Calling on Canada during a Climate Crisis

Examining the Utility of Section 7 of the Canadian Charter of Rights and Freedoms *in Forcing Government Action on Climate Change*

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A. Introduction

The planet is changing. According to NASA, it is more than 95% likely that the warming planet is the result of human activity, and that the Earth is warming "at a rate that is unprecedented over decades to millennia".[1] Canada has experienced a higher rate of warming than much of the rest of the world, averaging an increase of 1.6 degrees Celsius per year between 1948 and 2013.[2] In the face of this evidence, what must the government do to combat climate change? How can Canadians hold their State responsible for tackling this issue?

The *Canadian Charter of Rights and Freedoms*[3] (the "*Charter*") might just be the answer. This paper argues that the right to life, liberty, and security of the person contained in section 7 of the *Charter* includes the right to a healthy environment. Specifically, section 7 can be used to litigate a positive obligation on the State to take corrective measures to combat climate change. This litigation is a tool of the citizenry to hold government accountable for increasing environmental harms.

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[1] NASA Jet Propulsion Laboratory (California Institute of Technology). "Climate change: How do we know?" edited December 20, 2017 by Holly Shaftel. Online at <https://climate.nasa.gov/evidence/>.
[2] Government of Canada. "Impacts of Climate Change", modified November 27, 2015. Online at <https://www.canada.ca/en/environment-climate-change/services/climate-change/impacts.html>.
[3] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Charter*"].

Part B of this paper introduces climate change law and policy in Canada at the international, national, and provincial level, with a particular focus on the role for the federal government. Part C then introduces litigation under section 7, exploring how a right to a healthy environment implicates the right to life and security of the person. The issue of justiciability – whether there is State conduct such that the *Charter* can be invoked – is addressed in this section. It concludes by discussing how gross disproportionality as a principle of fundamental justice should be expanded to capture future harms, in order to better protect environmental rights. Part D then addresses climate change litigation specifically, considering how this context opens the door to positive obligations under section 7. Finally, Part E considers several public policy arguments against this type of litigation, concluding that none of these concerns is ultimately persuasive. Litigating a right to a healthy environment, including a positive obligation to mitigate against climate change, under section 7 is an appropriate way to hold government accountable for climate change while protecting the rights of Canadians.

B. Climate Change Law and Policy in Canada

Like many areas of environmental law, climate change law in Canada is governed by a patchwork of federal and provincial laws and regulations. Due to the global nature of the climate change crisis, international agreements also play a significant role in the Canadian approach. This section will introduce this patchwork by jurisdiction – in order, international, federal, and provincial (specifically, Ontario) – touching on only the most important instruments from each. These laws, regulations, and agreements are introduced to provide background for the suggested

litigation discussed in the sections below; this section is not intended to serve as an exhaustive description of all relevant legislation in Canada and around the world.

International

The international starting point for binding climate change instruments is the *United Nations Framework Convention on Climate Change*[4] ("*UNFCCC*"). This treaty entered into force on March 21, 1994 – Canada ratified the treaty in 1992.[5] The *UNFCCC* in its preamble recognized that "change in the Earth's climate and its adverse effects are a common concern of humankind" and that States would need to cooperate in order to address this global concern.[6] However, even within its preamble, the *UNFCCC* noted the ultimate sovereignty of States in pursuing their own particular environmental policies – along with the sovereign right of States to develop their own natural resources.[7] Developed countries were specifically identified as needing to take an immediate role in the climate change crisis.[8] As its overall aim, the *UNFCCC* called upon States parties to "[stabilize] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" – on a deadline.[9] Article 3(3) notes that States parties should take a precautionary approach, considering that there may be a lack of full scientific certainty surrounding this relatively new phenomenon.[10]

[4] *United Nations Framework Convention on Climate Change*, entered into force March 21, 1994 ["*UNFCCC*"].
[5] United Nations: Climate Change. "Status of Ratification of the Convention". Online at < http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php>.
[6] *UNFCCC, supra* note 4 at preamble.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid* at Article 2.
[10] *Ibid* at Article 3(3).

However, the actual commitments attached to this treaty are quite weak. States parties are called upon to take inventory of their greenhouse gas emissions,[11] with developed States parties required to create independent, national policies to mitigate climate change.[12] Article 5 creates research and observation obligations for States parties;[13] Article 6 requires States parties to promote education and training;[14] and Article 7 introduces a Conference of the Parties.[15] Nowhere in the instrument are States parties required to actually reduce greenhouse gas emissions or otherwise take meaningful action to combat climate change. The *UNFCCC* was significant for two reasons – it was prescient of what would become a hot-button, global topic and it placed the burden of change on the shoulders of the developed nations of the world. The teeth of this treaty would come next.

