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Critical Infrastructure Defence Act Charter Challenge Survives Alberta Government's Motion to Strike

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Case Commented On: *Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, 2021 ABQB 371 (CanLII)

Last summer we posted a critical analysis of Alberta's Bill 1, the *Critical Infrastructure Defence Act*, SA 2020, c C-32.7 (*CIDA*). We argued that *CIDA*, which prohibits unlawfully entering onto, damaging, or obstructing any "essential infrastructure" in the province, violates several sections of the *Canadian Charter of Rights and Freedoms*, including freedom of expression (s 2(b)), freedom of peaceful assembly (s 2(c)), freedom of association (s 2(d)), the right to liberty (s 7) and the right to equality (s 15). Shortly after *CIDA* took effect on June 7, 2020, the Alberta Union of Provincial Employees (AUPE) and three individual plaintiffs brought a constitutional challenge against the law, arguing that it violates those *Charter* rights and freedoms (with the exception of s 15, which was not raised), as well as sections 1(a), (c), and (d) of the *Alberta Bill of Rights*, RSA 2000, c A-14 (which protect similar rights as well as the right to enjoyment of property). The plaintiffs also contended that *CIDA* encroaches on federal jurisdiction under *The Constitution Act, 1867*, namely, s 91(27) (federal jurisdiction over criminal law) and s 92(10)(a) (federal jurisdiction over interprovincial works and undertakings). In a decision released in June, Justice Shaina Leonard of the Alberta Court of Queen's Bench dismissed the government's motion to strike the challenge.

The Motion to Strike

The government made several arguments in support of its motion to strike (at para 4). First, they argued that AUPE and the individual plaintiffs did not have either private or public interest standing to challenge *CIDA*, as neither the union nor the individuals had been charged with violating the act. Second, they contended that the claim was not justiciable because there was no factual foundation for the plaintiffs' arguments. Third, they pointed to the constitutionality of the *Trespass to Premises Act*, RSA 2000, c T-7 and argued that because *CIDA* is very similar to that act, the challenge had no reasonable chance of success.

After describing the key features of *CIDA*, Justice Leonard set out the criteria for an application to strike a pleading under rule 3.68(2) of the *Alberta Rules of Court*, Alta Reg 124/2010, which require (amongst other possibilities) that the pleadings disclose no reasonable claim or constitute an abuse of process. Citing to the relevant case law, Justice Leonard also noted that "[p]leadings should only be struck where it is 'plain and obvious' that the claim cannot succeed," or where the action is "bound to fail" or has "no reasonable chance of success" (at para 12). The standard is a stringent one, and the reviewing court must assume that the facts pleaded are true.

The government argued that AUPE's alleged lack of standing was itself an abuse of process. While Justice Leonard indicated that "[n]o authority was provided for the proposition that a lack of standing on its own equates to an abuse of process", she agreed that if the plaintiffs did not have standing, there was no reasonable prospect that their claim would succeed (at para 13).

Private Interest Standing

Examining the government's contention that the plaintiffs had no private interest standing because they had not been charged under *CIDA*, Justice Leonard relied on *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439 (CanLII) at para 23, affirmed 2012 SCC 45 (CanLII), for the proposition that private interest standing requires a direct relationship between the claimant and the state, including a scenario "where the state engages a person in a court process" (at para 14). AUPE argued that a direct relationship existed because *CIDA* had a chilling effect on the union's activities, including leafleting, picketing, and collective bargaining. Justice Leonard accepted these facts as true, but noted that she was not required to accept the union's legal characterization of those facts (at para 17). Because neither AUPE nor any of the individual plaintiffs had been charged with an offence under *CIDA*, nor been named as defendants in any action under *CIDA*, they did not have private interest standing.

Public Interest Standing

Justice Leonard went on to find that AUPE did have public interest standing, using the test established in the Supreme Court of Canada's decision in *Downtown Eastside Sex Workers*. In making this finding, she referred only to AUPE and not to the individual plaintiffs.

The test for public interest standing requires consideration of three issues:

> (1) whether the case raises a serious justiciable issue;
>
> (2) whether the party bringing the action has a real stake or a genuine interest in its outcome; and
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> (3) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court. (*AUPE v Alberta* at para 21)

On the first issue, Justice Leonard explained that a justiciable issue "is one that is 'appropriate for judicial determination,'" which turns on "the nature of the issue and the institutional capacity of the courts to address it" (at para 23, quoting from *Downtown Eastside Sex Workers* (SCC) at para 30). For a justiciable issue to be seen as a serious one, it must raise a "substantial constitutional issue" or an "important" issue that is "far from frivolous" (at para 24, quoting from *Downtown Eastside Sex Workers* (SCC) at para 42). Justice Leonard found that AUPE's argument that *CIDA* interferes with lawful picketing and leafleting raised an important and substantial issue, provided that there was sufficient evidence to be able to adjudicate the claim.

