

Feeling the Heat: Using the Charter to take on climate change in Canada

Ontario Climate Consortium - Just Transformations
Climate Law and Justice Panel

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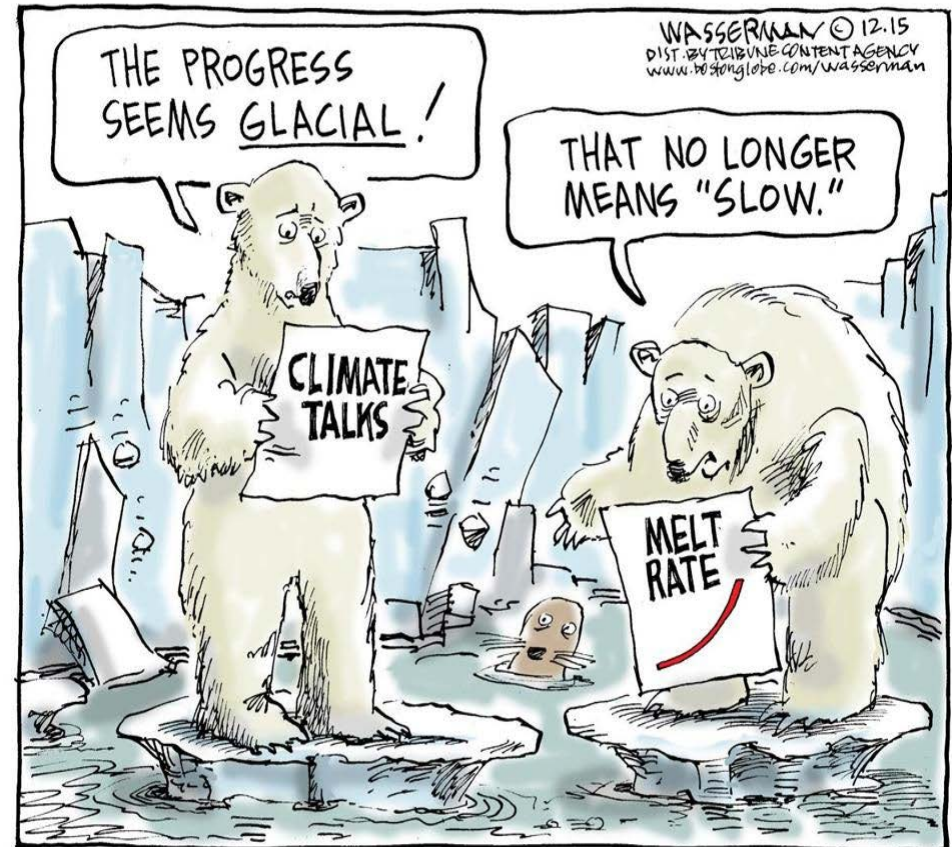


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Outline

1. Context and objective
2. Climate change through a *Charter* lens
 - focus on s. 7 and 15(1)
3. Key questions for a climate *Charter* claim
4. Conclusions

We have moved from 'whether' and 'what' to 'how' and 'how fast'



In the meantime...



Growing tide of climate litigation



Objective of research

Does the Canadian government's conduct in relation to climate change violate sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*?

NOTE: There are many other interesting avenues for litigation, from Aboriginal rights and s. 2(a) of the *Charter*, to public trust and international human rights, not addressed here.

Key provisions

- **Section 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.
- **Section 15(1)** Every 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.

Is there a Charter violation?

Section 7

- **Life:** *IPCC cites increased risk of mortality*
- **Liberty:** *Indigenous communities' place-based traditional and cultural practices and food security at risk; communities being stranded for longer periods of time in shoulder seasons.*
- **Security of the person:** *Fear of losing one's community and/or way of life is serious psychological stress; ongoing fear of extreme weather events.*

Is there a Charter violation?

