board are appointed by the provincial Cabinet, the legislation mandates an initial, fixed term of 5 years. After that, the legislation says that appointment is "during the pleasure" of Cabinet, but the actual practice of the Board has been to extend the appointment through subsequent fixed terms. In addition, the removal of a Board member is not at the pleasure of the Cabinet in the legislation, but rather requires approval by the legislature.[89] Thus, it is likely not the case that the EUB lacks structural independence from the government on these grounds.

Questions are also sometimes raised about another aspect of the legal rule against bias in regard to the EUB. This relates to the principle that administrative tribunals must provide for an impartial decision-making forum. The rule requires decision-makers to base their decisions, and to be seen as basing their decisions, on nothing but the relevant law and the evidence properly before them. In other words, they must not be subject to external influences in reaching their decision. The test that courts apply asks whether "an informed person, viewing the matter realistically and practically – and having thought the matter through", would have "a reasonable apprehension of bias"?[90]

Although easy to state, the application of this test in particular circumstances can be difficult. Two facts about the EUB are sometimes mentioned as potentially violating the requirement for impartiality – first, that the Board is comprised mostly of former oil and gas industry members, and second, that the EUB receives a large part of its funding from the very industry that it regulates.

On the issue of Board membership, the actual practice of the Board is that appointees are not always drawn from industry. Some come from private practice and others rise through the ranks of the EUB itself.[91] In any event, simply coming from a particular background industry has generally not been enough, according to the courts, to meet the test for bias. Courts recognize that such a rule would exclude a lot of very qualified individuals, and the courts have acknowledged that many specialized tribunals like the EUB need experience and expertise from the particular industry involved.

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[88]*C.U.P.E. v. Ontario (Minister of Labour)* (2003), 50 Admin. L.R. (3d) 1 (S.C.C.); and *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[89]*Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, ss. 5(1)-(4).

[90]See, for example: *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.

[91]Personal communication with J.P. Mousseau, EUB Legal Department (16 April 2004).

The cases where courts have found actual bias based on previous employment have been situations where the particular member had specific knowledge of a particular case or had a special relationship with a party because of the prior employment. As well, courts have consistently said that any direct financial interest in the outcome of a matter will disqualify a member from acting. The EUB's legislation has specific provisions prohibiting such financial interests on the part of Board members. In short, it is unlikely that the courts would find some general violation of the rule against bias simply because some of the EUB's members were formerly employed by the oil and gas industry.

As regards the Board's funding, the Board currently receives about 60 percent of its funding from the oil and gas industry. In theory, being funded by the very industry one regulates could give rise to some type of structural or institutional bias. Institutional bias arises in situations where a reasonable apprehension of bias is generated by the structure or operation of a decision-making body, rather than by the words or actions of an individual decision-maker.

There have not been many cases in this area, and the ones that have found bias have been limited to specific situations, such as where a tribunal member carries out more than one function in relation to a particular case. For example, where the possibility exists that a member of a board could be part of an investigation, decide to hold a hearing and then participate in the hearing process, this would undoubtedly cause an informed person to have a reasonable apprehension of bias.[92] To date, there are no cases where courts have found that simply receiving funding from the industry regulated raises such an apprehension of bias.

In any event, in the case of the EUB, it is important to note that not all of its funding comes from industry. Sixty percent of current funding comes from industry and 40 percent comes from government through grants. Additionally, even the funding that comes from industry is not something within the industry's control. Rather, the funding is imposed by the Board through fees and levies on each facility it regulates.

Bibliography/Suggested Reading

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004), chapters 9 and 10.

R. Kligman, *Bias* (Markham: Butterworths, 1998).

D. Mullan, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

K. Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence" (2001) 14 C.J.A.L.P. 61.

[92]See *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool)*, [1996] 3 S.C.R. 919.

5.3 Tests for Standing and Intervener Costs before the EUB

Subsection 26(2) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "ERCA") sets out the test for who is entitled to a hearing before the EUB. Such parties are said to have "standing" before the Board. Those who have standing are entitled to present evidence before the Board as well as to cross-examine other witnesses. According to s. 26(2), standing is only granted to those whose "rights" may be directly and adversely affected by the EUB's decision on an application.