These teeth took the form of the *Kyoto Protocol*, adopted under the *UNFCCC* on December 11, 1997 and entering into force on February 16, 2005.[16] The *Kyoto Protocol* assigns greenhouse gas emission limits for each States party, and provides specific deadlines for progress in meeting these targets.[17] The *Kyoto Protocol* also permits States parties to purchase "emission reduction units" from other States parties.[18] Canada's commitment under the *Kyoto Protocol*, as provided for in Annex B, was to reduce emissions to 94% of its base year emission level.[19]

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[11] *Ibid* at Article 4(1)(a).
[12] *Ibid* at Article 4(2)(a).
[13] *Ibid* at Article 5.
[14] *Ibid* at Article 6.
[15] *Ibid* at Article 7.
[16] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Kyoto, December 11, 1997 ["*Kyoto Protocol*"].
[17] *Ibid* at Articles 3(1), (2).
[18] *Ibid* at Article 6(1).
[19] *Ibid* at Annex B.

Canada's commitment under the *Kyoto Protocol* was short-lived. In 2011, the federal Conservative government under Prime Minister Stephen Harper announced that Canada would withdraw from the protocol.[20] The federal government cited financial penalties for failing to meet its emissions reduction targets as the reason for the withdrawal, and instead committed Canada only to reducing levels to 17% below emission levels from 2005.[21]

In 2016, Canada voted to ratify another agreement under the *UNFCCC*, the *Paris Agreement*.[22] This agreement is intended to foster global cooperation to keep global temperature increases less than 2 degrees Celsius above pre-industrialization levels.[23] While Canada ratified the agreement while bringing in the new Liberal federal government's carbon pricing plan, there has been concern that Canada will be unable to play its part in this instrument.[24] However, the agreement is non-binding. Thus, while the international stage played a significant role in advancing climate change policy on a state-to-state level in the early 1990s, later attempts to solidify international obligations in the face of climate change have been less promising. Particularly for Canada, the international climate change agenda seems to be not much more than a footnote to national and provincial regulation.

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[20] Bill Curry and Shawn McCarthy, "Canada formally abandons Kyoto Protocol on climate change". *The Globe and Mail*, December 12, 2011. Updated March 26, 2017. Online at < https://www.theglobeandmail.com/news/politics/canada-formally-abandons-kyoto-protocol-on-climate-change/article4180809/>.

[21] "Canada pulls out of Kyoto Protocol". *CBC News – Politics*, December 12, 2011. Updated December 13, 2011. Online at <http://www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072>.

[22] *Paris Agreement*, December 12, 2015. Status. Online at < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

[23] *Paris Agreement*, December 12, 2015 at Article 2.

[24] Elizabeth McSheffrey, "Canada officially ratifies historic Paris climate agreement". *National Observer*, October 5, 2016. Online at <https://www.nationalobserver.com/2016/10/05/news/canada-officially-ratifies-historic-paris-climate-agreement>.

Federal

Canada's federal climate change strategy is regulated and administered by *Environment and Climate Change Canada* (formerly Environment Canada; the new name was adopted in 2015 by the federal Liberal government)[25].The department administers dozens of statutes, including the *Canadian Environmental Protection Act, 1999*[26] ("*CEPA*"). Part 4 of *CEPA* permits the Minister of the Environment to require "pollution prevention plans" for specific, listed toxic substances.[27] Part 5 likewise allows the Minister to monitor "toxic substances" (which include substances that, if in sufficient quantity, may be dangerous to human life or health if entering the environment)[28] and to determine the maximum emission levels for such substances.[29] There is a multitude of regulations under *CEPA*, including the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*,[30] which regulate, among other measures, limits on intensity of carbon dioxide emissions.[31]

While previous federal governments have introduced various measures to combat climate change – efforts that have been of varying levels of ambition[32] – the most recent federal initiative is the *Pan-Canadian Framework on Clean Growth and Climate Change*[33] ("*Pan-Canadian FCGCC*"). This policy framework was developed in 2016 and included input from citizens,

[25] CTVNews.ca Staff, "Trudeau government renames key departments". *CTV News*, November 6, 2015. Online at <https://www.ctvnews.ca/politics/trudeau-government-renames-key-departments-1.2646008>.
[26] *Canadian Environmental Protection Act, 1999* S.C. 1999, c. 33 ["*CEPA*"].
[27] *Ibid* at s. 56(1).
[28] *Ibid* at s. 64(c).
[29] *Ibid* at s. 64(3).
[30] *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* SOR/2012-167.
[31] *Ibid* at s. 3(1).
[32] See for example *Bill C-30: Canada's Clean Air and Climate Change Act*, LS-539E.
[33] Government of Canada. *Pan-Canadian Framework on Clean Growth and Climate Change*, Cat. No.: En4-294/2016E-PDF. Online at < http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.