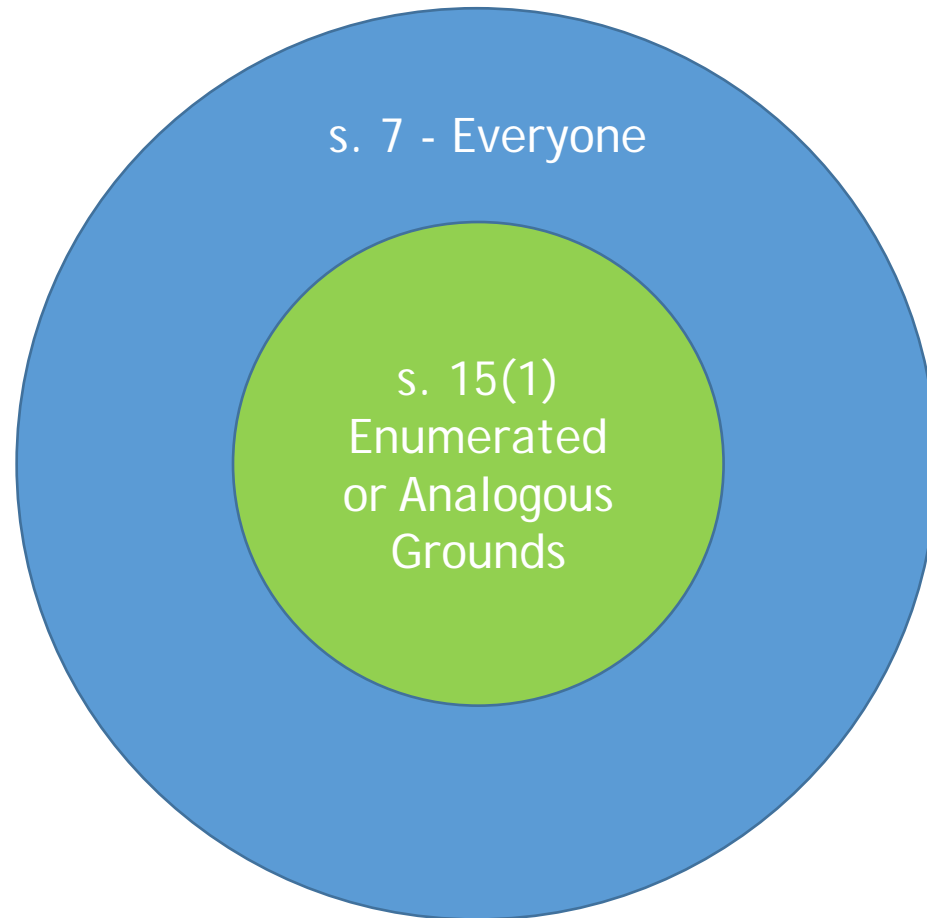
Section 15(1)

Does Canadian climate law and policy discriminate against some Canadians, such as youth who face a future with an unstable climate, or indigenous communities who may have to relocate in order to subsist or face significant hurdles (such as food insecurity) not faced by others?

Key questions

1. Who would be the best potential claimants and would they have standing to bring the case?
2. What government conduct would they challenge?
3. What would they need to prove? (the evidentiary burden)
4. Would the courts hear the case? (justiciability)
5. What remedy would be sought?
6. How would the global nature of the problem factor in?
7. What pros and cons do sections 7 and 15(1) each present?

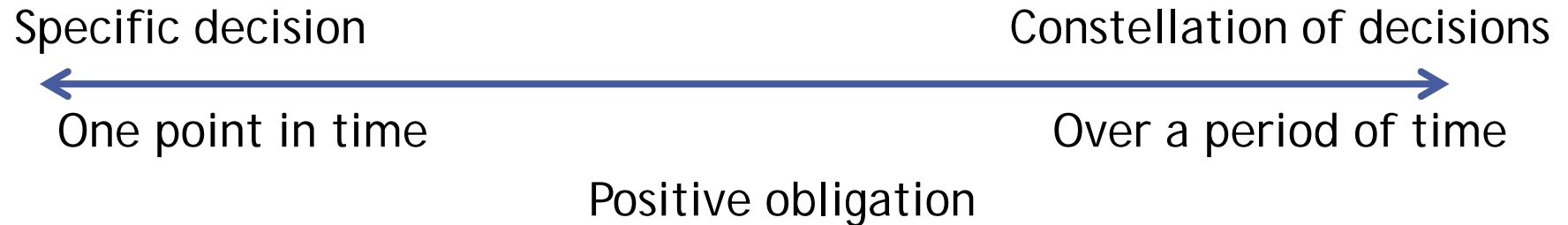
Potential claimants



Many possibilities, including *inter alia*:

- Indigenous person and/or community in the North (where warming is happening at twice the global average)
- Youth and future generations
- Senior women
- Pregnant women
- Coastal communities, farmers, general public (s.7)

