

## HUMAN RIGHTS, HEALTH AND RESOURCE DEVELOPMENT IN ALBERTA: A SUMMARY OF CURRENT AND EMERGING LAW

Article by Nickie Vlavianos ♦

### Introduction

Rural Albertans have worried about the actual and potential effects of oil and gas development on their health for years. Recently, these worries have intensified, with health concerns being raised more often and more forcefully before Alberta's energy regulator, the Energy and Utilities Board (the "EUB"). A number of factors are likely contributing to this increase in health concerns.

Like others worldwide, Albertans are becoming increasingly aware of the links between human and environmental health. At the same time, the development of oil and gas in Alberta has proceeded at a frantic pace in recent years. By 1998, more than 199,025 wells had been drilled in Alberta<sup>1</sup> and, between 1998 and 2002, an average of about 12,000 additional wells were drilled each year.<sup>2</sup> As well, large-scale development of the oil sands is well underway. In 2002, crude bitumen production surpassed conventional oil production by 25 percent,<sup>3</sup> and the EUB estimates that production of crude bitumen will triple by 2011, accounting for as much as 75 percent of Alberta's total oil supply.<sup>4</sup>

This increase in oil and gas activity not only means that more Albertans are coming into contact with the industry, but it also means that those already living and working near resource facilities are coming into more frequent contact with industry activities. While the presence of one well in any given area may not be particularly worrisome, the addition of a number of others along with batteries, pipelines and gas plants may raise the level of actual or perceived environmental risk amongst those in the area.

These cumulative effects are of growing concern and Albertans are increasingly voicing their concerns using the language of "rights". The argument is being made that oil and gas operations may, in certain circumstances, infringe upon fundamental human rights.

For example, in one case, a number of applicants argued that they were entitled to a hearing before further oil and gas development was approved because they held certain public health rights that might be implicated. They claimed that Canadian law grants them a fundamental right to life and liberty, which "... arguably includes a right to a healthy environment, *i.e.* one free from exposure to any harmful pollution emanating from [the] proposed well."<sup>5</sup>

Albertans, such as these, believe that they have a "right" which addresses the health effects they feel they face (or might face) from the environmental impacts of oil and gas development. Such a right has been formulated in various ways. It has been referred to as a positive right to health, a right to clean air, or a right to a safe or healthy environment. Conversely, it has been conceived of as a negative right to be free from exposure to toxic or harmful substances.

The paper, of which this article is an abbreviated version, seeks to examine whether these Albertans are correct. Does Canadian human rights law provide any protection from exposure to environmental contamination that impacts human health?





## RÉSUMÉ

Les Albertains qui s'inquiètent des incidences du développement des hydrocarbures sur la santé expriment leurs préoccupations de plus en plus en termes de "droits". Ils soutiennent que les opérations pétrolières risquent, dans certaines circonstances, d'empiéter sur les droits fondamentaux de la personne – par exemple le droit à un environnement propice à la santé ou le droit de ne pas être exposé aux effets nocifs de la pollution. Cet article examine le droit national et le droit international et évalue si de tels droits sont reconnus par la législation canadienne afférente aux droits de la personne. L'auteur conclut qu'au plan national, il est difficile d'identifier des droits spécifiques qui offrent des recours précis eu égard aux effets de la pollution environnementale sur la santé. Néanmoins, une évolution dans ce sens est notable, notamment au plan international.

