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Frost on the Constitutional Windshield: Challenge to *Critical Infrastructure Defence Act* Struck by Alberta Court of Appeal

By: Jennifer Koshan, Lisa Silver and Jonnette Watson Hamilton

Case Commented On: *Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, 2021 ABCA 416 (CanLII) (*AUPE* (ABCA))

The *Critical Infrastructure Defence Act*, SA 2020, c C-32.7 (*CIDA*) has been in the news recently, with the truckers' blockade at Coutts, Alberta causing some to question the lack of enforcement of available legal sanctions. *CIDA* prohibits entering on to, damaging, or obstructing essential infrastructure in the province, amongst other activities. Essential infrastructure is broadly defined and includes highways and – as of October 2021– health care facilities (*Critical Infrastructure Defence Regulation*, Alta Reg 169/2021; for a discussion of that addition see here). However, it appears that no charges have been laid under *CIDA* to date despite several disruptive COVID-19 related protests on and blockades of essential infrastructure.

Several ABlawg posts have analyzed *CIDA* since it came into effect in June 2020, commenting on the Act's potential violation of several *Charter* rights as well as Aboriginal rights under the *Constitution Act, 1982*. The focus of these posts was on the groups that *CIDA* was aimed at – for example, Indigenous people protesting pipeline construction.

Only a few days after *CIDA* took effect, the Alberta Union of Public Employees (AUPE) brought a challenge alleging that the Act infringed multiple *Charter* rights, several sections of the *Alberta Bill of Rights*, RSA 2000, c A-14, and the constitutional division of powers between the federal and provincial governments. The Alberta government's motion to strike AUPE's challenge was dismissed by Justice Shaina Leonard of the Alberta Court of Queen's Bench in June 2021. She found that AUPE had public interest standing to bring its claim and that its challenge could be assessed on the basis of "reasonable hypotheticals" in light of the lack of charges laid under *CIDA*. We blogged on that decision here, arguing that Justice Leonard's approach was well-grounded in the case law. However, in December 2021, the Alberta Court of Appeal (Justices Frans Slatter, Barbara Lea Veldhuis, and Bernette Ho) allowed the government's appeal and struck AUPE's claim.

This post will analyze the Court of Appeal's unanimous reasons for striking AUPE's claim, which found that AUPE's lack of standing made their claim an abuse of process and that reasonable hypotheticals were not an appropriate basis for hearing AUPE's claim. We will also raise questions about how a potentially unconstitutional law can be challenged when it is not enforced, yet nevertheless has a chilling effect on some activities, groups, and individuals (and not on others).

Grounds of Appeal and Procedural Issues

The government's two main grounds of appeal were that AUPE's pleadings disclosed no reasonable claim and were "purely speculative and hypothetical", and that AUPE had no standing to bring the action (at para 16). The Court of Appeal began its reasons by considering the rules that apply to each of these interrelated arguments under the *Alberta Rules of Court*, Alta Reg 124/2010. An argument to strike a pleading that discloses no reasonable cause of action triggers a presumption that the pleaded facts are true (rules 3.68(2)(b) and (3)). On the other hand, the argument that a claimant has no standing was characterized by the Court as an abuse of process that does not trigger this presumption (at para 18, citing rules 3.68(1) and 3.68(2)(d)). Justice Leonard had found that the government provided "[n]o authority … for the proposition that a lack of standing on its own equates to an abuse of process" (*Alberta Union of Public Employees v Her Majesty the Queen (Alberta)*, 2021 ABQB 371 (CanLII) (*AUPE* (ABQB)) at para 13), and the Court of Appeal did not cite any case law to support its contrary finding. The government's argument that AUPE provided an insufficient factual record also failed to engage the presumption that pleaded facts are true (at para 19). Although the government's other argument was that AUPE's pleadings disclosed no reasonable claim, which should have triggered the presumption, the Court held that this was not its primary argument (at para 17). Instead, the Court noted that AUPE pleaded few facts and was prepared to have its claim assessed on the basis of "reasonable hypotheticals" (at para 20).

The Court went on to find that Justice Leonard erred in granting public interest standing to AUPE and in assessing its claim on the basis of reasonable hypotheticals.

Analysis of Issues

Standing relates to whether the claimant has an appropriate interest in bringing its action before the court. Private interest standing requires a "direct, personal interest" in the matter at hand (at para 26). AUPE and its members had not been charged under *CIDA* and had no greater interest in its constitutionality than "any other similarly situated organization or person in Alberta" (at para 26), so the Court of Appeal agreed with Justice Leonard that private interest standing was inapplicable.