The EUB has said that this test for standing has two prongs. First, the person seeking standing must demonstrate that he or she has "rights", and then he or she must show that those rights might be "directly and adversely affected" by the EUB's decision. There is, as one might expect, great debate on what "directly and adversely affected" means in any given context, but from a human rights point of view, the more interesting part is the first part of the test – defining the word "rights" in subsection 26(2).

According to the EUB, the word "rights" in subsection 26(2) of the *ERCA* means that the person asking for a hearing must prove that he or she is entitled to exercise a legally-recognized interest with respect to the land where the development will be located or land adjacent to it. The Board has further decided that such legally-recognized interests with respect to land include only monetary or economic interests. Thus, there have been cases where people who used land for recreational purposes such as fishing and hunting have been denied standing.[93]

Using human rights law to assist in interpreting subsection 26(2) of the *ERCA* might lead to a more expansive definition of the word "rights" in that provision. If, as discussed earlier, section 7 of the *Charter* does in fact provide some health and/or way of life protection, the word "rights" in this provision may have to be more broadly interpreted beyond economic and property interests to include a whole range of rights. Perhaps that is why the word "rights" was actually used in subsection 26(2). If so, a person whose health or way of life may be impacted by proposed oil and gas development might be entitled to a hearing, whether or not he or she has any monetary interest in the land involved.

The Alberta Court of Appeal has recently issued a decision that appears to favor a broader interpretation of the test for standing in subsection 26(2). In *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, the court held that the word "rights" in subsection 26(2) requires the Board to ask whether the right or interest being claimed is

[93]See, for example, EUB, *Re Objections to Application Nos. 1070380 & 1071058 Well Licence and Pipelines, Shell Canada Ltd. et al. –Waterton 13-35-5-3* (Carbondale Area) (May 11, 2001).

one known to law. According to the court, "[o]bviously a constitutional, a legal, or an equitable interest would suffice".[94] The court makes no mention of a requirement of an economic or monetary interest in the land in question. It does, however, note that there must be some reasonable factual connection between the right claimed and the proposed project. In the context of an alleged constitutionally-protected aboriginal right, the court stated as follows:

> "[The EUB] is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board."[95]

Compared to the language in the test for standing, the test for who is entitled to intervener costs in section 28 of the ERCA is quite different. In that provision, there are clear terms referring to property interests – someone is a local intevener if they have an interest in land or are in actual occupation or are entitled to occupy land that may be directly or adversely affected by the application. This difference in the language chosen by the legislature may signal that the word "rights" in subsection 26(2) was intended to have a broader meaning, beyond economic and property interests in land.

From a practical point of view, however, it is often irrelevant if you have standing for a hearing, but do not have the financial resources to participate effectively in the proceeding. Section 28 of the ERCA (which allows for interveners' costs to be paid for by the oil and gas company bringing the application) was intended to address this very problem and to ensure access to justice. As noted, however, the clear terms of this provision limit the availability of costs only to those who have property interests of some kind in the land that is to be affected by the proposed project. Does human rights law have anything to say about this?

As discussed in Chapter 2 of this paper, there can be no breach of section 7 of the *Charter* if a violation of the right to life, liberty or security of the person occurs in accordance with the principles of fundamental justice. These principles include a right to a fair trial which of course raises issues of access to justice. In the criminal law context, there have been cases where courts have said that, where the liberty of the accused is at stake (because, for example, there is possible jail time associated with a particular charge), there is a right to state-funded legal counsel that is guaranteed by the principles of fundamental justice in section 7.

Other cases have required state-funded legal counsel outside the criminal law context as well. In one case, for example, the Supreme Court of Canada concluded that the failure by the government of New Brunswick to provide the appellant with state-funded counsel

[94][2005] 363 A.R. 234 (C.A.) at para. 12.