### Human Rights

The idea of addressing questions of environmental pollution through the lens of human rights is, although not new, a radical departure from traditional approaches to environmental protection. As early as 1970, J. Sax exposed the differences between our traditional regulatory model of environmental protection and a rights-based regime. The primary characteristics of the former include broad governmental powers, sweeping administrative discretion, and various procedural rights such as the right to be consulted or to be heard in a decision-making forum. By contrast, in Sax's view, a truly rights-based regime would be one which granted to its citizens clear, substantive environmental rights that would have to be balanced against other legally-recognized interests (property rights, for example).<sup>6</sup>

Thirty years after Sax's critique, Canadian environmental law and policy continue to mirror the traditional approach to dealing with environmental issues which he described. It is certainly apparent in Alberta's approach to dealing with environmental issues generally and with respect to oil and gas development in particular. If an Albertan wants to dispute a particular oil and gas development because of alleged harmful health effects, this must be done by convincing the EUB that the project is not in the *public* interest (having regard to its social, economic and environmental effects). The question is not whether the claimant has any valid rights that may or may not be infringed in the circumstances but rather, whether the interests of Albertans as a whole justify the particular project. As for specific health concerns, these are considered by the EUB having regard to the public's well-being and standards based on protecting

the general public, not particular individuals.

Discussing sour gas operations in Alberta, the EUB has described the protection of human health through the traditional regulatory model as follows: "Residents' concern about their health, well being, and safety when living near sour oil or gas facilities is a paramount consideration of the Board when reviewing [energy] applications. Indeed, the bulk of the Board's regulations, requirements, and guidelines in this area embody the principles of protection of the *public's* well-being and the environment."<sup>7</sup>

Put simply (and in the words of Sax), an Albertan facing particular health effects from oil and gas operations must come before the EUB "essentially as a supplicant" and request that the public interest be interpreted so as to protect his/her health. This is very difficult to do where the applicable standards that aim to protect the general public are already being met. The idea that such a claimant could base his/her claim on certain substantive, legal "rights" to health, clean air, etc. – rights which must be balanced against the public interest – is not part of the traditional regulatory model governing oil and gas development in the province. And yet, as noted at the outset of this article, Albertans are increasingly speaking in terms of rights that they believe should be recognized.

### The Nature of Human Rights

People tend to speak in terms of human rights when they believe something is critically important. Human rights rhetoric 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.





From a moral standpoint, the idea that human beings have a right to breathe clean air, drink clean water or, more generally, live in a clean and healthy environment is not particularly controversial. Since environmental health is a prerequisite to human life, such “rights” go to the core of the inherent worth and dignity of every human being. As E. Swanson has put it: “[c]lean water and clean air are believed to be ours by birth; we somehow assume that such important and fundamental rights are protected by law.”<sup>8</sup>

But history has shown repeatedly that a moral right does not always necessarily translate into a right which is actually protected by law and which, when violated, allows for legal redress. Not all rights that have found broad moral support in a particular community are necessarily reflected in law. Often the goal of human rights advocates is to have current moral human rights evolve into rights protected in law.<sup>9</sup>

In short, by using the language of rights in the context of perceived health impacts from oil and gas development, Albertans are asserting how fundamental they believe human health is to one’s dignity. They also hope such “rights talk” will draw lines when societal benefits are considered and set limits on what effects from environmental pollution we are willing to tolerate. After all, this is the crux of human rights law – to ensure that the rights of the individual are balanced against the will of the majority and, in appropriate circumstances, to even trump that will.

### **Human Rights Law in Canada**

Human rights law in Canada is found in a number of different sources. By far the most significant domestic source of human rights law is the *Canadian Charter of Rights and Freedoms*, adopted in 1982. As part of the Constitution of Canada, the *Charter* takes priority over any law that is inconsistent with its terms. It also ensures that any action or decision by government cannot violate the rights and freedoms it guarantees.

Another important source of human rights law in Canada 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 states 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 increasingly important, especially in the human rights and environment areas. Soft law is called “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.

