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Climate Change and the Right to a Healthy Environment in the Canadian Constitution

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Foreword

- This is not a presentation about climate change science. All major court cases have accepted the consensus position on climate change.

- Catherine Fraser CJA in *Reference re Greenhouse Gas Pollution Pricing Act*:

  > "[t]he dangers of climate change are undoubted as are the risks flowing from the failure to meet the essential challenge."

Foreword (cont'd)

- Climate change is being litigated in two arenas: public law and private law.

- Private law claims (mainly pleaded in tort) have been brought by large US cities against publicly-owned energy companies. Private law claims have been threatened in Canada, but have not been commenced

- Public law litigation is the only form of climate change litigation active in Canada today with four cases in the early stages. This presentation is about the public law litigation.

Outline

1. International Constitutional Cases
   a) *Urgenda v. The Netherlands*
   b) *Juliana v. United States*

2. Canadian Constitutional Cases
   a) *Environnement Jeunesse v. Canada*
   b) *La Rose v. Canada*
   c) *Mathur v. Ontario*
   d) *Lho'imggin v. Canada*

Outline (cont'd)

3. Constitutional Issues
   a) Political Questions and Justiciability
   b) Interpreting s. 7 of the *Charter*
      i. *Purposive Interpretation*
      ii. *Text and Origins of s. 7*
      iii. *s. 7 Jurisprudence*
   c) The *Charter* and Positive Rights
4. Conclusion

Urgenda v. The Netherlands

- Failure to achieve *Paris Agreement* GHG reduction target (-25% relative to 1990 levels) by 2020 alleged to breach ECHR.

- Alleged breaches of the European Convention on Human Rights. ECHR right to life (Art. 2) has been interpreted to require the state to take positive actions to protect life, including mitigating risk of environmental hazards

Urgenda v. The Netherlands

State Defense	Court Finding
The threat of climate change is global in nature and not something within the control of the state.	Climate change is a big problem, but United Nations Framework Convention on Climate Change (UNFCCC) is predicated on idea that each country must do its part. The Netherlands' *de minimis* contribution to global GHG emissions is not a defense.
The Netherlands is not legally bound to achieve its *Paris Agreement* targets.	*Paris Agreement* not legally binding, but GHG reduction targets provide a standard by which government efforts to protect ECHR rights may be measured.
The Court cannot require the state to create legislation.	ECHR requires that rights violations have a remedy. Appropriate remedy is a declaration. Declaratory relief leaves the means of complying with the Paris *Agreement* targets in the legislative domain.

Juliana v. United States

- *Juliana* is sometimes referred to as the children's climate change lawsuit because the plaintiffs are all young people.
- Asserted a constitutional right to a "climate system capable of sustaining human life" pursuant to the Due Process Clause of the Fifth Amendment, among other theories, and sought a declaration and injunction requiring the U.S. to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."
- District Court of Oregon denied US motions to dismiss. Decision appealed to the 9th Cir. Court of Appeals.

Juliana v. United States

- Article III of the US Constitution requires that a plaintiff have:
  - a concrete and particularized injury;
  - that is caused by the challenged conduct; and
  - is likely redressable by a favourable judicial decision.

- The majority acknowledged that the US government had been "deaf" to the problem of climate change and that elected representatives have a "moral responsibility" to act.
- The appeal focused on the third question which comes down to whether a court can grant an effective remedy.

Juliana v. United States

- However, the majority ultimately held that the remedy requested would require a "fundamental transformation of this country's energy system, if not that of the industrialized world."
- The majority held that the court did not have the expertise to formulate the complex policy required to address climate change and granting a remedy would infringe upon the separation of powers. An injunction would further require decades of supervision.
- There was a strong dissent noting that the question is not whether a remedy will solve global climate change, only whether it will have a real impact on climate change. Declaratory and injunctive relief not offensive to the separation of powers because Congress has discretion as to how to meet the objective.

Environnement Jeunesse v. Canada

- Class action by residents of Quebec aged 35 and under.

- Canada alleged to have breached s. 7 and s. 15 of the *Charter* "by failing to put in place the necessary measures to limit global warming to 1.5^{o}C."

- Also pled s. 46.1 of the Quebec Charter which provides for a "right to live in a healthful environment in which biodiversity is preserved"

- Case dismissed at the certification stage.

La Rose v. Canada & Mathur v. Ontario

- Similar claims filed within weeks of each other in late 2019. Plaintiffs are all young people affected in different ways by climate change. Learning from the mistake in *Enjeu*, neither case is a class action.

- *La Rose* targets alleged shortcomings in Federal climate change policy while *Mathur* targets alleged shortcomings in Ontario's climate change policy. Both cases based on s. 7 and 15 of the *Charter*.

- Claims seek an accounting of GHG emissions and orders to reduce GHG emissions consistent with *Paris Agreement* commitments.

Lho'imggin v. Canada

- Claim commenced in February 2020. Plaintiffs are leaders of sub-units of the Wet'suwet'en First Nation.

- Key difference is that *Lho'imggin* situates climate change within a narrative of colonial oppression of indigenous peoples.

- Claim based on s. 7 and s. 15 of the *Charter*. Section 35 aboriginal or treaty rights not asserted.