provincial Ministers, Indigenous Peoples, and the federal government.[34] The policy targeted four areas: "pricing carbon pollution; complementary measures to further reduce emissions across the economy; measures to adapt to the impacts of climate change and build resilience; and actions to accelerate innovation, support clean technology, and create jobs".[35] As part of this initiative, the federal government announced a target of the year 2030 to eliminate traditional coal units across Canada.[36] The *Pan-Canadian FCGCC* explicitly recognized the dangers of climate change in Canada, particularly in the Arctic, as creating "significant risks to communities, health and well-being, the economy, and the natural environment".[37]

Ontario

At the provincial level, Ontario released the *Five Year Climate Change Action Plan*[38] ("*ON Action Plan*") in 2016. Ontario's Liberal government promised action in 6 areas: transportation, buildings and homes, land-use planning, industry and business, collaboration with Indigenous communities, and research and development.[39] In particular, Ontario has promised greenhouse gas emission reductions below 1990 levels of 15% by 2020, 37% in 2030, and 80% in 2050.[40] The *ON Action Plan* is implemented under section 7 of the *Climate Change Mitigation and Low-carbon Economy Act*.[41] This Act implemented a cap-and-trade program[42] in Ontario and determined

[34] *Ibid* at pg. 2.
[35] *Ibid* at pg. 2.
[36] *Ibid* at pg. 13.
[37] *Ibid* at pg. 27.
[38] Government of Ontario. *Ontario's Five Year Climate Change Action Plan 2016-2020*. Online at < http://www.applications.ene.gov.on.ca/ccap/products/CCAP_ENGLISH.pdf>.
[39] *Ibid*.
[40] *Ibid* at pg. 12.
[41] *Climate Change Mitigation and Low-Carbon Economy Act, 2016*, S.O. 2016 C.7.
[42] *Ibid* at ss. 14-20.

Ontario's emission allowances for various sectors.[43] Fines may be levied for failure to comply with the Act, ranging from $50,000 - $100,000 for individuals per day for which the Act is contravened[44] and $250,000 - $500,000 for corporations.[45]

Provincial efforts to combat climate change are certainly important, especially when considering the provincial jurisdiction over non-renewable natural resources.[46] As well, the provinces have the general jurisdiction to regulate various industries, including the power to control greenhouse gas emissions from such industries.[47] However, as noted above, the federal government has the power to regulate toxic substances,[48] which as of 2005 includes six greenhouse gases.[49] The federal government has also exercised authority in regulating emission levels by virtue of its "power to regulate international and interprovincial trade and commerce" – climate change might also fall under the residual federal regulatory power, as an issue of "national concern".[50] Largely due to the cross-border nature of climate change dangers and harms, the argument that follows in the remaining sections focuses largely on the role of the federal government, rather than on Ontario's role, in possible climate change litigation.

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[43] *Ibid* at ss. 30-39.
[44] *Ibid* at ss. 51(1).
[45] *Ibid* at ss. 51(2)
[46] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s. 92A.
[47] Becklumb, Penny. "Federal and Provincial Jurisdiction to Regulate Environmental Issues", *Background Paper*, Library of Parliament. Economics, Resources and International Affairs Division. September 24, 2013. Publication No. 2013-86-E at pg. 6 ["Becklumb"].
[48] Affirmed in *R v Hydro-Quebec*, [1997] 3 S.C.R. 213 ["*Hydro-Quebec*"].
[49] Becklumb, *supra* note 47 at pg. 6.
[50] *Ibid*.

C. Section 7 of the Charter and Environmental Rights

Canada's Constitution is to be given a "large and liberal interpretation".[51] The Supreme Court of Canada has described the Constitution as "a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[52]

However, the right to a healthy environment – or any environmental right at all – is not guaranteed in the *Canadian Charter of Rights and Freedoms*. If the *Charter* guarantees environmental rights, such rights will be found in section 7. Section 7 reads:

> 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.[53]

While section 7 is to receive the same "large and liberal" treatment as the rest of the Constitution,[54] it has been applied in a more restrictive way. Section 7, in addition to the "reasonable limits" clause,[55] is limited by the reference contained within it to the principles of fundamental justice. This internal limit was originally intended to resemble due process clauses found in the American constitution by limiting section 7 to procedural protections only.[56] However, the Supreme Court of Canada has held that there is substantive scope for section 7 as well.[57]

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[51] *Edwards v Attorney-General of Canada*, [1930] A.C. 124 (P.C.); 1929 CanLII 438 (UK JCPC), per Lord Sankey L.C. at pg. 136.
[52] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698; 2004 SCC 79 at para 22.
[53] *Charter*, *supra* note 3 at s. 7.
[54] *Re B.C. Motor Vehicle Act*, 1985] 2 SCR 486 at para 53 ["*B.C. Motor Vehicle*"].
[55] *Charter*, *supra* note 3 at s. 1.
[56] Hogg, Peter W., "The Brilliant Career of Section 7 of the Charter." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 58 (2012) at pg. 195-196.
[57] *B.C. Motor Vehicle*, *supra* note 54 at para 21.

