

**SUPREME TWITTER COURT OF CANADA**

**IN THE MATTER OF:**

A Reference by the Lieutenant Governor in Council concerning the Constitutionality of a public right to a healthy atmosphere [Atmospheric Right Reference].

---

**FACTUM OF THE INTERVENER GOVERNMENT OF BRITISH COLUMBIA**

---

**Ryan Heighton**

E-Mail: ryanheighton@osgoode.yorku.ca

Tel: 416-910-9949

**Jonathan Ungaro**

E-Mail: jonungaro@gmail.com

Tel: 647-876-7508

Counsel for the Interveners  
Government of British Columbia

## PART I – REFERENCE QUESTION AND STATEMENT OF CASE

1. The Governor in Council referred a single question to this Court:  
“Does the common law of Canada recognize the existence of a public right to a healthy global atmosphere?”
2. The position of the Government of British Columbia is that the answer to this question is “yes.” The regulation of the global atmosphere is not prescribed to a particular division of government in the *Constitution Act, 1867*, and as such, neither the provincial nor federal government has the unilateral power to grant nor extinguish a public right to a healthy atmosphere. This position is based on the limits on the division of powers and the existing public right to air.  
*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91 [*Constitution Act, 1867*].

## PART II – ARGUMENT

### (1) Uniqueness of the Atmosphere, Environmental Protection, and Legislative Authority

3. While the Constitution confers exclusive power to provinces over natural resources, this power is localized, thereby only including a portion of the wide global atmosphere. Similarly, the federal power concerns matters of national interest. Climate change is a global issue, and the provincial and federal governments have been described as “co-tenants,” with the rest of global society, of the global “atmospheric commons.”  
Mary Wood. *Atmospheric Trust Litigation Around the World* in Ken Coghill, Charles Sampford, Tim Smith, (eds). *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Australia: January 2012), at p 172.
4. This assertion is supported both in statute and common law. While the *Constitution Act, 1867* confers provincial power to regulate local environmental issues and natural under s. 92, the *Canadian Environmental Protection Act* was upheld as valid federal legislation in *R v Hydro-Quebec*, with a legitimate public purpose.  
*Constitution Act, 1867*, s 92.  
*Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [CEPA].  
*R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Quebec*].
5. Indeed, the breadth of environmental legislation on both levels indicates the public importance of the issue of a clean atmosphere, and its role in climate change. By upholding *CEPA* as a valid exercise of criminal law power, the Supreme Court of Canada [SCC] in *Hydro-Quebec*, held that environmental protection was subject to punitive consequences. Criminal law, particularly since the implementation of the *Charter*, is strongly informed by public policy and is developed to regulate behaviour of citizens in order to preserve freedoms in our free and democratic society. The intention of criminal law is to put public good paramount, while still respecting the individual rights that the *Charter* protects. Moreover, by acknowledging that the pith and substance of the *CEPA* involved protection of human life, the SCC inferred a right to health and government protection from invasion of healthy air.  
*CEPA*.  
*Hydro-Quebec*.
6. The federal government may oppose the formal acknowledgement of a right to a healthy atmosphere, despite the vast codification of international air pollution protection in the *CEPA*, for political reasons. Such a right would place finite limits on governmental action, particularly in developing resources and pursuing economic ends. Furthermore, conferring such a positive right could be costly to the federal government, as policies would need to be implemented to ensure that the right is protected.  
*CEPA* ss 166-174.
7. Despite federal apprehension, the Crown has long been established as the guardian of public rights, and in *Canadian Forest Products* [*CFP v BC*], the SCC recognized its ability to collect environmental damages on the basis that an environmental right has been infringed. Conferral of such damages in combination with the common law and statutory principles above strongly suggest that a public right to a healthy atmosphere has been established.  
*Canadian Forest Products Ltd v. BC*, [2004] 2 SCR 74 [*CFP v BC*].

8. Finally, because of the unique nature of the global atmosphere and the current jurisprudence and legislative scheme regarding division of powers, Parliament is not entitled to unilateral extinction of a right to a healthy atmosphere, presuming it is recognized in common law.

**(2) Extension of Public Right to Air**

9. The thread of a public right to air can be traced through the common law to the Justinian Code. While airspace has been brought within the ambit of property rights, the air itself remains *res communes*. It cannot be owned by a single entity, and its abuse by a single entity affects all - greenhouse gas emissions from a factory in Hamilton, for example, will contribute to greater carbon dioxide emissions in the global atmosphere.

Timothy Bonyhady. The Law of the Countryside: The Rights of the Public (LexisNexis Butterworth, London, 1987), at p 197.

10. This notion is grounded in modern law by the finding in *R v Meyers* that natural environmental rights exist due to common usage. While the scope of that case was navigation rights over water, it is submitted that the principle enumerated should be applied to extend Canadians' right to clean air. Air shares many properties of water - it is used and reused by all citizens, it is polluted by an uncountable number of sources that crosses jurisdictional boundaries, and its degradation endangers public health, industry, and the habitability of entire areas.

*R. v. Meyers* (1853) 3 U.C.C.P. 305

11. It is not an uncommon practice in Canada to bring a nuisance claim for air pollution, and the law on nuisance is adapting to the realities of atmospheric pollution - the Ontario Court of Appeal has found that proximity is an unnecessary element of nuisance, so long as causation is proven. There clearly exist remedies for air pollution in Canadian law - the question is whether the global atmosphere be protected by a right.

*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2011 ONCA 419 at para 116.

12. This Court is asked to note the tradition of claims for air pollution, and to follow the *Meyers* principle that, due to its common ownership, the global atmosphere be recognized as protected by public rights. As held in *CFP v BC*, the Crown may file claims as *parens patriae* for damage to public lands. Should another member of the atmospheric commons interfere with Canadians' reasonable enjoyment of their atmosphere, it is submitted that the Crown should be able to ground a claim in a recognizable right, regardless of proximity to the polluter.

*CFP v BC*.

**PART III – ORDER REQUESTED**

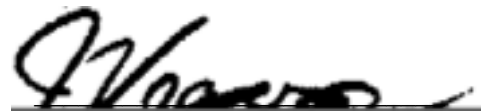
13. The Government of British Columbia submits that the constitutional question referred to this Court (“is there a common law public right to a healthy global atmosphere?”) should be answered in the affirmative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of November 2012.



Ryan Heighton

Counsel for the Intervener  
Government of British Columbia



Jonathan Ungaro

Counsel for the Intervener  
Government of British Columbia

## PART IV - TABLE OF AUTHORITIES

### LEGISLATION

*Canadian Environmental Protection Act, 1999*, SC 1999, c 33.

*Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

### JURISPRUDENCE

*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2011 ONCA 419.

*Canadian Forest Products Ltd v. BC*, [2004] 2 SCR 74, 2004 SCC 38.

*R v Hydro-Québec*, [1997] 3 SCR 213.

*R v Meyers*, (1853) 3 UCCP 305.

### SECONDARY MATERIALS

Mary Wood. Atmospheric Trust Litigation Around the World in Ken Coghill, Charles Sampford, Tim Smith, (eds). *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Australia: January 2012).

Timothy Bonyhady. The Law of the Countryside: The Rights of the Public (LexisNexis Butterworth, 1987).