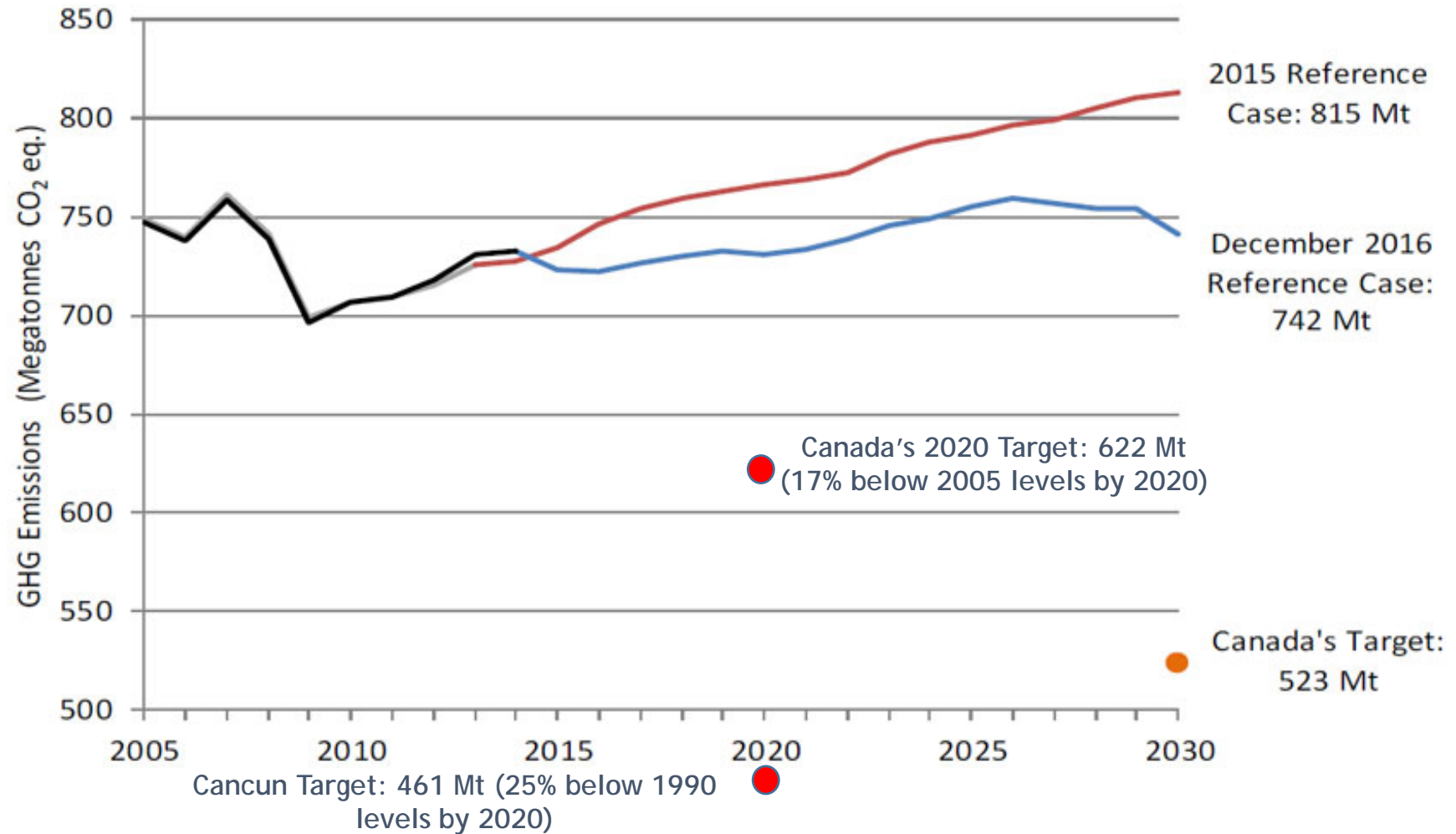
What government conduct to challenge?



Many possibilities:

- Long-term subsidization of the fossil fuel industry
- Authorizing, financing & enabling big fossil fuel projects and infrastructure
- Pan-Canadian Framework on Clean Growth and Climate Change
- Insufficient international and domestic GHG reduction targets
- Failure to meet those targets
- Failure to take steps needed to avoid 2 degree threshold (Cancun target)
- Positive duty to mitigate to avoid 2 degree threshold

Canada's GHG emissions projections



What would they need to prove?

- Causation has been the thorn in the side of environmental cases under s. 7
- Claimants need to show a « sufficient causal connection » between the government's action and the harm
 - This is a flexible standard which allows the circumstances of each case to be considered
 - Government conduct does not have to be the only or dominant cause of harm
 - Causation is satisfied by a reasonable inference, drawn on a balance of probabilities

What would they need to prove?

- In the climate context, a very thorough and robust evidentiary record exists which governments have endorsed (eg. IPCC documents, UNFCCC, IEA, GOC)
- In *Urgenda*, the evidentiary base was a set of accepted international and government documents (eg. IPCC reports, Dutch govt reports)
- Courts are increasingly taking judicial notice of climate change (see Powell & Yam, 2015)
 - “The government has admitted that, yes, climate change is a reality and that, yes, it’s induced by human activity, and they admit that CO2 right now is at a level of 400 parts per million, which. . .is the highest level in millions of years.” (Judge Thomas Coffin, case management conference, Feb 7, 2017, *Juliana v. US*)

What would they need to prove?