However, while AUPE asserted that *CIDA* had caused a chilling effect on their leafleting and picketing activities, there was no evidence to that effect. Moreover, the government pointed out that *CIDA* does not restrict *legal* activities—it prohibits entering onto, obstructing, or destroying essential infrastructure *without lawful right, justification or excuse,* and would not prohibit picketing, leafleting, or other forms of protest in public spaces. Nevertheless, Justice Leonard found that the constitutionality of *CIDA* could be assessed through a hypothetical scenario, following the approach of the Supreme Court of Canada in *R v Nur*, 2015 SCC 15 (CanLII). *Nur* dealt with the constitutionality of mandatory minimum sentences, and allowed for the possibility that, even if the law in question did not violate the claimant's rights based on the facts of their case, it could still be reviewed by asking the questions "What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact?" (*AUPE v Alberta* at para 33, quoting from *Nur* at para 61).

Applying this approach, Justice Leonard noted that *CIDA* "has a broad reach and catches a wide range of conduct" (at para 34). She referenced three aspects: the broad definition of "essential infrastructure" in s 1, which includes streets, sidewalks, and ditches; the prohibition of entering onto these spaces "without lawful right, justification or excuse" in s 2(1); and the lack of a definition for "without lawful right" (at para 35). She also noted that the *Use of Highway and Rules of the Road Regulation*, Alta Reg 304/2002, prohibits pedestrians from "impeding the free movement of vehicles on the highway," and then hypothesized that *CIDA* might prohibit a child "from playing road hockey on a street if it interferes with vehicular traffic" (at para 37). More germane to the case at hand, "a spontaneous demonstration or parade" might also be caught by *CIDA* (at para 38), as might "entering a sidewalk while disregarding the provisions of a collective agreement and engaging in an illegal 'wildcat strike'" (at para 39). Because it was "very difficult to determine the circumstances in which an individual might unlawfully be on essential infrastructure," and there was "nothing in the *CIDA* to indicate that this conduct would not be captured," the claim was found to raise justiciable issues for the purposes of the public interest standing test (at paras 38-39).

On the second issue, the government did not challenge AUPE's genuine interest in the litigation, so Justice Leonard quickly moved to the third issue: whether the proposed claim is "a reasonable and effective means to bring the case to court." This issue encompasses a number of factors, including: the capacity of the plaintiff to bring the claim; the concreteness and factual context of the claim and its public interest; the possibility of other claims that would be more efficient and effective at raising the issues; and the impact of the claim on other possible litigants (at para 42, citing *Downtown Eastside Sex Workers* (SCC) at para 50).

Justice Leonard had "no doubt" that AUPE had the capacity to bring the claim and that having a court consider the constitutionality of *CIDA* was in the public interest (at para 43). In terms of alternative means of challenging *CIDA*, she recognized that while persons charged under the act would be well placed to bring a claim, they might not "challenge the *CIDA* in the comprehensive way that is proposed in this case" (at para 43). There was also no reason to think that the claim "might prejudice subsequent challenges to the legislation by those that are charged under the *CIDA*" (at para 44).

The most contentious factor was the question of factual context. Considering the lack of evidence of a breach of *Charter* rights and freedoms due to a lack of charges under *CIDA*, the hypothetical fact scenario re-emerged at this stage of analysis. Here, Justice Leonard again noted that whether *CIDA* prevents lawful protests or other associational activities on roadways, sidewalks, and ditches depends on the meaning of "without lawful right", and this term is not defined in the act (at para 46). It was therefore possible for a court to devise reasonable hypothetical factual scenarios to use to adjudicate AUPE's claim. The criteria for public interest standing were therefore satisfied.

Reasonable Claim

The last issue was whether the pleadings disclosed a reasonable claim. Not surprisingly in light of her public interest analysis, Justice Leonard found that AUPE's arguments did present a reasonable claim. Citing *Charter* case law, she found that it is "generally accepted that lawful demonstrations are permitted on public streets" yet "public streets are "essential infrastructure" pursuant to the provisions of the *CIDA"* and whether particular protests are "lawful" under *CIDA* "is difficult to determine" (at paras 49-50). Justice Leonard noted again that protests and demonstrations might be captured by *CIDA*, engaging the fundamental freedoms under s 2 of the *Charter*.