A claimant arguing a breach of section 7 must prove three elements: first, there must be State conduct that "affects an interest protected by the right to life, liberty, or security of the person within the meaning of s. 7"; second, the State conduct must constitute a "deprivation"; and third, this deprivation must not be "in accordance with the principles of fundamental justice".[58] To determine whether a rule is a principle of fundamental justice for the purposes of a section 7 analysis, a threefold test must be met:

1. The rule must be a legal principle;
2. There must be broad societal consensus that the rule is fundamental to the fair operation of the legal system; and
3. The rule must be able to be precisely identified.[59]

The most commonly litigated principles of fundamental justice are arbitrariness,[60] overbreadth,[61] and gross disproportionality.[62]

How might environmental rights fit into this framework? The right to a healthy environment is fairly easily understood to impact the right to life or the right to security of the person. In fact, the Supreme Court of Canada has recognized that "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger

[58] Cousins, Mel. "Health Care and Human Rights after *Auton* and *Chaoulli*". 54 McGill L.J. 717 Winter (2009) at pg. 723 ["Cousins"].
[59] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4 at para 8; *R v Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at para 113 ["*Malmo-Levine*"]; see also Hendrey, James, "Section 7 and Social Justice." 27 Nat'l J. Const. L. 93 [2009-2010] at p. 110 ["Hendrey"].
[60] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35 ["*Chaoulli*"].
[61] *R v Heywood*, [1994] 3 SCR 761.
[62] *Malmo-Levine*, *supra* note 59.

human life and human health".[63] In *Chaoulli*,[64] the Supreme Court noted that any increased risk of mortality would necessarily implicate the right to life, while an increase in psychological stress could bear on an individual's right to security of the person.[65] Of course, the use of the section 7 right to life or to security of the person is not without issue – the "plain meaning" of "'[e]veryone' in the text of s. 7 suggests that 'only human beings can enjoy these rights'".[66] Thus, the use of section 7 means that environmental rights are valued for their attachment to humans, as opposed to for the utility of the environment itself.

The right to life is typically where environmental rights have been grounded internationally. In a case against Turkey, the European Court of Human Rights found that Turkey had violated the right to life when it failed to take preventive measures against a methane gas explosion, despite knowing of the risks.[67] The Inter-American Commission on Human Rights similarly found that Brazil had violated the right to life when it failed "to prevent serious environmental damage caused by resource companies".[68] Domestically, India, Pakistan, Bangladesh, and Nigeria have all found that the right to a healthy environment exists as part of the constitutional right to life.[69]

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[63] Wu, David W.-L. "Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension Between the Need for Precaution and the Need for Harm", 33 Nat'l J. Const. L. 191 December 2004 at pg. 204 ["Wu"].
[64] *Chaoulli, supra* note 60.
[65] *Ibid* at paras 116, 119.
[66] Wu, *supra* note 63 at pg. 195.
[67] Collins, Lynda M. "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms". 26 Windsor Rev. Legal & Soc. Issues 7 February (2009) at Part 2 ["Collins"]; citing *Oneryildiz v Turkey*, [2004] ECHR 657, (2005) EHRR 20, 48939/99.
[68] Collins, *supra* note 67 at Part 2; citing *Yanomami vs Brazil*, Case No. 7615, Resolution No. 12/85 of March 5, 1985.
[69] Collins, *supra* note 67 at Part 2.

The bigger concern for Canadian litigation will be in demonstrating a deprivation of the right to life or security of the person, and particularly in demonstrating that there is a justiciable issue to bring before the courts. "Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum".[70] The Supreme Court of Canada has frequently distinguished between political issues – what should be done about a complex issue – and legal issues – whether the action that has been taken complies with the *Charter*.[71] It is only where the question at issue is of the latter type that the courts will get involved.[72] What then is the justiciable State conduct in environmental rights?

There is a high bar for any section 7 claimant to prove deprivation by State conduct. In *Operation Dismantle*,[73] the Supreme Court of Canada produced an (often criticized)[74] doctrine of unprovable facts: the majority held that the claimants had produced only speculation as to what the effects of government action may be, and so had not demonstrated that a violation of security of the person would follow.[75] Without a causal link, the claim must fail.[76] A causal link is particularly difficult to prove in environmental claims, due to the "imperceptibility of environmental harm and the complex web of relationships between the environment and human health".[77] However, the Supreme Court of Canada has not been consistent in its application of this doctrine. In *Chaoulli*, *supra*, the Court was provided with virtually no proof that Quebec's ban on

[70] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d e. (Toronto: Carwell, 2012) at p. 162; cited with approval in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 at para 21 ["*Tanudjaja*"].
[71] *Tanudjaja*, *supra* note 70 at paras 24-25; see also *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134; 2011 SCC 44 at para 105; *Chaoulli*, *supra* note 60 at para 107.
[72] *Tanudjaja*, *supra* note 70 at para 27.
[73] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 ["*Operation Dismantle*"].
[74] Wu, *supra* note 63 at pg. 200.
[75] *Operation Dismantle*, *supra* note 73 at para 18.
[76] *Ibid* at para 30.
[77] Wu, *supra* note 63 at pg. 200.

private health insurance was leading to increased mortality due to longer wait lists to receive healthcare.[78] The Court accepted the tenuous causal link between the legislation and the right to life and security of the person largely because the government appeared to be inactive – as Justice Deschamps stated, "[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".[79] This is a very different interpretation of the government's role under section 7.[80] Finding a deprivation of the right to life under section 7 in order to ground environmental rights will be easier if the *Chaoulli* framework is highlighted – when Canadians' right to life is engaged, the government cannot "do nothing". The legislative action taken (or not taken – see below) thus becomes justiciable.