International human rights law may apply in Canada in its own right. Or, more importantly for our purposes, it may be used to assist Canadian courts in interpreting the rights and freedoms guaranteed by the *Charter*.<sup>10</sup> Moreover, even where 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.<sup>11</sup> In addition, Canadian courts faced with a novel situation often consider approaches taken by other countries.<sup>12</sup>

### **The Canadian Charter of Rights and Freedoms**

Simply stated, the *Charter* guarantees certain rights and freedoms and protects individuals from governmental actions or decisions that infringe upon those rights. Unlike other state constitutions, the *Charter* does not explicitly grant any rights that directly address human health concerns arising from environmental impacts. But the absence of any such explicit right does not preclude argument that it may exist implicitly within the provisions of the *Charter*. In particular, the language of and case law around section 7 of the *Charter* suggest that a right that protects human health from adverse environmental conditions may be implicit within that provision.<sup>13</sup>

Although not determinative, there have been cases where the courts have hinted that human health impacts from environmental causes may be covered by section 7 of the *Charter*. In *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*,<sup>14</sup> for example, the court was prepared to find that the claim of a violation of section 7 based on the threat to human health posed by the operation of a waste incinerator was a serious legal issue that needed to be tried. However, since an environmental impact assessment on the incinerator had yet to be completed, the court concluded that this *Charter* claim was not yet ripe for hearing and dismissed the claim.





Beyond these environmental cases, case law on section 7 in other contexts also signals that risks to human health may be covered by this provision. Because the right to security of the person holds the most promise, this aspect of section 7 is considered in more detail below.

### **Security of the Person**

Canadian courts have given the right to “security of the person” a broad interpretation. For example, the Supreme Court of Canada has held that this section 7 right encompasses a right to bodily integrity and a right to be free from harm and from threats to that integrity, including risks to health.<sup>15</sup> Along with physical integrity, the courts have found that “security of the person” also grants a right to be free from psychological stress. It is thus 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.

Even if the right to life, liberty and security of the person has been infringed, however, it must be remembered that, as section 7 itself makes clear, there is no violation of the *Charter*, if the infringement occurred “in accordance with the principles of fundamental justice”. These principles include a right to reasonable notice, to a fair hearing, and to reasons for a decision before the government is justified in limiting a right to life, liberty or security of the person.

It is also clear that one of the greatest obstacles to the success of such a claim would be whether the claimant is able to establish sufficient proof of a causal connection between the injury alleged and the law or EUB decision in question. Given the gradual and cumulative nature of many environmental health impacts, this may prove to be very difficult in some cases.

### **International Human Rights Law**

As noted earlier, Canadian courts often look to international law or to approaches taken by other countries to assist them in interpreting the *Charter*, especially in novel cases. Although the idea of addressing the health impacts of environmental degradation from a human rights perspective is fairly new in Canadian domestic law, there have been

significant steps taken internationally towards exposing the links between human rights and the environment.

At the level of international law, two possible avenues for addressing health impacts from environmental degradation as human rights violations are available. First, there has been some movement towards exploring the environmental dimensions of existing rights – in particular, the right to life, liberty and security of the person and the right to health as those exist in international law. A recent petition to the Auditor General of Canada submits that the federal government’s failure to adequately regulate air pollution violates both Canadians’ basic human right to life, liberty and security of the person and their right to health as those rights exist in international law.<sup>16</sup>

Second, since the late 1980s, there has been growing support amongst international environmental and human rights scholars towards the creation of a new human right – a right to a clean or healthy environment. In this article, due to limitations of space, only the potential for applying existing rights to environmental issues will be discussed.

### **Right to Life, Liberty and Security of the Person**

#### **International Law**

As in Canadian domestic law, 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*,<sup>17</sup> and in the *International Covenant of Civil and Political Rights*.<sup>18</sup> Although the *Declaration* 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 out the basic right in the following terms: “[e]veryone has the right to life, liberty and security of person”. The International Covenant, on the other hand, is an international convention which Canada has ratified. Article 6 states that:

“ 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*, there is recognition that these rights may have to yield to other concerns in some circumstances.