As for the claim under s 7 of the *Charter*, the plaintiffs' argument was that *CIDA* violated the right to liberty in its imposition of possible jail time for an offence and by restricting individuals' ability to move freely. AUPE also argued that *CIDA* contravened the principles of fundamental justice because the Act deprives persons of liberty in a manner that is vague, arbitrary, overbroad, and grossly disproportionate. The government argued this claim should be struck because *CIDA* was "largely the same" as the *Trespass to Premises Act* (at para 3), which had been upheld as a constitutional limit on s 7 in *R v SA*, 2012 ABQB 311 (CanLII), affirmed 2014 ABCA 191 (CanLII). Justice Leonard dismissed the government's s 7 argument in short order, noting that *CIDA* differed from the *Trespass to Premises Act* in that the latter only prohibits trespass on premises for which "no trespassing" notice has been given. In contrast, *CIDA* does not require notice, which might be relevant to AUPE's claim of overbreadth (at para 53). Justice Leonard also opined that while prohibiting entry to a gas plant or public utility infrastructure might be rationally connected to *CIDA*'s objective of protecting critical infrastructure (i.e. it might not be arbitrary), it was harder to see this connection when "protecting a sidewalk or ditch" (at para 54). Indeed, in the case of sidewalks and ditches, she wondered "[w]hat is the government seeking to protect that cannot be dealt with through the provisions of the [*Traffic Safety Act*, RSA 2000, c T-6], a municipal bylaw, or through trespass legislation?" (at para 54). The plaintiffs' s 7 claim was therefore seen as a reasonable claim that was justiciable as well.

Justice Leonard found it unnecessary to rule on the claim related to federal/provincial jurisdiction (at para 55).

The government's application to strike the plaintiffs' constitutional challenge to *CIDA* was dismissed, with costs awarded to AUPE.

Commentary

To begin our commentary on Justice Leonard's decision, it is important to properly situate the impact of *CIDA* considering current events. There have been numerous rallies in and around critical infrastructure since the COVID-19 pandemic and related government restrictions began, all without charges being laid under *CIDA*. Although this might seem to suggest the legislation is sound, non-prosecution cannot cure unconstitutional legislation. In fact, reliance on prosecutorial discretion is an empty response to constitutionality concerns and is an improper attempt to "insulate otherwise unconstitutional laws" (*Nur* at para 91). In *R v Ferguson*, 2008 SCC 6 (CanLII), Beverley McLachlin CJC said that "the divergence between the law on the books and the law as applied – and the uncertainty and unpredictability that result – exacts a price paid in the coin of injustice" (at para 72).

Turning to Justice Leonard's analysis on the public interest standing issue, she viewed the justiciability requirement contextually through an evidentiary lens (at para 26). Not only must the claim raise important constitutional concerns, but there also must be an evidentiary basis for that claim. Without an evidentiary foundation, the court will lack the ability to adequately assess the constitutional challenge (at para 28). However, Justice Leonard properly found that a systemic *Charter* claim brought on behalf of the public interest does not require individual prejudice and harm but can rely on the "reasonable hypothetical." Such a hypothetical would provide the court with a basis for the constitutional argument by positing "reasonably foreseeable situations" in which a member of the public would be unfairly captured by the legislation. This approach would focus the claim on the unconstitutionality of the legislation rather than on the individual or group whose rights were violated. In *Ontario (Attorney General) v G*, 2020 SCC 38 (CanLII), Justice Andromache Karakatsanis, writing for the majority, recognized "that the impact of legislation, even unconstitutional legislation, extends beyond those whose rights are violated—it is bad for all society for unconstitutional legislation to 'remain on the books'" (*G* at para 96; see also *Nur* at para 51).

Although we agree with Justice Leonard's use of the reasonable hypothetical approach, her attention to the scope of the s 2 freedoms in identifying these hypotheticals is rather minimal. One of her examples – activities related to labour unions, including forming associations of workers, collective bargaining, and withdrawing one's labour (i.e. going on strike) – clearly engages ss 2(b), (c) and (d) (see e.g. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 (CanLII), *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (CanLII), *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII)). But many other pertinent examples raise possible violations of one or more of the s 2 freedoms, such as Indigenous persons and their allies protesting against the construction of a pipeline on-site in Alberta, or the recent protest outside the Calgary Court Centre and surrounding area by Black Lives Matter YYC and other groups for Dalia Kafi.