[95]*Ibid*. at para. 14.

at a child welfare custody hearing constituted a breach of section 7 of the *Charter*.[96] The court emphasized that this constitutional obligation was required in the particular circumstances of this case to ensure a fair custody hearing. By analogy, it may be that there are other cases where life, liberty and security of the person is involved that might require the provision of some type of legal costs so as to ensure effective participation in a proceeding. It is not inconceivable that such cases might arise in the oil and gas/environmental context. For example, if the evidence was such that, on a balance of probabilities, someone's physical or psychological health could be seriously impacted by proposed development, it may be that that person should be entitled to some form of financial assistance to have his or her concerns represented effectively.[97]

5.4 Public Interest Test

The last aspect of the EUB approval process that this Chapter will consider is the public interest test set out in section 3 of the ERCA. This section requires the EUB to consider whether a particular project is in the public interest before approving or rejecting it. The provision states that the social, economic, and environmental effects of a project must be considered in the EUB's determination of the public interest. Does human rights law have anything to say about this test?

Undoubtedly the public interest test in section 3 of the ERCA is a highly discretionary test. The Act does not assign any priority to any of the factors that the EUB must consider; nor does it set out any specifics as to each. The EUB has said that this test requires it to consider both local and provincial public interest issues related to a project. Thus, it is not just the interests of the applicant nor those of the interveners that are at sake. Rather, the Board has said that it "… has a duty to safeguard the interest of all the citizens of the province of Alberta".[98]

It should be noted that this approach of having an administrative body decide whether something is or is not in the "public interest" is actually quite common in legislation, especially in the environmental area. It is not something unique to the EUB or to its legislation. Moreover, Canadian courts have generally upheld such broad statutory grants of discretion as being a necessary feature of modern government.[99] The common justification is that there is a need for flexibility to deal with a number of different

[96]*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra* note 5.

[97]Most recently, the Canadian Bar Association has commenced a test case to ask the courts whether the *Charter* provides for a general right to civil legal aid: see CBA Press Release, "CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid" (20 June 2005).

[98]EUB Decision 2005-060, *Compton Petroleum Corporation Application for a Well Licence, Crossfield Field* (21 June 2005) at 12.

[99]See, for example, *supra* note 16.

scenarios as they arise. Since these scenarios are so numerous and varied, they cannot adequately be defined and addressed in any detail through legislation. A broad grant of discretion gives tribunals the flexibility to deal with particular cases as they arise.

Only a handful of cases have struck down legislation granting sweeping discretion as being too vague and overly broad. These cases have concerned legislation that created criminal and quasi-criminal offences of some kind. In these cases, the courts held that the discretion was so broad that it was impossible for someone to determine whether what they did would amount to an offence or not. In this context, the legislation was struck down as being unconstitutional.[100]

Based on the existing case law, it would likely be difficult to claim successfully that section 3 of the ERCA should be struck down as being overly broad or too vague. This is especially true, given that there is a list of factors in that provision (albeit a broad list). Nonetheless, although broad statutory discretions are generally allowed, courts will police the exercise of those discretions. As noted earlier, there are various administrative law grounds for reviewing the exercise of statutory powers or discretions. In addition, the *Charter* acts as a limitation on the manner in which discretion is exercised since all decisions by statutory bodies must comply with its principles.

Consequently, if some type of human right exists in the *Charter* that protects health and ways of life from the impacts of oil and gas development, the EUB would have to be mindful of this whenever it exercised its discretion under this public interest test in any given case. Currently, the EUB considers health impacts as simply one of the factors to be considered in this test, on equal footing with all the other factors. This may not be appropriate if in fact section 7 of the *Charter* provides some health protection from environmental impacts.

Although, as noted earlier, individual rights are never absolute and always have to be weighed against societal goals and purposes, it may be that if there is a human right involved, it should be accorded a different weight in the balancing of all factors. It may be that in some circumstances the impact on certain human rights will have to take priority over other considerations so as not to run afoul of the principles of the *Charter*. It remains to be seen whether any of these circumstances will be found in the context of oil and gas development in Alberta..

[100]See, for example: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; and *R. v. Morales*, [1992] 3 S.C.R. 711.

Bibliography/Suggested Reading

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

D. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), chapter 6.

D. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

Appendix A: Making Human Rights Arguments in Alberta –The Process

This Appendix provides some very general information on the processes involved for raising human rights arguments before the EUB, and before a court of law in Alberta. This is for informational purposes only. This Appendix is not comprehensive, and should not be relied upon in any particular case. A lawyer should be consulted in all cases to discuss the particular facts of specific cases.