Although the traditional focus of the rights to life, liberty and security of the person was not modern environmental problems,<sup>19</sup> scholars have recently started to flesh out the environmental dimensions of these rights. The idea underlying these attempts is, as noted above, that life, liberty and security are fundamentally and inextricably tied up with an environment of a certain quality. As stated by N. Popovic:

“The right to life represents the most basic human rights doctrine, the essential and non-derogable prerequisite to the enjoyment of all other rights. Environmental problems that endanger life – directly or indirectly – implicate this core right.”<sup>20</sup>

Although there has yet to be an explicit binding statement to this effect by an international legal body in an actual case, there has been some suggestion of movement in that direction. In the early 1990s, for example, 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 in international law has environmental dimensions which are capable of “immediate” implementation by existing human rights bodies.<sup>21</sup>

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 includes, for example, state obligations to protect from threats (including environmental ones) to survival or quality of life.<sup>22</sup>

#### Regional Human Rights Law

Guidance on the environmental aspects of the right to life, liberty and security of the person may also be found in the approach taken by regional human rights bodies. In particular, the European Court of Human Rights has exposed the links between the right to life and environmental pollution in a series of cases. These cases have for the most part been brought under Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>23</sup> which grants everyone the right to respect for his “private and family life”. The European Court has repeatedly found violations of this human right where the complainants suffered health effects from exposure to significant toxic emissions from various industrial activities.

#### Right to Health

##### International Law

The second possible avenue for making human rights claims in the context of health concerns from environmental degradation is through the right to health, which is generally believed also to be an existing right in international law. One expression of the right is found in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*,<sup>24</sup> which declares that state parties to the Convention (including Canada) “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Similar language is also found in more specific treaties such as the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>25</sup> and the *Convention of the Rights of the Child*,<sup>26</sup> both of which have been ratified by Canada.

Despite the general belief that the right to health is an existing right in international law, there is significant debate on what the right consists of.<sup>27</sup> Although much of this debate has centered on whether the right to health includes a right to universal health care, there has been some development of the idea that the right includes a right to certain conditions (including environmental ones) for the protection of human health.

##### Regional Human Rights Law

Although the environmental dimensions of the right to health have yet to be established by an international human rights body in a specific case, we can again perhaps glean where international law might end up by looking at the approach taken by regional human





rights bodies. Of particular interest in this regard are decisions of the *African Commission on Human and Peoples' Rights*, which deals with complaints brought under the African Charter on Human and Peoples' Rights,<sup>28</sup> and the Inter-American Commission on Human Rights which administers the *American Convention on Human Rights*.<sup>29</sup> Both bodies have held that exposure to environmental pollution may infringe upon the right to health in certain circumstances.<sup>30</sup>

## Conclusion

From this brief review of current domestic and international law, it is difficult to point to specific, existing human rights that can provide clear-cut remedies for people suffering health impacts from environmental pollution. This is clearly an emerging area of the law but, as noted, there is evidence of movement in that direction, especially at the international level.

For Albertans, the most relevant provision for those seeking to make human rights claims in relation to health effects from oil and gas development is section 7 of the Charter. Although there is yet no clear precedent dealing with health impacts from environmental degradation, case law under section 7 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.

Furthermore, in interpreting section 7 of the Charter in this context, Canadian courts may be influenced by approaches taken by international and regional human rights bodies. The U.N. Human Rights Committee has repeatedly stated that the right to life, liberty and security of the person has environmental dimensions that must be fleshed out. Regional human rights bodies have been doing just that. In a number of decisions, the European Court of Human Rights, for example, has exposed the links between environmental pollution and quality of life.

As this area of law develops, one can surmise that the recognition of a right that would protect human health from the adverse impacts of environmental degradation would have significant consequences for the way oil and gas development proceeds in Alberta. All stages in the process would likely be affected, from the disposition of mineral rights to the manner in which the operations are conducted and monitored.