The reasonable hypothetical approach works particularly well in s 7 challenges, where the doctrines of overbreadth and vagueness look to the general effect and impact of the legislation. As discussed in *Nur* in the context of hypotheticals under s 12 of the *Charter*, which protects against

cruel and unusual punishment, the question is whether it is reasonably foreseeable that the legislation will violate the named *Charter* right (*Nur* at para 57). This means, in the words of McLachlin CJC in *Nur*, that "the process is simply an application of well-established principles of legal and constitutional interpretation" (at para 57). Recently, in *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310 (CanLII), Mr. Justice John Steeves, relying on the *Nur* decision, explicitly approved of the reasonable hypothetical approach in advancing both s 7 and s 15 claims (*Cambie* at para 1178). In his view, the evidentiary burden could be met by relying on hypotheticals or evidence of the violation of the rights of third-parties (*Cambie* at para 1181). As discussed earlier in this post and in the *AUPE* judgment (at para 45-46), there are many reasonable scenarios, which would provide the evidentiary record for this constitutional challenge.

Another concern raised by Justice Leonard that engages s 7 of the *Charter* is the undefined requirement in *CIDA* that the person entering the critical infrastructure do so "without lawful right." She viewed this term to be of "broad reach," catching "a wide range of conduct" (at para 34). As an example, Leonard J opined that the lawful right of entering a sidewalk or road would be governed by the *Traffic Safety Act* (at para 35). This may be so but "without lawful right" would also be subject to common law usage of the term (see *R v M Keeper*, 2014 ONSC 3537 (CanLII) at para 67). For instance, the phrase is often used in trespass and property law cases (see e.g. *Ross v Whitson*, 2001 BCSC 941 (CanLII) at paras 3 and 24; *Viceversa Developments Inc. v City of Winnipeg*, 2013 MBQB 312 (CanLII) at para 23). A review of this case law suggests that "without lawful right" includes a broad range of conduct that is not only contrary to the *Criminal Code*, RSC 1985, c C-46 and other statutory rules, but also civil torts, such as the torts of nuisance, intimidation, assault and battery and mischief (see *Marine Harvest Canada Inc. v Morton*, 2018 BCSC 1302 (CanLII) at paras 142-145). This greatly expands the kind of conduct at risk of violating *CIDA*, creating further concerns with the vagueness and overbreadth of the law, which strengthens the AUPE position that the chilling effect is real and substantial.

What about the equality rights claim that AUPE did not make? In our view, it is unfortunate, but understandable, that AUPE did not include a claim under s 15(1) of the *Charter*. As we noted in our June 2020 post, restrictions on expression, assembly, association or liberty that target or disproportionately affect protected groups may also violate the equality guarantee (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 (CanLII)). However, it is likely that s 2 and s 7 protections will be interpreted through an equality rights lens when AUPE's constitutional challenge is heard on the merits.

The current test for proving a prima facie violation of s 15(1) requires a claimant to prove that the impugned law or state action:

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

(*Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at para 27, per Rosalie Abella J)

While *CIDA* is neutral on its face, it is likely that the chilling effect on protests identified by the AUPE has had a greater impact on members of marginalized groups without access to legislative or economic power, i.e. those who most often demonstrate against government or corporate action or inaction. These "adverse effects" claims are more difficult to prove than are direct discrimination claims. They often depend on statistical evidence showing, for example, the characteristics of those charged under the challenged legislation. However, we are not aware of any charges being laid under *CIDA*, even at the height of the blockades and protests of COVID-19 restrictions and vaccinations that have taken place since *CIDA* came into effect. That is the reason for the need for hypotheticals. Examples could involve workers rallying in a parking lot outside a meat packing plant to bring attention to the gendered and racialized impact of the Alberta government's response to COVID-19, or parents of children under 12 with disabilities and their allies marching through downtown Calgary streets to protest the lack of COVID-19 preventative and protective measures.

Of course, *CIDA* was not intended to restrain the activities of those protesting COVID-19 health measures. It was introduced in the legislature in February 2020 in response to railway blockade protests in support of the Wet'suwet'en hereditary chiefs in British Columbia and their opposition to the Coastal GasLink Pipeline project. As the Assembly of First Nations Alberta Regional Chief Marlene Poitras stated in February 2020: "Allowing the bill to pass will serve to erode individual rights, unfairly target Indigenous Peoples, and has no place in a democratic society" (Controversial bill targeting rail blockade protesters soon to be Alberta law, CBC News, May 28, 2020). Although instances are rare, adverse effects discrimination can be intentional (e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII)).