Public interest standing is discretionary and requires the Court to consider three factors:

> (a) whether the case raises a serious justiciable issue;
>
> (b) whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and
>
> (c) whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court.
>
> (at para 27, citing *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII) (*Downtown Eastside Sex Workers*))

Applying the first and second factors, the Court of Appeal accepted that the constitutionality of any statute is a serious justiciable issue and that AUPE has a genuine interest in the constitutionality of *CIDA* (at paras 28-29). AUPE's challenge was based on the argument that *CIDA* has a chilling effect on its future activities, such as picketing and leafleting, as well as having an unconstitutional impact on other reasonable hypothetical activities. Whether AUPE's claim was "a reasonable and effective means" of bringing *CIDA*'s constitutionality to court – the third factor – depended on whether these two arguments were an appropriate basis for proceeding (at para 31).

The Court characterized AUPE's chilling effect argument as being hypothetical itself, given the inapplicability of the presumption that pleaded facts are true (at para 33). AUPE relied on *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 (CanLII), for the argument that a court can consider the constitutionality of legislation that might have a chilling effect on the exercise of constitutional rights or freedoms. *Dunmore* considered whether Ontario's exclusion of agricultural workers from its labour relations legislation violated the *Charter*, specifically s 2(d) (freedom of association) and s 15 (equality rights). The argument there, accepted by the Supreme Court of Canada, was that without the protection of labour legislation, agricultural workers who attempted to unionize would face sanctions from their employers. The evidence showed that no agricultural workers had been able to unionize in the face of this exclusion – in other words, the exclusion had a chilling effect on the workers' *Charter* rights.

The Court of Appeal distinguished *Dunmore* from the case at hand, noting that it "concerned exclusion from certain associational rights, not mere uncertainty as to their boundaries or the reach of any statute" (at para 37). *Dunmore* was also decided on the basis of evidence rather than hypotheticals, and involved "chilling" acts by employers rather than the state or its legislation (at paras 38-39). The Court noted that any analysis of chilling effects must be based on an objective standard and that the "mere subjective assertions" of AUPE were insufficient (at para 40). In a notable line pondering the degree of chilling that would be needed to show a breach of the *Charter*, the Court asked: "When does frost form on the constitutional windshield, and how much additional chill is demonstrably justified in a free and democratic society?" (at para 40). Whatever the answer to those questions might be, it was clear to the Court that AUPE's argument was about a hypothetical chilling effect, raising the second issue – whether the claim could proceed on the basis of reasonable hypotheticals alone.

The Court noted that while they have some discretion, courts generally do not entertain hypotheticals or abstract matters without a factual foundation (at paras 43-50). One recognized exception is s 12 of the *Charter*, where courts have assessed whether mandatory minimum sentences are cruel and unusual by considering reasonable hypotheticals. In this context, even if such a sentence would not be unduly harsh for the accused, it can be challenged on the basis that it would be cruel and unusual for another reasonable hypothetical accused person. This analysis derives from the Supreme Court's holdings in *R v Nur*, 2015 SCC 15 (CanLII) and *R v Ferguson*, 2008 SCC 6 (CanLII), where it held that constitutional exemptions are an inappropriate remedy for mandatory minimum sentences that are cruel and unusual even for one person – the appropriate remedy is to strike down the legislative provision mandating the sentence (*AUPE* (ABCA) at paras 51-54).

Justice Leonard held that this type of analysis could be applied to the *Charter* rights that AUPE's claim invoked: freedom of expression (s 2(b)), freedom of peaceful assembly (s 2(c)), freedom of association (s 2(d)), and the right to life, liberty and security of the person in accordance with the principles of fundamental justice (s 7)). The Court of Appeal found that she erred in this regard. While the Court acknowledged that the general rule that courts "will not provide constitutional rulings based on hypothetical situations" is "discretionary and flexible", it held that *Nur* was an "exception to" rather than "abrogation of" this rule (at para 60). The "all or nothing" approach to s 12 was seen to be a "particular feature" of this section, whereas for *CIDA*, the Court asked what should happen if 99/100 hypotheticals were constitutional but one was not (at paras 62-63). *CIDA* was characterized as akin to a statute authorizing searches – in other words, the Court saw *CIDA* not as mandatory, but as potentially unconstitutional only to the extent it is actually enforced (at para 66). Without a factual context, "it would be impossible to try and adjudicate, in the abstract, on every hypothetical situation that could be imagined" whether in terms of possible breaches of *Charter* rights or justification of any breaches (at para 67).

The Court also pointed out that *Nur* and *Ferguson* involved accused persons who already had standing – i.e., private interest standing based on their criminal charges – and in this context, they could raise the impact of mandatory minimum sentences on reasonable hypothetical others. In contrast, AUPE was seeking public interest standing, and this type of standing required "a sufficiently concrete and well-developed factual setting" (at para 59, quoting *Downtown Eastside* at para 51).