Constitutional Issues

- All of the cases plead *Charter* s. 7 and s. 15. *Lho'imggin* also pleads a novel interpretation of the POGG power.

- This presentation deals only with the s. 7 claims because those claims are, in our estimation, the most plausible. The s. 7 claims are analogous to those in *Urgenda* and draw upon academic writing advocating recognition of environmental rights under the rubric of s. 7.

- The *Charter* s. 15 claims are based on age discrimination or discrimination against indigenous persons. These claims are not plausible and will not be discussed in any detail.

Political Questions and Justiciability

- US political question doctrine is based on the idea of the separation of powers: courts deal with legal issues and legislatures deal with political issues.

- Canada does not have a formal political question doctrine, but courts will sometimes decline to decide cases on grounds of justiciability.

- Federal Court declined to enforce the *Kyoto Protocol Implementation Act* in *Friends of the Earth v. Canada* on the grounds that a review of policy was not appropriate.

- Several years later in *Turp v. Canada* the Federal Court refused to intervene in an executive decision to withdraw from the *Kyoto Protocol* on the grounds that foreign affairs is exclusively an executive matter.

Political Questions and Justiciability

- *Operation Dismantle* stands for the principle that where a breach of *Charter* rights is asserted an otherwise policy-driven issue may be appropriate for a court to answer.

- Canada's Political Question Doctrine:
  - Does the case pose a legal question?
  - Does the legal question have a significant extralegal aspect?
  - Can the extralegal elements be separated?

- *Tanudjaja v. Canada* - court declined to answer *Charter* question about the adequacy of homelessness policy on the grounds that there was no judicially discoverable or manageable standard.

Political Questions, Justiciability, and Remedy

- The common remedy requested in the constitutional climate change claims is a declaration that Canada must meet its *Paris Agreement* targets or an injunction compelling the same result. Arguably this constitutionalizes the *Paris Agreement* contrary to the executive's discretion to conduct foreign affairs.

- *Khadr I* and *Khadr II* suggest that in the event of a *Charter* breach a declaration might be granted even if it touched on foreign affairs so long as the executive and Parliament maintained discretion over how to comply with the declaration. This is reminiscent of the approach of the Netherlands Supreme Court in *Urgenda*.

Interpreting Section 7 – Text

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

Interpreting Section 7 – Purposive Interpretation

- How should *Charter* rights be interpreted?
  - "liberal and generous" interpretation?
  - purposive interpretation?

- How is the purpose of a right to be ascertained?
  - Purpose to be drawn from context
  - Context includes legislative history of the *Charter*
  - Context may include international commitments

- *R. v. Poulin*: open-ended standards less likely to be defined by history.

Interpreting Section 7 - Origins

- Environmental and property rights were considered for inclusion in the *Charter* and not included.

- *Re BC Motor Vehicle Act* rejected the use of history as a basis for a narrow interpretation of the meaning of "fundamental justice".

- SCC rejected history and earlier precedent in finding that s. 2(d) protected a right to collective bargaining and right to strike.

- Historical omission not an insurmountable obstacle to recognizing that right to life and security of the person may include environmental rights.

Interpreting Section 7 – International Law

- The use of international law commitments to define *Charter* rights and to interpret statutes is controversial.

- Advocates of recognizing environmental rights in s. 7 of the *Charter* point to international law as a basis for a broad interpretation. *ICESCR* provides that signatories must take steps to improve "all aspects of environmental and industrial hygiene."

- International law does <u>not</u> provide an adequate basis for recognizing environmental rights in the *Charter*.

Interpreting Section 7 – Case Law

- Criminal restrictions that cause physical and psychological suffering has been found to be an infringement of the right to security of the person: *Chaoulli*, *Morgentaler*, *Rodriguez*.

- Government action that exacerbates existing conditions may be found to be an infringement of the right to security of the person so long as there is a causal connection: *Bedford*, *PHS Community Services Society*.

- Would the SCC extend these principles to situations where it is Government inaction that exacerbates existing conditions?

Charter and Positive Rights

- Positive rights are rights that require state action whereas negative rights require an absence of state action. In reality there is no bright line that separates positive and negative rights.

- Environmental rights, whether a right to a stable climate system or otherwise, are positive rights because they require state action.

- The *Charter* has some explicit positive rights. Many of these are procedural rights such as the right to disclosure in a criminal case. There are also substantive rights such as the right to minority language education.

Charter and Positive Rights

- The SCC will recognize positive rights in the context of rights that are framed in negative terms: *Dunmore v. Ontario*.
- Underinclusive legislation successfully challenged in the context of s. 15: *Vriend v. Alberta.*
- McLachlin CJC: "[keep]open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances." (*Gosselin v. Quebec*)
- SCC has consistently denied positive rights claims while using rhetoric that suggests that positive rights claims are possible.

Conclusion

- *Trans Mountain Pipeline v. Mivasair* (2019):

> "[the protesters] argue that government action must foster "'a climate system capable of sustaining human life' and that the enhancement of the Trans Mountain Pipeline is antithetical to that obligation. The jurisprudence does not support the conclusion that there is such a positive obligation."