This paper has outlined a number of possible arguments based in human rights law (and in some cases administrative law) to challenge either a piece of legislation (or a regulation), or a governmental decision in the context of oil and gas development in Alberta. It is conceivable that such arguments could arise in two ways. First, a judicial review application could challenge a decision made by government, such as the Minister of Energy, or an administrative body such as the EUB. The court would review the decision and determine if there are any legal reasons to prevent the decision from taking effect. Second, a challenge could be brought before the EUB itself, or a court of law, to argue that a particular regulation or piece of legislation violates a human right protected by law.

RAISING HUMAN RIGHTS ARGUMENTS BEFORE THE EUB

Administrative tribunals, like the EUB, generally have the power to set their own procedures which must be consulted in any given case. Most such rules are, however, typically fairly liberal about allowing submissions and will allow them during the proceedings as long as some notice is given to the other side.

In the case of the EUB, section 23 of its *Rules of Practice* details what must be included in an intervener's written submission to the Board prior to a hearing. In particular, subsection 23(2)(v) requires the intervener to set out the reasons why the intervener believes the Board should decide in the manner the intervener advocates. Thus, if a *Charter* argument is to be raised at the hearing, it should be included in the written submission. The Board will order the submission to be served on all parties to the

proceeding and it may require more information or may ask for further submissions, either orally or in writing.[101]

A person who intends to raise a question of constitutional law before the EUB must provide notice to the Attorney General of Canada, the Minister of Justice and the Attorney General of Alberta, and the parties to the proceeding. Notice must be provided in writing at least 14 days prior to the hearing. Written notice of the person's intention to raise a question of constitutional law must also be given to the Board.[102]

RAISING HUMAN RIGHTS ARGUMENTS BEFORE THE COURTS

Application for Judicial Review

Prior to asking a court to review an administrative decision, it is prudent to consider other possible remedies. For example, an appeal might be available in the statute governing the administrative body in question. If so, this avenue should be pursued first. Sometimes legislation will provide an appeal to another administrative body (for example, Alberta's Environmental Appeal Board) or the appeal might be to a court.

In the case of the EUB, an appeal to the Court of Appeal of Alberta is allowed on questions of jurisdiction or questions of law. Leave to appeal must first be granted from a justice of the Court of Appeal, however. The applicant must show that the question raises a serious and arguable matter.

Because the possible appeal is limited to one of jurisdiction or law, the Court of Appeal cannot review factual determinations made by the EUB. So if the Board made no legal error in approving a project as being in the public interest, the Court of Appeal cannot intervene. Decisions by the Board about, for example, the need for the project, the economic, social and environmental impacts are typically findings of fact that the Court of Appeal will not review. However, where a legal argument, such as one based on the application of the *Charter*, was addressed by the Board, this could provide an opening for an appeal. If so, an application for leave of the Court of Appeal must be filed within 30 days of the EUB order or decision having been made.

[101] *Alberta Energy and Utilities Board Rules of Practice*, A.R. 101/2001.

[102] See *ibid.*, s. 23.1 and, s. 12 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.

Standing to Bring a Judicial Review Application

Private Interest Standing

To bring a judicial review application, you must have legal standing to do so. Administrative law does not allow just any concerned citizen to challenge the decision of a statutory delegate. To have standing, an applicant must be "aggrieved", "directly affected", or have some other "sufficient interest". According to the case law, this means a person who has suffered some peculiar grievance of his or her own beyond some grievance suffered in common with the rest of the public.[103] The person must have some legally-recognized interest in the matter, as opposed to a philosophical or personal interest.[104]

The decision as to when standing ought to be granted is always in the court's discretion. Since the decision in 1986 of *Finlay v. Canada (Minister of Finance)*[105] discussed below, courts have been more willing to grant standing.

Public Interest Standing

In a number of cases, including *Finlay*, courts have held that they have the discretion, in certain circumstances, to grant standing to people who individually do not meet the specific requirements of private interest standing. Courts will do so where those seeking standing are regarded as proper representatives of the larger public interest.