The evidentiary record shows that:

- Warming is anthropogenic
- Dangerous level of climate change is 2 degrees C of warming (450 PPM CO₂)
- Very probable that 2 degrees will lead to irreversible consequences for humans and the planet
- There is a time lag between emissions and their impact
- Developed countries need to reduce 25-40% below 1990 levels by 2020 to avoid 2 degrees of warming (Cancun 2010)
- Canada has been a significant emitter (one of the highest per-capita emitters)
- Canada's Paris target is insufficient to avoid 2 degrees warming
- Canada's emissions are not on track to meet this inadequate target

What would they need to prove?

Emphasis in s. 15 cases is different - about establishing that government conduct creates a distinction which creates a disadvantage:

« Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).” (*Withler*, SCC para 62-3) (emphasis added)

What would they need to prove?

- The kind of evidence allowed in *Charter* cases is broad (the experience of one individual's rights being violated is sufficient to engage a remedy)

"... statistical evidence is [not] invariably required to establish that a facially neutral law infringes s. 15. In some cases, the disparate impact on an enumerated or analogous group will be apparent and immediate." (*Taypotat*, SCC 2015)

"If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." (*Québec v. A*, SCC 2013)

What would they need to prove?

By the government's own admission:

"Taking strong action to address climate change is critical and urgent. The cost of inaction is greater than the cost of action: climate change could cost Canada \$21-\$43 billion per year by 2050.... In recent years, severe weather events have cost Canadians billions of dollars, including in insured losses. Indigenous Peoples, northern and coastal regions and communities in Canada are particularly vulnerable and disproportionately affected. Geographic location, socio-economic challenges, and for Indigenous Peoples, the reliance on wild food sources, often converge with climate change to put pressure on these communities."

(Pan Canadian Framework on Climate Change, 2016, p. 1)

Would the courts hear the case?

Justiciability:

Key question is whether the issue possesses a sufficient legal component to warrant a decision by the court.

Two climate cases (*Friends of the Earth* and *Turp*) were found to raise non-justiciable issues, but neither were *Charter* challenges and they are distinguishable.

Would the courts hear the case?

Friends of the Earth decision

“The issue of justiciability must also be assessed in the context of the other mechanisms adopted by the Act for ensuring Kyoto compliance. In this case, the Act creates rather elaborate reporting and review mechanisms within the Parliamentary sphere. ... the Act clearly contemplates Parliamentary and public accountability. While such a scheme will not always displace an enforcement role for the Court, in the overall context of this case, I think it does. If Parliament had intended to impose a justiciable duty upon the government to comply with Canada’s Kyoto commitments, it could easily have said so in clear and simple language.” (para. 42, *Friends of the Earth v. Canada*, (2009) 3 FCR 201, upheld 2009 FCA 297, leave to SCC denied) (emphasis added)

Would the courts hear the case?

Turp decision

“Under the royal prerogative, the conduct of foreign affairs and international relations, including the decision to conclude or withdraw from a treaty, falls exclusively under the executive branch of government ...In the absence of a Charter challenge, it appears that a decision made in the exercise of prerogative powers would not be justiciable” *Turp v. Canada (Justice)*, 2012 FC 893 (emphasis added)

Would the courts hear the case?

Charter context:

- When someone alleges that a *Charter* right has been violated, a court is obliged to determine whether that is the case.

“[W]hile the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers’ right to security” (*Chaouilli*, SCC 2005, at para 97)

Global nature of the problem

Does the fact that Canada contributes only 1.6% of today's global GHG emissions absolve it of responsibility?

- The Dutch government made this argument since it emits only 0.5 % of global emissions
- The Court rejected this argument for several reasons:
 - Nations have both an individual and a collective responsibility
 - Every emission contributes to the rising global concentration of CO₂
 - Annex I countries must assume a leading role
 - Moreover, Dutch per capita emissions are high

Global nature of the problem

Does the fact that Canada contributes only 1.6% of today's global GHG emissions absolve it of responsibility?

- Canada is among top 11 global emitters
- Canada is one of the top 3 per-capita emitters
- Only 0.5% of the population

Pros and cons of sections 7 and 15

Section 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.

Section 15(1) Every 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.

Conclusion

“Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”

(U.S. District Judge Ann Aiken in *Juliana v. United States*, Nov 10, 2016)



Thank you

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