Finally, a claimant must demonstrate that the State violation of the right to life or security of the person is not in accordance with the principles of fundamental justice.[81] The most likely principle of fundamental justice to be argued in advancing environmental rights under section 7 is gross disproportionality. Gross disproportionality means that the "seriousness of the deprivation is totally out of sync with the objective of the measure".[82] A harm must be grossly disproportionate to the purposes of the State conduct. To ground environmental rights in section 7, the future impact of present State conduct should be weighed in the gross disproportionality analysis.[83] This would widen the impact of this principle of fundamental justice to include a more fulsome understanding.

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[78] Cousins, *supra* note 58 referred to the Court's "artificial link" at pg. 725.
[79] *Chaoulli*, *supra* note 60 at para 97.
[80] Though Justice Deschamps was specifically relying upon the right to life as found in the Quebec *Charter of Human Rights and Freedoms, chapter C-12*, the three judges forming the rest of the plurality in *Chaoulli* found a violation of section 7 of the *Charter*.
[81] Though the Supreme Court of Canada has also held that a remedy can be available for a breach of section 7 "where there [is] no principle of fundamental justice to justify the breach": Hendrey, *supra* note 59 at pg. 125.
[82] *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101; 2013 SCC 72 at para 120 ["*Bedford*"].
[83] Wu, *supra* note 63 at pg. 220.

Recognizing a wider range of interests in the gross disproportionality analysis would also mitigate against the concerns raised about causality – that is, explicitly inviting speculation as to future projections would allow the courts to recognize a lower threshold for causality between environmental action and impact. Since some degree of speculation will be necessary, the causal link need not be so strictly limited to "provable facts".

D. Litigating Inadequate Climate Change Regulations under Section 7 of the Charter

This discussion has, thus far, discussed quite generally how environmental rights can be grounded in section 7. The limits of such a general discussion are quite clear – *Charter* claims are necessarily fact-dependent. This next section addresses more specifically how inadequate climate change action can be addressed under section 7. While the general framework will not be repeated, this section will focus on whether positive rights can be litigated under section 7.

Positive rights "require the State to do or provide something 'for' the person", as opposed to negative rights which prevent the State from taking some action.[84] The question of whether or not section 7 entails positive obligations on Canada is contentious. In *Gosselin*,[85] a case involving a challenge to Quebec's social welfare scheme that was argued to provide less than the minimum standard of living to persons under 30,[86] the Supreme Court rejected the use of section 7 to create positive obligations on government. The majority stressed that "[nothing] in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life,

[84] Hiskes, Richard P. "The Human Right to a Green Future: Environmental Rights and Intergenerational Justice". Cambridge University Press, New York (2009) at pg. 28 ["Hiskes"].
[85] *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429; 2002 SCC 84 ["*Gosselin*"].
[86] *Ibid* at paras 1-6.

liberty or security of the person".[87] However, even this strong language is not conclusive – the Court followed up by noting that "[one] day, s. 7 may be interpreted to include positive obligations".[88] Likewise, in *Reference re Public Service Employee Relations Act (Alberta)*,[89] the dissent noted that a negative rights-only approach to the *Charter* "may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms".[90] The debate between positive and negative rights under the *Charter* is thus far from over.

Climate change has created the perfect storm for fully introducing positive rights into section 7. It is clear that "[w]ithout diverse and sustained living and non-living resources, human beings cannot survive".[91] Climate change is a problem that cannot be solved without government regulation – companies do not have freestanding incentives to reduce emissions, and are only targeted when it can be shown that their specific actions have led to direct and specific harm.[92] It is difficult for any single plaintiff to show this direct and specific harm.[93] The harms that arise from climate change are necessarily collective in nature – thus, the "distribution of risks" should be addressed from a communal perspective.[94] The federal government is not only best positioned to take on this distribution, it is the *only* body that can do so efficiently. Recognizing emerging positive rights in this context would thus be a small constitutional step rather than a wholesale

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[87] *Ibid* at para 81.
[88] *Ibid* at para 82.
[89] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313.
[90] *Ibid* at para 77.
[91] Anton, Donald K. & Shelton, Dinah L. "Environmental Protection and Human Rights". Cambridge University Press, New York (2011) at pg. 131.
[92] Carlarne, Cinnamon Pinon. "Climate Change Law and Policy: EU and US Approaches". Oxford University Press, New York (2010) at pg. 99.
[93] *Ibid* at pg. 112-113.
[94] Hiskes, *supra* note 84 at pg. 20.

break with past jurisprudence – an exception, rather than a revamping of the system. Where the federal government has chosen inadequate measures to address climate change, Canadians should have recourse to section 7 of the *Charter* in order to protect their right to a healthy environment.

