AGAINST A "STABLE CLIMATE" CLAIM UNDER SECTION 7 OF THE CANADIAN *CHARTER OF RIGHTS AND FREEDOMS* PART 2 - LACK OF STATE ACTION

This post is the second post in which I am arguing that attempting to regulate the climate by court action using section 7 of the *Charter* – the right to life, liberty and security of the person - is not sustainable. In the first post, referring to the court case brought in Quebec by the environmental organization Envlronnement JEUness against the federal government and a similar case brought in the U.S. called *Juliani v. The United States*, I touched only briefly upon the tremendous remedial problems that would be faced by any court,[1] and then dealt with various non-constitutional reasons why a section 7 claim cannot succeed:

1) **It will be difficult to prove injury-in-fact, that is, some personal individual injury endangering life, or physical or psychological health, now or in the future;**
2) **There can be no proof of causation between the injuries said to be occurring, or to occur, and the refusal by any Canadian government to legislate against carbon emissions;**
3) **Because Canadian emissions are so insignificant compared to world-wide emissions, a Canadian court has no means by which to redress the complaints.**

In moving now to discuss the various constitutional issues why such a claim cannot succeed, I deal firstly, in this post, with the fact that there is no *state action* for a court to set aside and thus no basis to utilize section 7 of the *Charter* by climate change litigants.

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[1] I neglected to mention in my last post the work of Professor Vaclav Smil, in particular to his *Energy and Civilization: A History*, that show that transitioning to new energy systems take decades, if not longer. Thank you to Andrew Roman for reminding me of this source.

PART 2 - LACK OF STATE ACTION

> 7. 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.

Introduction – The Necessity for State Action

Proponents of the section 7 claim base their request for legal intervention not on any existing common law right, or under any legal cause of action created legislatively, but rather under section 7 of Canada's *Charter of Rights and Freedoms.* The *Charter* is part of the constitutional law of Canada and is of a particular type of constitutional document - a *bill of rights* - which generally serves only to protect individual civil rights and civil liberties from the power of government and not as call for government to act.

For this reason, it is necessary that a claimant demonstrate some *state action* - some legislation or action by state officials or others acting under the authority of the laws – to be restrained by reason of an infringement of the rights guaranteed in the *Charter*. To succeed therefore, a claimant cannot simply say that he lacks legislative protection[2] but rather must locate some affirmative coercive or harmful state action. Failure to act by the government will rarely amount to state action for *Charter* purposes in general and section 7 in particular.[3]

That the *Charter* and in particular, section 7, requires that there be some state action follows from the text of the *Charter,* its legislative history and from the normal role of a constitution in a constitutional democracy.[4] [5] "A constitution,"

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[2] *Beauchamp v. Canada*, [2009] FC 350, at para. 22. A person does not automatically suffer an interference with section 7 interest because of the absence of legal protection.

[3] Stewart, *Fundamental Justice: Section 7 of the Charter of Rights and Freedoms*, at p. 54.

[4] See Hogg, *Constitutional Law of Canada*, para. 37.2(h).

[5] We do not go into legislative history (other sources do an adequate job) nor do we now go into "the normal role of a constitution," which we shall emphasize later in our posting on *non-justiciability*. On textual correspondence, we would briefly say that both section 7 and the entirety

affirms Peter Hogg, "establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people." [6]

Fatal to the *Charter* claim for a stable climate is that there exists no state action for the court to protect against as our energy system is not essentially a creature of government but rather flows from the natural processes of our society to provide for human flourishing.

We shall now more fully examine the possible activity for which state action might be claimed by climate change litigants to show that there is no sufficient state aspect to interdict. After that, we dispute arguments made by proponents to still claim that state action exists – 1) the *government permitting* argument and 2) the *underinclusive* doctrine. In the end, we conclude that there is no state action existing and hence section 7 is unavailable to claimants demanding governments to stabilize the climate.

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of the *Charter* supports the necessity for state action to invoke court intervention. The language of section 7 itself indicates this function:

> 7. 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.

If no state action has occurred, no deprivation of life or security of the person can have occurred. The phrase "in accordance with principles of fundamental justice" loses all meaning as among matters, without state action, there is no means to make any comparisons. *Tanudjaja v. Attorney General of Canada*, 2014 ONCA 852 (CanLII), at paras. 27 and 28. There must have been some deprivation by government; inadequacy of the government program is not for questioning by the courts. See in particular *Scott v. Attorney General*, 2017 BCCA 422, at para. 89.

Additionally, other portions of the *Charter* would be rendered meaningless without some law or other state action. Determining the limitations allowed under section 1 of the *Charter* would be unworkable as the limits must be "prescribed by law." Section 32 – stating that the Charter applies to "the parliament and government of Canada in respect of all matters within the authority of Parliament" would be of no effect. Section 52 remains unavailable as there is "no law" that is inconsistent with the provisions of the constitution," and to utilize section 24 alone, would seem not to be sufficient.