Three criteria must be satisfied before a court will consider granting public interest standing: (a) the applicant must be raising a serious issue as to the invalidity of the decisions complained of; (b) the applicant must demonstrate a genuine interest in the matter; and (c) another reasonable and effective way to bring the issue before the court must not be available. In one case, for example, standing was denied to an environmental group because there were other parties with private interest standing who could adequately represent the public interest issues of concern to the environmental group.[106]

Other cases have, however, granted public interest standing to parties affected by governmental decisions in the context of resource development. In an application for judicial review of a forest management agreement, the court granted a number of parties,

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[103]See, for example, *C.U.P.E. Local 30 v. WMI Waste Management of Canada Inc.* (1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.).

[104]But persons with this latter type of interest are sometimes granted public interest standing as discussed below.

[105][1986] 2 S.C.R. 607 (S.C.C.) [hereinafter *Finlay*].

[106]*Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board),* [1996] 4 W.W.R. 604 (Alta. C.A.).

including two environmental groups, standing even though they had no direct personal economic or other interest in the matter.[107]

Stay of Proceedings

Even if a judicial review application is started, the general rule in Alberta is that the original administrative tribunal decision remains in effect. The only way to prevent this is to bring an application to the Court of Queen's Bench of Alberta for what is called a "stay of proceedings". If granted, this order will halt the application of the decision until the judicial review application has been decided by the court.

To obtain a stay of proceedings, the Alberta Rules of Court state that you must demonstrate that a stay is required to preserve your position and that it would not be contrary to the public interest or to public safety for it to be granted. As well, you must prove that your case has a real chance of success, that you would suffer irreparable harm if the stay were not granted, and that it is more convenient for the stay to be granted than not.[108]

Commencing an Application

Where the decision to be reviewed is that of a provincial statutory body in Alberta, such as the EUB, an application for judicial review must be made to Alberta's Court of Queen's Bench. The application requires the filing of a document called an "originating notice" in the format specified by the Rules of Court and payment of the applicable fee. The originating notice must concisely state the grounds of the judicial review application and what remedy, or outcome, is being sought. Any supporting affidavits (documents which set out the facts and evidence to support the application) must be filed along with the originating notice.

Copies of the originating notice and affidavits which have been filed with the Court must then be served on the decision-maker, any person who is interested in or is likely to be directly affected by the proceedings, and the Attorney General of Alberta. The Attorney General is automatically entitled to be heard on the application. The originating notice must be filed and served on all of these parties within six months of the decision being rendered, and must be served at least ten days prior to the date for the hearing named in the originating notice.

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[107] *Reese v. Alberta (Minister of Forestry, Lands and Wildlife)* (1992), 87 D.L.R. (4th) 1 (Alta. Q.B.).

[108] See: *Skydive Ranch Inc. v. Alberta (Fatality Review Board)* (2004), 356 A.R. 210; *Economic Development Edmonton v. United Food and Commercial Workers, Local 401,* 2002 A.B.Q.B. 590; and *Youth Criminal Defence Office v. Legal Aid Society of Alberta,* 2004 A.B.Q.B. 589.

Bibliography/Suggested Reading

Alberta Rules of Court, A.R. 390/68, Part 56.1.

Alberta Rules of Court, A.R. 390/68, s. 753.15.

The Standard of Proof

Judicial review does not involve a re-hearing of the case that was decided by the administrative decision maker, such as the EUB. Rather, the court will focus upon the administrator's decision, and consider whether there are any grounds upon which that decision can be reversed. These grounds are limited, especially where the statute has given the decision maker discretion. Nonetheless, as noted earlier, although they are limited, administrative law as well as the *Charter* do provide some grounds for review.

Depending on the ground being advanced and the particular circumstances of the case, courts will apply differing standards of review. Courts will weigh various factors to determine how eager they should be in interfering with a governmental decision. Sometimes the court will intervene if the decision was incorrect in the court's view – in other words, if it is different from the one the court would have arrived at – and other times a court will only interfere if a decision was patently (or obviously) unreasonable. The determination of which standard will be adopted by a court in any given case is not easy. A lawyer who has reviewed the circumstances of your particular case should be consulted for advice on this critical question.