E. Public Policy Concerns

Even if section 7 of the *Charter* can be used to successfully litigate a right to a healthy environment, and even if this is a positive obligation such that the government is required to take appropriate action to combat the effects of climate change – what next? This section will outline four public policy concerns with this litigation strategy: the "floodgates" argument; the issue of political versus judicial function; Canada's international position; and cost. While each of these points raises important issues when framing the fight for climate change action through the courts, ultimately, each can be managed by framing the issues narrowly.

"Floodgates" Arguments

The first public policy concern springing immediately from the above discussion is the "floodgates" argument. This term is used to describe Court findings – such as that a right to a healthy environment is contained within the *Charter*, requiring the government to take positive steps to combat climate change – that are likely to lead to a large influx of litigation relying on such findings. There are two possible "floodgates" arguments arising from the discussion above.

First, the idea of considering the future in the gross disproportionality analysis would dramatically widen the scope of the *Charter*. As Richard P. Hiskes has noted,

> "…speaking of the rights of future generations seems to do violence to the whole concept of rights as the property of living persons. Especially because rights are typically viewed as the property of individual persons … it is intrinsically difficult to picture real persons many generations down the road whose rights should restrict our behavior today."[95]

While "doing violence" is extreme rhetoric, it may very well be problematic to afford significant weight to future generations at a cost to present generations within an individual-focused rights framework. Using the *Charter* in this way creates another battleground for short- versus long-term planning. Why do anything today if it could be harmful down the road? This particular "floodgates" argument also creates a risk that policy could stagnate: if the rights of future generations are to be considered now alongside the rights of present generations, won't the balance always be better decided tomorrow than today? If this argument is persuasive, it certainly is detrimental to finding any environmental rights in the *Charter* at all, since "the entire cause of environmentalism presumes a connection with and a concern for the claims of future persons".[96] However, in the context of climate change, this argument is not persuasive. It is well-known that the effects of climate change will be felt, and are being felt, within the lifetimes of present generations and will continue to have effects for future generations. The rights at issue then are not precisely the rights of future generations, but rather the future rights of present generations. Individuals who exist now will see their "healthy environments" significantly degraded over time – this distinguishes this argument from that which can be made about abortion rights (the context in which Richard P. Hiskes identified future generations' rights as incompatible with a rights

[95] *Ibid* at pg. 6.
[96] *Ibid* at pg. 5.

framework). In the latter case, the rights are not only future but are also of future persons – persons who might not exist at all – whereas the rights here will attach later to persons who already have a collection of rights. This diminishes the importance of the first floodgates argument. It is easier to see how an existing person may have future rights – for example, a law requiring all persons over age 18 to enter a detention facility could be argued to violate the future liberty right of a child under section 7. We can conceptualize how section 7 rights can attach to present persons in the future, without doing the "violence" of expanding human rights frameworks to capture all possible interests of future generations.

The second "floodgates" argument that arises is whether grounding environmental rights that are *positive* in nature – that is, requiring governments to take action, rather than simply refraining from acting – will create an influx of litigation regarding other positive rights. If there is a justiciable right to a healthy environment entailing the government's responsibility to act, why shouldn't the courts find the government has a constitutional responsibility to provide food, shelter, water, basic income – all other factors that can easily impact the right to life?

Like the first "floodgates" argument, this argument can be defeated by framing the climate change issue narrowly. Positive environmental rights can be distinguished from other social welfare issues by construing environmental rights as issues of discrete public goods. A public good is nonexcludable and nonrivalrous in consumption (meaning that no one can be kept away from enjoying it, despite not paying for the good, and that consumption by one person doesn't leave less good available for the next person).[97] Often, government is the only efficient producer of a public

[97] Cowen, Tyler. "Public Goods", *The Concise Encyclopedia of* Economics, 2nd ed. Library of Economics and Liberty. Online at <http://www.econlib.org/library/Enc/PublicGoods.html>.

good.[98] A healthy environment, corrected as much as possible for the effects of climate change, is nonexcludable as the effects of climate change are not limited to geographic or political borders.[99] It would be impractical to the point of being impossible to limit clean air or stable climates to individuals who are willing to pay for this good. It is also nonrivalrous in consumption, as the enjoyment by one person of a clean environment doesn't leave a worse environment for the next person. The free market is thus not an efficient vehicle for this type of good – this is distinguishable from affordable housing, and even food and water. Each of these goods is both excludable and rivalrous. By framing climate change litigation as necessary to procure a public good, as opposed to inviting the courts to force Parliament to pay for any and all necessary goods, this second "floodgates" concern is minimized.