[6] Hogg, *Constitutional Law of Canada*, para. 37.2(h).

The Possibilities for State Action

What are the possibilities for state action for Canadian emissions of carbon dioxide into the atmosphere? We are assisted greatly in our analysis in an article by two proponents for a section 7 claim, law professors Nathalie Chalifour and Jessica Earle,[7] who comprehensively list all possibilities that might exist to claim state action.[8] After detailing a number of relatively smaller matters that they claim could be attacked such as pipeline approvals (which are obviously too minor in their impact to be said to cause any Canadians climate injuries) they discuss more substantial targets. We take the liberty of listing from their paper those that show the most plausible claims for state action:

1. The inadequacy of the federal government's GHG reduction target to reduce emissions by 30% below 2005 levels by 2030;[9]

2. The failure of the federal government to meet its international commitments to reduce GHG emissions and avoid dangerous levels of warming;

3. The inadequacy of the mitigation policies under the Pan-Canadian Framework;

4. The whole constellation of government decisions "authorizing and subsidizing fossil fuel extraction, development, transportation and infrastructure that, together lead to unacceptable levels of GHG emissions;"[10]

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[7] *Feeling the Heat: Climate Litigation under the Charter's Right to Life, Liberty and Security of the Person*. Ottawa Faculty of Law Working Paper No. 2017-48, available online at SSRN.com. (November 20, 2017) (*Chalifour and Earle*). As stated previously, I disagree with most of the conclusions in the paper.

[8] *Chalifour and Earle*, pp. 33-43.

[9] The chosen state action target in *Urgenda*, supra.

[10] Somewhat similar to the chosen state action target in *Juliana*, *supra.*

5. The inadequate implementation of past climate plans, or the insufficiency of the government's current targets and legislation, or, where governments have legislated targets, such as in British Columbia, by failure to take steps to meet the legislated targets;

In their discussion of state action, they also list another matter that is not really an activity but rather a characterization:

6. Frame the obligation as a duty by government to take action to meaningfully reduce GHG emissions to avoid harm.

The last characterization in item # 6 – that section 7 casts a *positive duty* on government to act - is of a different kind than those preceding it and really is an admission that there is no activity that can be seen as state action. We don't discuss *positive rights* here but rather it merits a section of its own and will be dealt with not in this post but in the one to follow.

Examining the other suggested targets for litigation (items # 1-5) makes it clear is that proponents cannot find any state action to attack. The authors complain variously of "inadequacy" or "insufficiency" of action, showing that their complaint is not against any particular state action but rather with the amplitude of government efforts to mitigate. Activists wish the court to substitute its own judgment for that of the legislature, but that is an improper judicial function. "In carrying out their duties," Justice Iacobucci has said, "courts are not to second-guess legislatures and their executives on what they regard as their proper policy choice: this is for the other branches."[11]

As to other matters raised by the list, we have previously shown in our last post that 1) international commitments (item #2), and 2) legislative targets (item #5) are not actionable in our courts. We can additionally say now that there is no

[11] Iacobucci J. in *Vriend v. Alberta*, para. 136.

reason why missing commitments or targets would constitute state action so as to engage section 7. Nor would inadequate "implementation" - as distinct from legislation or policies - give rise to any state action.

There is only one other possible claim for state action that merits further consideration is that touched upon in item #4 –- whether the government regulation of some aspects of our use of fossil fuels, such as issuing permits, is sufficient to constitute state action.

Government Permitting is not State Action

> "They assert that government is really everywhere, even if by facilitation or abstention."[12]

Proponents suggest that the requirement for state action can be met by the fact that governments are engaged in considerable regulation of the energy industry. This argument is echoed (in part) by Chalifour and Earle:[13]

> It would be more compelling [to determine what state conduct to challenge] to focus attention on the network of policies, plans and decisions that have the cumulative effect of causing harm. For instance, the Canadian governments routinely grants permits and licenses authorizing activities that emit GHGs, such as oil and gas extraction projects, refineries and pipelines.

Something of the same claim has also been made by Professor Linda Collins, although not specifically in respect to climate change but rather to environmental harm generally under section 7:[14]

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[12] Peter Hogg, *Constitutional Law of Canada*, para. 37.2(h).
[13] Chalifour and Earle, *Feeling the Heat*, p 33.
[14] Lynda M. Collins, *An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms,* (2009), 26 Windsor Review of Legal and Social Issues, 7, at pp. 17-18.