◆ This article is based on a paper researched and written by Nickie Vlavianos, LL.B. 1996 (Alberta), LL.M. 2000 (Calgary). Ms. Vlavianos acted as Primary Researcher on the Canadian Institute of Resources Law/Alberta Civil Liberties Research Centre Human Rights and Resource Development Project from September 2001-November 2002, funding for which was provided by the Alberta Law Foundation. The full paper is entitled *Health, Human Rights and Resource Development in Alberta: Current and Emerging Law* and can be obtained from the Canadian Institute of Resources Law by writing to <cirl@ucalgary.ca> or calling (403) 220-3200. In order that the paper could be reduced to a length suitable for this newsletter, it was revised by Janet Keeping, Research Associate with the Canadian Institute of Resources Law and Co-Manager of the Human Rights and Resource Development Project.

## Notes

1. EUB, *Alberta's Energy Resources: 1998 in Review* (Calgary: EUB, 1999) at 4.
2. EUB, *Field Surveillance Provincial Summary April 2001/March 2002*, Statistical Series 57 (Calgary: EUB, July 2002) at 19.
3. EUB, *Alberta's Reserves 2002 & Supply/Demand Outlook 2003-2012*.
4. EUB, *Alberta's Reserves 2001 & Supply/Demand Outlook 2002-2011*.
5. 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.
6. J. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: A. Knopf, 1970).
7. *Range Petroleum Corporation Application for a Well Licence LSD 4-35-70-24W5M Sturgeon Lake Area*, Decision 99-18 at 25 [emphasis added].
8. E. Swanson & E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 205.
9. B. Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002) at 24.
10. See generally, A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) and W. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Toronto: Carswell, 1996).
11. See, for example, *114957 Canada Ltée v. Hudson (Town)*, [2001] 2 S.C.R. 241 where the Supreme Court of Canada referred to the precautionary principle to assist in its analysis without first deciding whether it is in fact a principle of international law.
12. Again, see *ibid.* where the Supreme Court considered the approach taken by the Supreme Court of India in regard to the precautionary principle.



13. To a lesser extent, s. 15 may have some relevance as well. It is discussed in the paper on which this article is based, but is not addressed here.
14. (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.
15. *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30.
16. Sierra Legal Defence on behalf of Greenpeace Canada & Toronto Environmental Alliance, *Petition under the Auditor General Act*, R.S.C. 1985, c. A-17 (August 21, 2002).
17. Signed December 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71, reprinted in [1948] U.N.Y.B. 465.
18. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (the "ICCP"). The ICCPR was ratified by Canada in 1976.
19. See, for example, I. Scott, "The Inter-American System of Human Rights: An Effective Means of Environmental Protection?" (2002) Va. Env'tl. L.J. 197 at 211 (concluding that the vast majority of cases finding a violation of the right to life are extreme cases of torture, murder or forced disappearance by state agents.)
20. N. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1996) 27 Colum. H.R.L. Rev. 487 at 512.
21. 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).
22. See the 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).
23. Nov. 4, 1950, 213 U.N.T.S. 222.
24. G.A. Res. 22001 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S.3 (1966) (the "ICESCR"). The ICESCR was ratified by Canada in 1976.
25. Dec. 18, 1979, art. 12, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) [ratified by Canada in 1981].
26. Nov. 20, 1989, art. 24, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/44/49 (1989) [ratified by Canada in 1991].
27. See, for example, L. Smith, "The Right to Health" in K. Mahoney & P. Mahoney, eds., *Human Rights in the Twenty-First Century* (London: Martinus Nijhoff Publishers, 1993).
28. June 27, 1981, 21 I.L.M. 59.
29. Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.
30. See, for example, African Commission on Human & Peoples' Rights, Re Communication 155/96, Ref: ACHPR/COMM/A044/1 (May 27, 2002), regarding oil and gas development on Ogoni lands, and *Yanomami Indians v. Brazil* (1985) Inter-American Commission on Human Rights No. 7615, Annual Report of the Inter-American Commission on Human Rights: 1985, OEA/Ser.L/V/II.66/Doc.10 Rev. 1.

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The registration fee is \$495 and includes all materials and coffee both days. Please note lunch is not included. If you are interested in registering for this course, please contact Pat Albrecht at 403.220.3974 as soon as possible as space is limited.

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# RESOURCES

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