The targets of *CIDA*, according to UCP MLAs speaking in the legislature, were "green zealots and eco radical thugs," (2nd reading, Alberta Hansard, 30-2 (26 February 2020) at 12, 17 (MLA Glasgo, Brooks-Medicine Hat)), a "new generation of woke protesters," and "foreign-funded groups coming into Alberta" (Committee of the Whole, Alberta Hansard, 30-2 (28 May 2020) at 867-68 (MLA Glasgo, Brooks-Medicine Hat)); "thugs who have appropriated the noble goal of reconciliation with Canada's native peoples and used that as an excuse to hold the country hostage" (2nd reading, Alberta Hansard, 30-2 (26 February 2020) at 15 (Mr. Panda, Minister for Infrastructure)); "spoiled kids pushing the bounds of what the parents' law was," and "corporations that are actually condoning and backing this behaviour, getting the youth all riled up so they can do a TikTok video while they're out on a protest line" (2nd reading, Alberta Hansard, 30-2 (27 May 2020) at 794-95 (MLA Getson, Lac Ste. Anne-Parkland)); and "illegal protesters [who] co-opt the First Nations agenda, driving investment from our province, filming TikTok videos" (2nd reading, Alberta Hansard, 30-2 (27 May 2020) at 865 (Ms. Schulz, Minister for Children's Services)). As is evident from these statements and others made in the legislature and press conferences, the targets of *CIDA* were Indigenous rights activists, environmentalists, and youth.

The requirement for an enumerated or analogous ground would be the first challenge in any claim under s 15(1). Age is an enumerated ground. It can be tied to the importance of protest by the inability of those under the age of majority to vote and run for elected office. However, a look at the climate change cases currently before Canadian courts suggests a claim based on age

discrimination might be difficult. That litigation includes claims of adverse effects discrimination, arguing that the challenged laws, policies, or inaction infringe the rights of youth and future generations who will bear a disproportionate share of the burdens. As in the climate change cases, it would be difficult to define the proposed class of those adversely affected and escape the charge that any definition of the class was arbitrary and therefore inappropriate. (See Nathalie J. Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The Charter's Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 JL & Equality 1 for more on the climate change claims.) A claim by "environmentalists" per se would be an even harder to make, given courts' traditional reluctance to view employment status or occupations as analogous grounds (see e.g. *Reference Re Workers' Compensation Act, 1983* (Nfld), 1989 CanLII 86 (SCC), [1989] 1 SCR 922; *Baier v Alberta*, 2007 SCC 31 (CanLII)). Environmentalism could be tied to the age claim and the disproportionate impact of environmental degradation on younger generations. A claim brought by Indigenous protesters would have more chance of meeting the grounds requirement, given that Supreme Court of Canada has decided a number of s 15(1) claims involving Indigenous persons and groups, each raising different types of discrimination and different articulations of the grounds at play. The strongest claims would likely be those made by individuals on the intersecting grounds of youth and Indigeneity.

The second step in analyzing s 15 would require claimants to prove that *CIDA* imposes a disproportionate burden or denies a benefit in a way that has the effect of reinforcing, perpetuating, or exacerbating the pre-existing disadvantage of young people and/or Indigenous rights activists. The argument here would be that *CIDA* perpetuates historical disadvantage by prohibiting the very means that marginalized groups have to assert their interests, including mere entry onto essential infrastructure. Marginalization is itself the result of state suppression and exclusion, with the power to exclude being the essence of property– backed by *CIDA* in this case.

However, it has to be noted that adverse effects discrimination is infrequently recognized by the courts. *Fraser v Canada* was the first successful adverse effects discrimination case at the Supreme Court of Canada since *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 and *Vriend v Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493). It remains to be seen if *Fraser* will improve the success rates of these types of claims.

Nevertheless, as we noted in our June 2020 post, one of the goals of equality is to facilitate full participation in society by all (see e.g. *Gosselin v Québec (Attorney General)*, 2002 SCC 84 (CanLII) at para 22). Everyone in Canada is guaranteed freedom of expression, peaceful assembly, association, and liberty. They are also guaranteed equality based on protected grounds. Therefore, restrictions on protests by disadvantaged groups that express dissatisfaction with social conditions – like those in *CIDA* – violate all of these rights in an intersecting way. Even though AUPE did not raise s 15 arguments directly, it is hoped that the courts will undertake this type of analysis when the constitutional challenge is heard on the merits.

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