> Second a government may create environmental degradation capable of infringing Charter rights by affirmatively permitting private conduct that causes environmental harm. Facilities that discharge contaminants into the Canadian environment are subject to a complex web of municipal, provincial, and federal statutes and regulations requiring specific permitting of polluting activities. Where a government agency issues a license, permit, or certificate of approval specifically permitting a particular environmentally harmful emission, discharge, or course of conduct, there is no doubt that government action has occurred and that the s.32 [of the *Charter*] requirement is met.
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> Third, a government may create environmental harm by setting statutory and regulatory standards that allow for the emission of harmful levels of contaminants. … In all three scenarios, there is clear state action capable of grounding a Charter claim.

The argument goes, I believe, that fossil fuel usage is buttressed by a plethora of government regulation, thus rendering the entirety of the activity as state action. No authority is given in either article for the proposition that mere regulation, in itself, creates state action for constitutional purposes.[15] Again, proponents are not attempting to impugn any particular piece of legislation; it is after all not the fact that the government has mandated fossil fuel use. They are saying that the mere existence of legislation in a field creates sufficient government control to engage the *Charter*.

That state action occurs because government chooses to regulate some aspects of activity cannot succeed. The courts are still being asked to second-guess the government. The state could not be compelled by the court by the *Charter* to ban tobacco products because it regulates the tobacco industry to some extent. Nor could the court oversee infectious diseases merely because the government regulates them. With the degree of state regulation in today's world there is no activity that is left untouched and this proposition would thus constitutionalize almost all activities, making them subject to court oversight.

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[15] Professor Collins's third matter – setting inadequate standards for emissions – raises something akin to the American *state-created danger doctrine* but that has been rejected in parts by the Supreme Court. Furthermore, climate change is a case that is far more complex. See generally Andrew Varcoe, *Does the Constitution Provide a Substantive Due-Process Right to a Stable Climate System?* (2017) Washington Legal Foundation, Online.

Finally, this permitting argument must be said to have been put to bed by the result in *Tanudjaja v. Canada,* where government involvement in the housing industry was said by claimants there to violate rights to adequate housing. The court in response said that there was no sufficient legal component to engage the decision-making capacity of the courts as there was no state action or legislation challenged.[16]

We therefore conclude that the permitting argument for state action cannot succeed. We proceed to discuss next the last possible argument for state action – the under-inclusivity doctrine.

Not Under-inclusive State Action

As a last-ditch effort at satisfying the state action requirement, proponents argue that the failure of the government to legislate decarbonization is really an aspect of *underinclusivity*. In the *Vriend* and *Dunmore* cases,[17] the Supreme Court determined in section 15 equality reviews that comprehensive legal regimes created by human rights and labour relations legislation that left unprotected certain groups within those regimes that ought to be protected, such as LGBT members, or farm workers, are underinclusive in their coverage and subject to equality protection.

But this argument fails to comprehend that the ambit of the state exercise is different. In the *Vriend* and *Dunmore* situations, there are omitted and disadvantaged groups within a comprehensive regime. In the claim for a stable

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[16] At para 27. Chalifour and Earle hold out for a more optimistic result, relying upon the "following important qualification: "this is not to say that constitutional violations can never be addressed, *particularly when the issue may otherwise be evasive of review*."" (emphasis theirs), at p. 39, *Chalifour and Earle*. This is a very faint hope indeed. *Tanudjaja,* at para. 27*,* also reminds us that the necessity for state action plays out as well in *justiciability* concerns, which we discuss in the second next posting after this one.

[17] *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 1016; *Dunmore v. Ontario*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016

climate, there are no omitted groups but rather the government has not legislated at all, or has not gone so far as proponents would want. The latter is not a situation where "the legislature enters the fray, but holds back in one particular aspect."[18] The legislature has held back fully.

In the *Dunmore* case, Bastarache J. said:[19]

> Before concluding on this point, I reiterate that the above doctrine [of underinclusion] does not, on its own, oblige the state to act where it has not already legislated in respect to a particular area. One must always be on guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place.

We conclude that the underinclusive doctrine does not avail proponents to locate state action.

There thus appears to be an absence of state action, making a claim for life and security of the person untenable. However, suspecting as much, and showing great resilience, activists have called for a *free-standing positive duty* to be created by the courts from the rudiments of section 7 for something resembling the right to a stable climate, which we discuss next. Claimants for *positive rights* read bills of rights to not merely prohibit the government from doing certain things but also to contain affirmative commands to governments to provide benefits and protections. As we shall see, positive rights are not generally accepted in our constitutional democracy, so far, and with good reason.

TO BE CONTINUED

END OF PART 2

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[18] Diane Pothier, *The Sounds of Silence: Charter Application When the Legislature Declines to Speak,* (1996) Constitutional Forum, 113, at p. 119. Article cited in *Vriend*, at para. 60, per Cory J. (joint judgment).
[19] *Vriend,* para. 29.