Political versus Judicial Function

As discussed above, there will be a difficult fight in the suggested litigation as to the justiciability of the government's conduct – that is, whether it is subject to *Charter* scrutiny at all In addition to the legal analysis already discussed, there are policy concerns implicated in this issue. First and foremost, judges are not scientists. This fact has been specifically remarked upon by former United States Supreme Court Justice Antonin Scalia in the climate change case of *Massachusetts et al. v Environmental Protection Agency et al.*[100] When his terminology was corrected during argument, Justice Scalia is reported to have said,

[98] *Ibid*.
[99] Hiskes, *supra* note 84 at pg. 16.
[100] *Massachusetts v EPA (No. 05-1120)*, 415 F. 3d 50.

> "Whatever. I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth."[101]

While Justice Scalia's remark certainly should not be taken to mean that there is no overlap between scientific issues and legal issues, it is a strong reminder that the expertise of the bench is not typically grounded in technical environmental matters. This is another way to distinguish political questions from legal questions. A political party, seeking to author and implement a policy, can employ scientists and researchers to fully understand the effects or risks involved. The courts do not have this luxury, and are limited by what is presented to them. However, the courts are certainly best positioned to evaluate the rights of Canadians – this argument might be better understood as increasing the burden on an applicant, who must start from a blank page when convincing the court.

The courts' position may also be less desirable than that of the legislature owing to the fact that climate change science is still shrouded in uncertainty. Thus, the courts' pronouncement on climate change action might render government climate change response less flexible and less able to adapt efficiently, as the relevant science grows. This argument can be met by focusing on a *de minimus* remedy: a minimum standard of government action to combat climate change could be enforced by the courts, with the technical details and extent of this duty determined by experts within the government. This is frequently how such quasi-policy questions have been handled by the Supreme Court of Canada.[102] The *de minimus* remedy itself is also not entirely unchangeable.

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[101] Bazelon, Emily. "Antonin Scalia". *The Lives They Lived*. The New York Times Magazine, December 21, 2016. Online at <https://www.nytimes.com/interactive/2016/12/21/magazine/the-lives-they-lived-antonin-scalia.html>.
[102] See for example, *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, followed by *Canada (Attorney General) v JTI-Macdonald Corporation*, [2007] 2 SCR 610; 2007 SCC 30.

In *Bedford*,[103] the Supreme Court noted that an evidentiary or circumstantial change that "fundamentally shifts the parameters of the debate" is sufficient to allow lower courts to revisit settled law.[104] If, in future, the evidentiary foundation for a climate change litigation challenge changes dramatically, the courts could revisit the issue.

As well, there is a positive aspect of insulating environmental issues as legal questions rather than strictly political questions. On the international stage, it has become evident recently just how much of an impact the government of the day has on the sustainability of any long-term environmental plans.[105] Framing such issues as legal rather than political could insulate long-term climate change strategy from the whim of the current government. Canadian politicians have been quick to abandon controversial political issues in the face of legal pronouncement – for example, in the years following the *Morgentaler* decisions,[106] abortion in Canada has become "a virtual non-issue" that is essentially left untouched.[107] If environmental issues were given a similarly "untouchable" status, Canadians' rights could be ensured more securely in the long term.

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[103] *Bedford*, *supra* note 82.
[104] *Ibid* at para 42; cited also in *Carter v Canada (Attorney General)*, [2015] 1 SCR 331; 2015 SCC 5 at para 44.
[105] See for example, Dennis, Brady & Fears, Darryl. "Disasters, drilling and the Paris climate withdrawal: The top environmental stories of 2017". *Chicago Tribune*, December 27, 2017. Online at < http://www.chicagotribune.com/news/nationworld/science/ct-top-environmental-stories-of-2017-20171227-story.html>.
[106] *R v Morgentaler*, [1988] 1 SCR 30; *R v Morgentaler*, [1993] 3 SCR 463.
[107] TVO Current Affairs. "The politics of abortion after Morgentaler". *TVO*, December 5, 2017. Online at <https://tvo.org/article/current-affairs/shared-values/the-politics-of-abortion-after-morgentaler>. Reviewing Johnstone, Rachael. "After Morgentaler: The Politics of Abortion in Canada". *UBC Press* (2017).