Lastly, the Court found that it was "untenable to argue that a statute that only prevents unlawful activities is universally unconstitutional because it somehow has a chilling effect on lawful activities" (at para 65). Justice Leonard had raised a concern about *CIDA*'s lack of definition of when activities on essential infrastructure would be seen as "without lawful right." The Court of Appeal did not share these concerns, and noted that this and similar terms "have commonly been used both in statutes and in the common law for generations" (at para 75). At the same time, the Court indicated that any difficulty in trying to define "without lawful right" "should in itself have served as a warning against trying to resolve the underlying issues based on hypothetical situations" (at para 74). While it acknowledged that there might be "factual or legal disagreements" about whether certain activities, such as leafleting or picketing, are lawful, the Court stated that "[t]here is … no constitutional right to certainty" (at para 77). If uncertainty about the scope of *CIDA*'s offences created a chilling effect, this was due to the laws that justified entering onto essential infrastructure, not because of *CIDA*. The Court again drew an analogy to legislation authorizing searches, and noted that uncertainty about whether a hypothetical search is reasonable or not does not render it unconstitutional (at para 79).

In conclusion, the Court found Justice Leonard's decision allowing public interest standing on the basis of reasonable hypotheticals to be unreasonable, and it struck AUPE's claim.

Commentary

The Court of Appeal acknowledged that Justice Leonard's decisions on standing and use of reasonable hypotheticals were discretionary ones that were entitled to deference on appeal. With respect, however, the Court of Appeal's decision does not strike us as deferential. The Court

discredited every one of AUPE's arguments that Justice Leonard had accepted, and viewed both standing and use of reasonable hypotheticals very narrowly.

To begin, the Court's characterization of lack of standing as an abuse of process is problematic and not supported by the case law. The government's motion to strike was based on AUPE's claim being an abuse of process, but that procedural concern was primarily based on the standing issue, which was inextricably connected to whether there was a reasonable cause of action disclosed by the claim, as Justice Leonard recognized (*AUPE* (ABQB) at para 13). Her approach is similar to that in other applications to strike, where courts have focused on the failure to disclose a reasonable cause of action as the animating issue. See, for example, *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 1992 CanLII 116, where Justice Peter Cory, speaking for the Court, recognized that issues of standing and whether there is a reasonable cause of action "are closely related and indeed tend to merge" (at 253). Considering that the government's application to strike alleged there was no reasonable cause of action, Justice Leonard was correct to approach the application under rule 3.68(2)(b) and to apply rule 3.68(3), which precludes the submission of evidence and presumes the pleaded facts are true. In our view, this functional and purposive approach to the application was best suited to determining the standing of a claimant found to have a genuine interest in the issues.

The Alberta government has previously argued that an alleged lack of standing should be assessed as an abuse of process. Our colleague Shaun Fluker has blogged on cases that raised this argument, which has had mixed results (see here and here). We think the abuse of process approach is problematic, especially where the analysis turns on the third factor from the *Downtown Eastside Sex Workers* case. If there is a serious and justiciable issue to be tried, and the claimant has been found to have a genuine interest in the issue, how can the claimant be abusing the court's process? Such a claimant is not making a collateral attack, mounting a frivolous or vexatious challenge, or even being a "mere busybody" taking up scarce judicial resources (see *Downtown Eastside Sex Workers* at paras 26-28). Rather, AUPE and its members have a direct and real interest in the potential effects of *CIDA*, and its claim should have been evaluated in terms of whether it was "a reasonable and effective means to bring the challenge to court" (*Downtown Eastside Sex Workers* at para 44). This fits better with the government's "no reasonable cause of action" argument, which should have led to the pleaded facts being presumed true. Instead, the Court of Appeal's judgment reads as if it was applying the old version of the third factor from the public interest standing test, which required that there was "no other" reasonable and effective way to mount a challenge to the law in question (see *Downtown Eastside Sex Workers* at para 60).

Our next and related point is that even if reasonable hypotheticals have previously been used in cases involving accused persons with private interest standing, why should this type of analysis not extend to public interest standing? Indeed, when no one has been charged with an offence under a law such as *CIDA*, who else but a public interest litigant can challenge the law, and how else but on the basis of reasonable hypotheticals? If no charges are ever laid and no challenge can be brought without charges being laid, a law like *CIDA* can become an *in terrorem* instrument of the state that will chill the activities of law-abiding groups and individuals. As the Supreme Court of Canada noted in *Nur*, "[l]ooking at whether the [law] has an unconstitutional impact on others avoids the chilling effect of unconstitutional laws remaining on the statute books" (at para 64).