Remedies

Most of administrative law involves applications for one of the prerogative remedies or for a private law remedy of a declaration, an injunction or, less frequently, damages. These are defined and discussed briefly below. In Alberta, an application for judicial review can request a declaration or an injunction as all or part of the relief sought along with a request for one of the prerogative remedies. An application for judicial review cannot, however, request damages. Damages must be pursued through a separate court action.[109]

Prerogative Remedies

"Prerogative" remedies are so called because they used to be available only at the discretion of the Crown. They consist of *certiorari*, prohibition, *mandamus*, *habeas*

[109] *Alberta Rules of Court*, A.R. 390/68, s. 753.04.

corpus, and *quo warranto*. For our purposes, the relevant prerogative remedies are *certiorari* and prohibition.

Technically-speaking, c*ertiorari* is an order from a superior court compelling a statutory delegate to render up all of the record of its proceedings to permit the court to determine the lawfulness of those proceedings. If the superior court's review indicates an error of the kind the court will interfere with, then it will strike down the proceedings, set aside the decision in question and send the matter back to the decision maker to be decided properly. Rule 753.11(1) of the *Alberta Rules of* Court sets a six month time limit for bringing an application for an order to set aside a decision or act (*certiorari*).

An order of prohibition is similar to *certiorari*, except that it occurs before the final conclusion of the statutory delegate's proceedings, and its purpose is to prohibit (or prevent) the delegate from proceeding in a manner that would amount to a reversible error.

Even where the grounds for the remedy of *certiorari* or prohibition have been established, courts always retain the discretion to refuse to issue the remedy. Courts have refused to grant prerogative remedies in the following circumstances: (a) where the applicant has waived its right to object to the defect in the statutory delegate's proceedings, or acquiesced in them; (b) where there is unreasonable delay in bringing the application to the court; (c) where the applicant's conduct disentitles it to the remedy; (d) where granting the remedy would be moot, academic or futile; and (e) where there is an equally effective alternative remedy (such as an appeal).[110]

Private Law Remedies

Declaration

Aside from the prerogative remedies, a declaration is often requested in judicial review proceedings. A declaration is just that, a declaration (by a court), and can be used to determine the lawfulness of an administrator's actions, or the validity of legislation. Although declaratory relief typically – as its name implies – declares, or states, rights, in Alberta, Rule 753.05 of the *Rules of Court* specifically authorizes the court to "set aside the decision or act" instead of just making a declaration where the applicant is entitled to a declaration that a decision or act is unauthorized or invalid.

[110]See, for example, *Can Am Simulation Ltd. v. Newfoundland (Minister of Works, Services and Transportation)*, [1991] N.J. No. 7 (Nfld. T.D.).

Injunction

Another private law remedy that might be available to remedy unlawful administrative acts is an injunction. An injunction may be sought to restrain the enforcement of an unlawful order or regulation which infringes some right of the person seeking it. Or, it may be sought to restrain the unlawful exercise of authority or to compel the performance of a duty.

In Alberta, legislation has removed the possibility of obtaining an injunction against the provincial government or any Minister or other employee of the government (except perhaps in the case of unconstitutional action).[111] In the context of judicial review proceedings, this limitation may not be as significant as it may seem however. The most common form of injunction is a prohibitory one which forbids or restrains a defendant from doing a specified act such as, in the administrative law context, the execution of an invalid or illegal order or decision. In this way, an injunction is very similar to the prerogative remedy of *prohibition.* Thus, where injunctions are not available, the remedy of *prohibition* may be.

Damages

Through a separate action (*i.e.*, not by way of a judicial review application), someone who has suffered loss by a governmental decision may be able to claim monetary damages. Because governmental officials in Canada have no general immunity from legal liability for their actions, a claim for damages may succeed when an illegal administrative action causes harm of a kind otherwise known to the private law of property, tort or contract. In the case of tort, for example, a public official may be liable where the unauthorized or unlawful action constitutes trespass, nuisance, assault, battery, false imprisonment, defamation, or where the action is found to be negligent in relation to a person to whom there is owed a duty of care.