Canada's International Position

A third public policy issue is the impact of climate change litigation on Canada's international position and image. As discussed above, there are several States that now include a right to a healthy environment within their Constitutions – Canada is one of few that has not.[108] This is concerning when considering how significantly Canada is feeling and will feel the effects of climate change. However, there has been little discussion in the literature as to how recognizing a domestic right to a healthy environment impacts a State's foreign bargaining position. For example, under the *Kyoto Protocol* (from which, as noted above, Canada has withdrawn), States are required to meet different targets depending on their circumstances. It seems likely that a State that has recognized a domestic right to a healthy environment is in a weaker bargaining position internationally, as it may be domestically required to take steps that other States take only after negotiation. This has so far not materialized – at least, not outside the private channels of State-to-State negotiation – but may become a more significant issue as the risks and effects of climate change worsen. Canada in particular could suffer if its international position at the bargaining table was weakened, as it has much to lose and little to barter (as compared to, for example, the United States' heavy economic power).

This concern must be balanced against the advantages to be gained on the international stage. The current Liberal federal government has made global leadership on climate change issues a platform plank.[109] Considering Canada's relatively weaker influence in other areas of

[108] Wu, *supra* note 63 at pg. 192.
[109] Liberal Party of Canada. "Climate Change". Online at <https://www.liberal.ca/realchange/climate-change/>. See also Rabson, Mia. "Trudeau, Merkel push common climate coals at G20 summit in Hamburg". *The Canadian Press* for CBC News, July 7, 2017. Online at <http://www.cbc.ca/news/politics/g20-hamburg-trudeau-1.4194345>.

international politics, a heavier role in international environmental politics could enhance Canada's influence abroad. To maximize this influence and minimize the risks above, Canada should push towards recognizing a right to a healthy environment in international instruments and in customary international law (binding upon all States except persistent objectors).[110] There is already evidence[111] of such a norm of customary international law (which requires widespread State practice and *opinio juris*, or the subjective view of States that they are bound by the norm).[112] Canada could remain competitive by ensuring climate change practices in particular crystalize within customary international law. This would negate the public policy concern raised when taking a more aggressive domestic approach to climate change.

Cost

The final public policy concern raised here is that of cost. Cost is an issue at any number of stages – there is an access to justice issue in the cost of litigation; there is concern that damages awarded against the government from a successful action will be high; and there is concern that court-ordered climate change action could be prohibitively expensive. The most recent research into Canadian access to justice has concluded that there are "no methodological models for systematic measurement of Canadians costs of access to justice".[113] Despite this, the federal Department of Justice has estimated that the costs of bringing a *Charter* challenge in cases where

[110] Gunaratne, Dr. Rumanthika. "2.5: Who is a Persistent Objector (Updated)". *Public International Law: An Introduction to Public International Law for Students*. Online at <https://ruwanthikagunaratne.wordpress.com/2011/04/22/persistent-objector/>.
[111] Collins, *supra* note 67 at Part 2.
[112] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14 at para 207.
[113] The Canadian Forum on Civil Justice. "What does it cost to access justice in Canada? How much is 'too much'? And how do we know? Literature Review". February 2010 at pg. 23. Online at <http://www.cfcj-fcjc.org/sites/default/files/docs/2010/cost-litreview-en.pdf>.

there is "extensive legislative fact evidence" can exceed $1,000,000.[114] This places *Charter* litigation out of the reach of many. One option to ease this financial burden is the use of the *Court Challenges Program of Canada*, a national organization that provides funding to advance *Charter* litigation.[115]

The costs to government – in damages and in measures taken – is a different issue. While the government is not an impecunious defendant, it does have finite resources for addressing all of the important national issues, such as healthcare spending. Diverting government funds to defending this kind of litigation – and then to facing the costs – could mean less money available for other issues or even for other environmental protection issues. This unfortunate reality means simply that issues must be prioritized. While it may be politically unappetizing to focus resources in this way, the fact of the matter remains that without a healthy environment, the other rights and freedoms enshrined in the *Charter* mean very little. Costs could also be combatted by introducing more environmental taxes (like the carbon tax) that are targeted at changing consumer behaviour and reducing the overall costs of climate change mitigation.

F. Conclusion

As the planet's climate changes, so too must the law. Canada's *Charter* is ripe for expansion to include environmental rights, bringing Canada into step with much of the rest of the world. The section 7 right to life, liberty, and security of the person is the best choice for

[114] Government of Canada; Department of Justice. "The Costs of Charter Litigation". Online at <http://www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/p1.html>.
[115] See generally "About CCP", online at: <http://www.ccppci.ca/en/about.php>.

incorporating environmental rights into the *Charter*, relying on a violation of the right to life or security of the person that is grossly disproportionate. Inadequate climate change action taken at the federal level should be litigated as a failure to provide a constitutionally required positive obligation to Canadians. The remedy for this failure should be to introduce a minimum standard of climate change mitigation that is entrenched in law, rather than in short-term policy. While there are several policy concerns arising from this suggested litigation, these concerns can all be addressed by framing the issue narrowly.

"The stewardship of the environment is a fundamental value of our society".[116] Canada's future "depends on a healthy environment".[117] It is time that Canada's most powerful instrument for change, the *Charter*, recognize this reality.

[116] *Hydro-Quebec*, *supra* note 48 at para 127.
[117] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241; 2001 SCC 40 at para 1.