The Court of Appeal was also wrong to say that s 12 of the *Charter* is a special case when it comes to reasonable hypotheticals. The Supreme Court has permitted the constitutionality of offences to be assessed under s 7 of the *Charter* using reasonable hypotheticals where the argument is that the law is overbroad (see e.g. *R v Heywood*, 1994 CanLII 34, [1994] 3 SCR 761; *R v Appulonappa*, 2015 SCC 59 (CanLII)). In a recent paper, Debra Haak raises valid concerns about how hypotheticals can leave aside the perspective and context of victims, but courts could certainly include those considerations in their analysis. It is well recognized that if an offence has an unconstitutional impact on even one person, that is sufficient to amount to a violation of s 7 (see *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII)). The Court's question about what would happen if 99/100 reasonable hypotheticals were constitutional is therefore irrelevant.

Viewing the claim through s 7 – which AUPE raised – would have allowed the Court to consider reasonable hypotheticals beyond s 12, which is exactly what Justice Leonard did and what the case law supports. This would have been much more persuasive than the Court's analogies to s 8 of the *Charter*, the reasonable search and seizure provision, which does not create an offence. The Court's view of *CIDA* as authorizing charges and prosecutions in the same way that legislation authorizes searches is an odd way to view legislation that is fundamentally prohibitory, as *CIDA* is. All offences are subject to police and prosecutorial discretion, but people living in a free and democratic society have a right not to be captured by laws that do not provide adequate direction to law enforcement authorities (see e.g. *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72, [1992] 2 SCR 606). AUPE's "without lawful excuse" argument should have been assessed through this lens – the uncertainty with the meaning of that phrase creates the potential for the law to be enforced in a way that is overbroad, or that creates the fear of overenforcement, resulting in a chilling effect on legitimate activities.

There was also no impediment to considering reasonable hypotheticals under the s 2 freedoms that AUPE raised. The Court of Appeal's attempt to distinguish *Dunmore* in this regard did not show the necessary deference to Justice Leonard's decision and was not very persuasive in any event. While it may be the case that the "chill" in *Dunmore* was related to actions by the employer rather than the government, employers were free to intimidate workers because of legislation, so this is a distinction without a difference. And while the Court saw *Dunmore* as a case that involved a greater degree of chilling than what AUPE alleged with respect to *CIDA*, surely that is an issue for trial, not an application to strike.

The Court's comment that "[t]he *Charter* does not mandate disorder to prevent chilling" (at para 80) is somewhat ironic as well. *CIDA* has not prevented the disorder and danger we have seen at the Coutts blockade or at health care facilities, which reinforces the point that this law was passed for highly political reasons and with particular targets in mind. Should a law of this nature not be open to challenge on the basis of its chilling effects on groups who are not the government's base, such as unions and Indigenous peoples? Furthermore, the Court was inconsistent in suggesting that a successful challenge to *CIDA* might create disorder, when it pointed to other laws that already prohibit certain kinds of unlawful actions on essential infrastructure. The RCMP have also pointed to these laws as alternatives to *CIDA* for breaking up the blockade in Coutts (as did we in our first post on *CIDA*).

CIDA is in some respects unnecessary legislation because other legislation covers much of its scope. However, *CIDA* is still broader because of its prohibition of merely entering onto essential infrastructure willfully (see s 2(1)). It also allows for larger fines. Justice Leonard found – correctly in our view – that s 2(1) could be engaged if AUPE's leafleting and picketing activities entailed entering a road or sidewalk without an (undefined) lawful right to do so. Perhaps if AUPE had given specific examples of leafleting and picketing that its members had decided to avoid as a result of *CIDA*, that would have provided a more concrete context for its "chilling effect" argument. But again, this was a motion to strike, not a trial, and as we argued above, the facts AUPE pleaded should have been presumed to be true.

We raised several reasonable hypotheticals in our previous posts on *CIDA* that addressed its likely impact on marginalized groups and the possibility of a s 15 violation. AUPE did not include s 15 in its claim, but the Onion Lake First Nation has also filed a challenge to *CIDA* that includes arguments under s 15 as well as treaty rights under s 35 of the *Constitution Act, 1982*. Like AUPE's claim, the Onion Lake First Nation also argues that *CIDA* is invalid on division of powers grounds, an argument the Court of Appeal failed to address (for analysis of this argument see here). AUPE will be seeking leave to appeal to the Supreme Court of Canada, but if the Court of Appeal's decision marks the end of AUPE's constitutional challenge, we hope that future arguments focusing on *CIDA*'s impact on oppressed groups will resonate with the courts. The blockade at Coutts has reinforced the inequality inherent in who *CIDA* was meant to silence and who gets a pass. There appears to be no frost on some constitutional windshields, but that does not mean others are frost-free.

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