Aside from actions based in tort, damages may also be available where a statutory delegate has violated an individual's constitutional rights or freedoms under the *Charter*. This arises from the explicit and broad remedial power vested in the courts by subsection 24(1) of the *Charter* which, as noted in Chapter 2 of this paper, enables anyone whose rights have been infringed to apply to the court for such remedy as the court "considers appropriate and just in the circumstances". In one case, for example, the plaintiff was successful in obtaining damages in an action against Toronto's city police that arose out of their poor conduct in the investigation and apprehension of a serial rapist. The court

[111] *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25.

found that the acts and omissions of the police not only breached a common law duty of care owed to the plaintiff, but also violated her *Charter* rights under sections 7 and 15.[112]

Bibliography/Suggested Reading

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

D. Mullan, *Administrative Law* (Toronto.: Irwin Law, 2001), chapter 6.

D. Mullan, *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

Costs

Bringing a court action before the Court of Queen's Bench in Alberta is costly and time-consuming. It is not something that should be undertaken without serious consideration.

Typically in a court proceeding, the successful party is entitled to what are called "party and party costs" that are paid by the losing party. There are important limitations to such costs, however. First, the amounts that are recoverable are set by the Alberta Rules of Court and currently account for only about 40 percent of legal costs actually incurred. Second, these costs are only available with respect to the costs incurred for the proceedings before the court, and not for those before the tribunal. Finally, party and party costs are typically not awarded against an administrative tribunal or government. This is so even if the complainant has been successful in proving his or her case. In the case of the EUB, subsection 26(12) of the AEUB Act specifically states that the Board is not in any case liable for costs by reason of or in respect of either an appeal or an application. This likely includes costs associated with a judicial review application.

Appeal

In the event the Court of Queen's Bench dismisses an application for judicial review, an appeal from this decision is available to the Alberta Court of Appeal.

[112] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] 39 O.R. (3d) 487 (Ont. Gen. Div.).

Charter Challenge to Legislation or Regulations

Standing

As with a judicial review application, only those with legal standing are entitled to challenge a piece of legislation or a regulation as contrary to the Charter. Private interest standing is obtained when an individual is able to prove that his or her own rights have been (or will be) directly violated by the legislation or regulation in question. Public interest standing may be granted when, as outlined above, a serious issue is being raised, the applicant has a genuine interest in the matter, and there is no preferable way to bring the issue forward.

In addition to having standing, the plaintiff must also establish that the issue is justiciable. This means that the claim being brought must require the court to rule on a legal question, not a political one. There must be a legal issue that has been presented with adequate precision and information. The Supreme Court of Canada has held that whenever a violation of a *Charter* right is alleged, the issue is justiciable.[113]

Commencing a Challenge in Alberta

Constitutional challenges to legislation and regulations are brought before the Court of Queen's Bench in Alberta. A "statement of claim" must be filed to commence the proceeding along with payment of the applicable filing fee. This is a document in which the complainant sets out the factual and legal foundation for his or her case and the remedies or outcome that is sought. Section 23 of Alberta's *Judicature Act* requires 14-days written notice to be given to the Minister of Justice and Attorney General of Alberta. The Minister of Justice and Attorney General, as well as the governmental department who has jurisdiction over the legislation, should be named as respondents to the application.

Once the statement of claim is filed, it must be served on all of the parties named, and the Attorney General has an automatic right to defend the law being challenged.

Potential Remedies

Any law that is found to be unconstitutional for violating the *Charter* is technically of no force and effect, but a court has a number of options for how to deal with the *Charter* breach. Depending on the extent of the violation, the court may strike down the provision entirely, cut the offending portion out, "read it down" (that is, narrow its application), or re-interpret the provision so that it does not violate the *Charter*. In addition, the court

[113] *Operation Dismantle v. R., supra* note 5.

may temporarily suspend the declaration of the provision as invalid in order to give the legislature time to replace the legislation.[114]

An appeal is available from a decision by the Court of Queen's Bench to the Court of Appeal of Alberta.[115]

Bibliography/Suggested Reading

P.W. Hogg, *Constitutional Law of Canada*, 2004 Student Ed. (Peterborough: Thomson Carswell, 2004).

D. Jones & A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004).

L. McKay-Panos, *How Human Rights Laws Work in Alberta and Canada* (Calgary: Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law, 2005).

D. Mullan, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto: Emond Montgomery Publications Ltd., 2003).

[114]See, for example, *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33.

[115]*Alberta Rules of Court*, A.R. 390/68, Part 39.

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